ADVANCE SHEET HEADNOTE

October 4, 2022

2022 CO 48

No. 21SA220, *In the Matter of Brenda Storey* — Attorney Regulation — Asset Disclosure — Attorney's Fees

An attorney in a divorce proceeding pressed her client to sell furniture and other valuable marital property in order to pay her attorney's fees. The attorney also accepted as payment what appeared to be an Internal Revenue Service refund check made payable to both parties, without disclosing the check to opposing counsel or counseling her client to disclose the check. She did this without advising her client of the risks associated with selling marital property or of using the undisclosed check to pay her fees in light of the legal standards applicable in divorce matters. The Disciplinary Hearing Board found the attorney violated Colorado Rules of Professional Conduct 1.7(a)(2); 1.15A(a); 1.15A(c); 3.4(c); and 8.4(c). The Board suspended the attorney's license to practice in Colorado for a year and a day.

In this appeal, the Colorado Supreme Court considers whether the attorney's actions violated the Colorado Rules of Professional Conduct. The Colorado Supreme Court concludes that the Hearing Board appropriately concluded that the attorney's conduct violated each of the Rules, except for Rule 3.4(c), and remands for further proceedings consistent with this opinion.

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

2022 CO 48

Supreme Court Case No. 21SA220
Original Proceeding in Discipline
Appeal from the Office of the Presiding Disciplinary Judge, 20PDJ063

In the Matter of Brenda Storey

Judgment Affirmed in Part and Reversed in Part
en banc
October 4, 2022

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JUSTICE HART delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, **JUSTICE GABRIEL**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.
JUSTICE HART delivered the Opinion of the Court.

¶1 This is an attorney disciplinary proceeding that arises out of a domestic relations case. Though the Colorado Rules of Professional Conduct at issue apply to all Colorado attorneys, the domestic relations context is essential to understanding why the Disciplinary Hearing Board reached the conclusions it did and why we affirm those conclusions in large part. Two legal provisions particular to domestic relations are directly relevant. First, under section 14-10-107(4)(b)(I)(A), C.R.S. (2022), parties to a divorce proceeding are restrained from "transferring, encumbering, concealing, or in any way disposing of" marital property, except "in the usual course of business" or for "the necessities of life." And second, Colorado Rule of Civil Procedure 16.2(e)(1) recognizes that the parties to domestic relations cases owe to each other and the court "a duty of full and honest disclosure of all facts that materially affect their rights and interests," and a special obligation of candor.

¶2 In this case, respondent Brenda Storey pressed her client to find cash to pay her legal bills by selling furniture and other valuable marital property, accepted as payment what appeared to be a refund check from the Internal Revenue Service ("IRS") made payable to both parties without advising her client that the check should be disclosed, and failed to comply with a court order for return of the funds distributed from the IRS check. She did not advise her client of the risks associated with selling marital property or of using the undisclosed check to pay her fees.

¶3 The Disciplinary Hearing Board (the "Board") found that Storey violated Colorado Rules of Professional Conduct 1.7(a)(2) (representing a client despite a significant risk that the attorney's personal interests materially limit the attorney's representation of the client); 1.15A(a) (failing to safeguard property of others and appropriately maintain trust accounts); 1.15A(c) (failing to keep contested property separate); 3.4(c) (knowingly disobeying an obligation set by the court); and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). For these violations, the Board suspended Storey's license to practice law in Colorado for one year and one day.

¶4 Storey now appeals, arguing that she did not violate any Rules. She also challenges the Board's decision to exclude as hearsay contemporaneous notes she took during a meeting with her client. We affirm the Board on all but the Rule 3.4(c) claim. Given the reversal of this one claim, we remand to the Board for reconsideration of the sanction.

I. Facts and Procedural History

¶5 Storey is a family law attorney. She was admitted to practice law in Colorado in 1995, and she has operated the Law Offices of Brenda L. Storey, P.C. since 2013. In June 2018, Cynthia Sullivan retained Storey in connection with Cynthia's separation from her husband, Caldwell Sullivan, and the Sullivans'

anticipated marital dissolution.[1] Caldwell petitioned for dissolution of marriage in late November 2018 (the "Petition"). At the time of the Petition, and for much of the marriage, Caldwell was the family's sole income earner. Cynthia did not have an independent income or any significant separate assets.

¶6 At the start of their attorney–client relationship, Storey and Cynthia entered into a client services agreement that provided, inter alia, that Storey would bill Cynthia monthly, that bills must be paid in full by the 20th day of each month, and that Cynthia's failure to pay could lead Storey to cease work or move to withdraw from the representation.

¶7 In accordance with this agreement, from June 2018 (when the Sullivans were separated) through May 2019, Cynthia paid each bill in full and on time. She paid primarily with an American Express credit card that she held jointly with her husband and whose balance he paid each month. The attorney conduct at issue in this matter began in early June 2019, when Cynthia recognized that she would be unable to pay her bill for that month in full.

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[1] For purposes of clarity, we use "Cynthia" and "Caldwell," Mrs. and Mr. Sullivan's first names, throughout this Opinion.

A. Initial Status Conference and Request for Temporary Orders

¶8 On January 7, 2019, the Sullivans participated in an initial status conference. Storey raised the issue of Cynthia's legal fees and costs, pointing out that Caldwell had been paying for these expenses prior to the filing of the Petition, and asked the court to enter temporary orders directing him to continue to pay those fees and costs. The court declined to enter any temporary orders, noting that:

> In the Court's eyes there's already a temporary order in this case, so at least as to finances . . . . [The section] 14-10-107 restraining order in the Court's eyes is a temporary order that is requiring in the Court's opinion the party who is—whichever party is paying for the bills. Any bill, all the bills prior to the date of the petition should be continuing to be responsible for that.

The court then entered a minute order stating, "status quo should continue as it was prior to the filing of this case." The court also advised that counsel must "exhaustively confer" on any dispute, and stated that it would only set a hearing for temporary orders if a "crisis" was developing—"eviction, bankruptcy, credit suits, repossession"—that would result in irreparable harm.

B. Growing Tension over Nonpayment of Storey's Fees

¶9 By May 2019, Caldwell stopped paying the full balance on the couple's American Express card, which resulted in a credit limit being placed on the card. Cynthia had been using that card not only to pay Storey's bills, but also to pay for her and her children's necessities, including groceries, household maintenance,

school supplies, and gasoline. Without the unrestricted American Express limit, Cynthia was unable to pay Storey's bill of $12,511.21 that was due June 20, 2019.

¶10 Cynthia promptly notified Storey of the cap on the American Express card and her lack of access to cash. By June 13, Storey, through Caldwell's counsel, began to demand that Caldwell pay her bill directly. At least once, Caldwell's counsel responded with information about his client's cash flow challenges and various proposals for how to fund the couple's expenses using equity in marital assets. Storey's responses indicated that she did not find these proposals satisfactory and did not perceive any reason to discuss solutions to the family's cash-flow needs. As she explained to Caldwell's counsel, she believed such discussions were unnecessary because prior to the Petition there was "an unlimited budget," so there should remain an unlimited budget until the permanent orders hearing.

¶11 On June 21, Storey, on her client's behalf, filed a motion to hold Caldwell in remedial and punitive contempt for violating the court's May 24, 2019 order to maintain the status quo. She asserted that, because Caldwell had previously paid all of Cynthia's bills, including her attorney's fees, the cap on the American Express card and his statement that he could no longer pay the bills with cash on hand violated the status quo order because they were a change from prior practice.

¶12 The following week, Storey filed a motion for a telephone status conference to address Caldwell's "nonpayment for [Cynthia] to pay her fees and costs." The motion claimed that Caldwell was "purposely" not funding Cynthia's legal bill "either to negatively impact [Storey's] firm financially or to force its withdrawal as [Cynthia's] counsel for non-payment." It further averred that the unpaid June legal bill "has caused a financial burden on the firm."

¶13 During these weeks in June, Storey sent Cynthia multiple communications regarding the legal bill. Storey repeatedly urged her client to liquidate marital property in order to pay this—and future—legal bills. On June 18, she sent an email to Cynthia, instructing:

> If [Caldwell] does not pay my bill by the 20th, please start selling furniture and furnishings (that you do not want in the division [of property]). It is not a violation of the Automatic Temporary Injunction to pay your lawyer from marital funds/assets.

On June 20, Storey sent another email to Cynthia, instructing:

> Tomorrow, please list for sale on Facebook and/or Craigslist and/or anywhere else you would like to use any marital furniture you do not wish to keep. Please send us the listings.

On June 21, Storey sent another email to Cynthia, stating:

> While I am sorry for your financial concerns, I do want to highlight that per our fee agreement, you must pay our bill in full each month. If you do not, we have the right to cease work. While I am breaking this rule for this month, I must tell you that I will not do it for any future months. As such, you may need to ask family and friends to assist you until I can get the Court's assistance and/or Caldwell's compliance.

On June 28, Storey followed up with Cynthia, asking her to forward "ASAP, please" the "copies of your for sale listings." On July 2, Storey sent another email to Cynthia, advising:

> You will owe me $40,000 by July 20th, and if it is not paid by someone, I am withdrawing. I highly suggest you start selling marital furniture you do not want, in addition to the whiskey, watch and bikes you reference. If you lose me for non-payment, any other lawyer will expect payment as well, so you will need funds. I do not want to leave you, you need me and my style, but I must get paid. You are not violating anything if you sell marital personal property and furniture for fees and costs. . . .
>
> I will look for the promised listings of what you have posted.

In early July, Cynthia sent Storey screenshots documenting completed sales of furniture to which Storey responded, "Awesome! Submit payment to us ASAP," and, "Great—send us payment, please." On July 17, Storey's office manager sent an email to Cynthia, stating:

> I've conferred with Ms. Storey regarding non-payment on your file. Please submit payment towards your outstanding invoice from the proceeds of all items sold, and also the $2,500 from your credit card. If we do not receive payment by this Friday, July 19th, Ms. Storey will be filing her Motion to Withdraw.

¶14 Though Storey did not discuss with her client the legal significance or potential risks of disposing of these assets in light of the temporary injunction, Cynthia expressed to Storey that she was uncomfortable based on her own "values/morals" with selling furniture and other possessions that had personal

significance to Caldwell's family without his knowledge or permission. From the proceeds of the few possessions she did sell, Cynthia submitted a partial payment of $3,458.

¶15 On July 25, the court entered an order regarding Storey's motion for a conference to address the nonpayment of her fees. The court stated that "[t]he status quo order was never intended to require a party to pay for attorneys [sic] fees incurred during the proceedings, which, by simple logical deduction, are expenses incurred after the date of the filing of the Petition." The court then authorized "each party to draw, in equal amounts, but not to exceed $50,000 total, from equity in the marital residence, or any other agreed upon marital asset, for the payment of professional fees incurred and for other agreed upon expenses."

¶16 Following this July 25 order, Caldwell sent Cynthia $25,000, which Cynthia remitted to Storey. On July 29, Storey sent her client an email, stating:

> You do not have a choice as to whether you pay me in full. To me, my bill is the highest priority over your sprinkler bill, school supplies, or otherwise. It should be for you as well, as I will cease representing you, per our fee agreement, if you do not get me paid in full. . . .
>
> The Judge has told you exactly what to do to be able to pay me. Please contact [the bank] ASAP and ask them what they need for you to take $75,000 from the home equity line ASAP. The Expert CPAs need $25,000, and you owe me $32,617.31 per the August 1 bill after crediting you the full $25,000 that has yet to go through. The balance will go in my trust account for your September 1 bill. I will need to get agreement for this amount, but will wait to hear from you first as to what the bank says is needed for you to do this.

> Please let me know by 5:00 today what the bank has to say. I will no longer carry a balance with you, and will hold you to the fee agreement terms.

That day, at 5:14 pm, Storey sent another email to Cynthia:

> I will do no more work on your case until you pay me, except anything that requires a response or reply by a deadline.

The next day, on July 30, Storey filed a motion to withdraw as Cynthia's counsel, explaining to the court that Cynthia was indebted to Storey's firm. She also filed a notice of an attorney's lien. Cynthia expressed her distress and frustration in an email to Storey. Storey responded twice at great length, reiterating that she must hold Cynthia to the terms of the client services agreement, emphasizing the "invaluable benefit via [Storey's] representation" that Cynthia had already received, describing the long hours she had committed to Cynthia's case, chastising Cynthia for her "misplaced anger," and asking Cynthia, "How do you expect me to pay my employees their salaries? How do you expect me to pay my mortgage? How do you expect me to provide for my children?"

C. The IRS Check

¶17 On August 1, while the motion to withdraw was pending, Cynthia sent an apologetic email to Storey, offering "a solution to the open invoice"; a refund check from the IRS , jointly payable to Caldwell and Cynthia for $47,578.43, had arrived in the mail. Cynthia offered to bring the IRS check to Storey's office the next day

so that it could be used to pay her open balance. Cynthia included in the email a photo of the jointly payable check.

¶18 Hours later (in the early morning of August 2), Storey responded, stating,

> Yes, that is agreeable. However, you need to look into how you draw equity from [the bank] as well. Unfortunately, that IRS refund may not last long. Once that check clears, and you tell us what you need to do to access equity in the house, we will withdraw our Motion to Withdraw. Please let us know the equity how tos by 5:00 on August 2nd.

Storey did not acknowledge the fact that the IRS check was jointly payable to husband and wife; she explained during the hearing that she did not see the picture of the check because she was reading the email on her phone. She did not ask any questions about why the refund might have been issued or what relationship it might have to other marital assets.[2] She also did not advise Cynthia about her Rule 16.2 duty to disclose this asset to Caldwell.

¶19 On August 2, Cynthia brought the IRS check to Storey's office, endorsed it, and provided it to Storey's office manager, who deposited it into the firm's trust account.

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[2] The IRS check, it turns out, was issued as a refund to Cynthia and Caldwell by mistake. Caldwell had sent money to the IRS as estimated quarterly taxes for a certain tax year, but the IRS applied that amount to a different tax year, and, based on that error, issued a refund. Thus, the taxes that Caldwell intended to pay were not paid, and so the couple still needed to use the funds that came via "refund" for taxes due.

¶20 Later that day, Cynthia sent Storey an email, stating that she had told the office manager that Caldwell did not know about the IRS check and that she was "completely open to [Storey's] advice on how to proceed." On August 4, Cynthia again sent Storey an email regarding the IRS check, saying, "before [Caldwell's attorney] or Caldwell finds out what happened on Friday I would like to have a discussion with you." Storey responded two days later, asking "[y]ou are not speaking to [Caldwell] about this stuff, are you?" and advising "[t]here is no reason for him to find out about the tax refund just yet."

¶21 On August 6, Storey transferred $30,136.84 from the trust account to the firm's operating account, leaving $17,441.59 of the funds from the check in the trust account. She also withdrew her motion to withdraw and her notice of attorney's lien.

¶22 On August 7, Storey and Cynthia met in person. The two offer divergent accounts of this meeting. According to Storey, she told her client that disclosure was required, but Cynthia said that she did not want to disclose the existence of the IRS check to her husband at that point because she feared his reaction. Cynthia testified, however, that she understood she would need to disclose the check and she expected that Storey would take care of that disclosure. This was the only in-person conversation the two women had about the need to disclose the IRS check.

¶23 On August 12, Cynthia emailed Storey asking whether she should give Caldwell his mail, which included a letter from the IRS about the check. Storey did not respond to that email for eight days. When she did respond, instead of counseling Cynthia about the need for disclosure, she wrote: "I have held off in answering this, as I am not sure I feel comfortable weighing in. I know this will shock you, as I always tell you to wait for my advice and not act on your own, but: Do whatever you want on this issue."

¶24 On August 22, Storey again urged Cynthia by email to sell "marital property" and send Storey "proof" that she was selling it. On August 23, Storey sent a settlement proposal to Caldwell's counsel. The proposal included specifics about how to handle taxes and tax refunds. But Storey did not mention the IRS check. Nor did she advise Cynthia that she should do so.

¶25 On August 26, Storey filed a second motion to withdraw as counsel. The following day, she sent an email to Cynthia, stating:

> I do hope you will pay me the outstanding balance within the next 13 days. Otherwise, I will have to file a new Notice of Lien, and Caldwell will see that it went from that high amount from before, to this new low amount, and he will be pushing you about from where that money came. Again, you did nothing wrong, as the Automatic Temporary Injunction does not prevent you from paying fees and costs. Additionally, the Judge did find in July that there were sufficient marital assets for each party to pay his and her respective fees and costs. You did use marital assets via that tax refund to pay your fees and costs.

¶26 On August 27, the court held a telephonic hearing at which the parties again discussed payment of attorney's fees. Although Storey knew that she had used the IRS check for payment of her fees since the last time the parties had spoken with the court in July, she did not disclose the existence of the IRS check at this hearing, and she did not advise Cynthia that she should disclose.

¶27 On September 1, Storey transferred the entire balance remaining from the IRS check funds ($17,441.59) from her trust account to the firm's operating account as payment for fees earned. In early September, the court granted Storey's motion to withdraw as counsel for Cynthia.

D. Events Following Storey's Withdrawal as Counsel

¶28 Cynthia retained new counsel, Jennifer Alldredge, on September 4, 2019. As part of the transition, Storey and Alldredge discussed the case by telephone and Storey told Alldredge about the IRS check, including the fact that it had been used to pay her fees and that it had not been disclosed to Caldwell. She did not suggest to Alldredge that Cynthia had told her to delay disclosing the check, but she did share her view that it should be disclosed at some point. According to Alldredge, Cynthia told her at the start of the representation that she wanted the IRS check to be disclosed to Caldwell.

¶29 Alldredge did disclose the IRS check to opposing counsel, but before doing so she consulted with other attorneys in her firm and with the Colorado Bar

Association's ethics hotline regarding her concerns that the IRS check had not been timely disclosed, that the failure to disclose it may have been a violation of the disclosure rules, and that the use of the funds might have constituted a violation of the temporary injunction.

¶30 When Alldredge disclosed the check to Caldwell's counsel on September 25, they both agreed that the funds from the check should be returned to Cynthia so that the Sullivans could determine together what should be done with them. Both attorneys reached out to Storey, asking her to return the funds, but she did not. Accordingly, on Friday, September 27, Caldwell's counsel filed what he styled as an "unopposed" motion asking the court to direct Storey to return the funds to her former client and explaining that the funds were needed to pay the Sullivans' outstanding IRS obligation. He did not serve the motion on Storey, but when the court granted the motion late the same day it was filed, directing Storey to remit the funds within forty-eight hours, Caldwell's counsel forwarded that order to Storey. When Storey did not return the funds by later the following week, the court set a hearing on the issue for October 9, 2019. Storey appeared at the October 9 hearing and argued that the court lacked jurisdiction over her because she had withdrawn as Cynthia's counsel and was no longer part of the case. At that time, the court agreed with her argument and vacated the order directing Storey to return the funds.

¶31 In the meantime, Storey had filed a motion to intervene in the Sullivan case, an attorney's lien, and a motion for entry of judgment seeking payment of the remaining fees Cynthia owed her for her past work. In November 2019, the court reconsidered its conclusion that it lacked jurisdiction over Storey and directed her to respond to the September 27 motion asking for return of the IRS check funds. Litigation over the check continued into the following year until, in March 2020, Storey provided the funds for deposit into Caldwell's counsel's trust account, where they were held until the parties could agree about their ultimate disposition. The parties ultimately agreed that the funds should be returned to Storey as part of the division of property, and the court entered an "Agreed Order" to that effect on September 21, 2020.

¶32 The Office of Attorney Regulation Counsel ("OARC") filed a complaint before the Presiding Disciplinary Judge ("PDJ") on September 17, 2020, asserting five claims: violations of Rule 1.7(a)(2) (Claim I), Rules 1.15A(a) and (c) (Claims II and III), Rule 3.4(c) (Claim IV), and Rule 8.4(c) (Claim V). Both Storey and the People filed motions for summary judgment with the PDJ, and both were denied. The matter proceeded to a five-day hearing during which Cynthia, Caldwell, Storey, Alldredge, and Caldwell's counsel, among others, testified. In addition to these fact witnesses, both the People and Storey presented expert testimony, which focused on the operation of the Rules of Professional Conduct in the context of

family law matters and the accepted or common billing practices of family law attorneys in Colorado.

¶33 After hearing testimony from both the fact and expert witnesses, assessing the credibility of these witnesses, and considering the applicable legal standards, the Board concluded that Storey had violated the Rules of Professional Conduct largely as charged by the People. Storey appealed that determination to this court.

II. Standards of Review

¶34 This court "has exclusive jurisdiction over attorneys and the authority to regulate, govern, and supervise the practice of law in Colorado to protect the public." *In re Kleinsmith*, 2017 CO 101, ¶ 11, 409 P.3d 305, 308 (quoting *Colo. Sup. Ct. Grievance Comm. v. Dist. Ct.*, 850 P.2d 150, 152 (Colo. 1993)). The Board's determination that Storey's conduct constituted a violation of a rule of professional conduct is a conclusion of law that we review de novo. C.R.C.P. 242.33(c);[3] *In re Betterton-Fike*, 2020 CO 19, ¶ 29; 459 P.3d 522, 527. We

[3] The Colorado Rules of Civil Procedure pertaining to the Attorney Discipline process were amended in 2021. There is some ambiguity as to whether the old rules or the new should apply in this proceeding. These rule amendments became "effective for cases filed with the Presiding Disciplinary Judge or the Supreme Court on or after July 1, 2021." Although this matter was resolved by the Hearing Board before July 1, 2021, the appeal was filed in this court after July 1, 2021. As relevant here, the rule changes were not substantive, but merely consisted of relocating the same standards of review in different rule numbers. We cite the currently existing rules—those applicable after July 1, 2021.

review the Board's findings of fact for clear error. C.R.C.P. 242.33(c). We will affirm a sanction imposed by the Board unless it "bears no relation to the misconduct, is manifestly excessive or insufficient in relation to the needs of the public, or is otherwise unreasonable." *Id.*

¶35 Unless otherwise provided by rule, disciplinary hearings "must be conducted in accordance with the Colorado Rules of Evidence." C.R.C.P. 242.30(b)(2). The PDJ has discretion to exclude or limit the purposes of certain evidence. C.R.C.P. 242.6(c)(3). We review those evidentiary decisions for abuse of discretion. *People v. Ramos*, 2017 CO 6, ¶ 5, 388 P.3d 888, 890. A court abuses its discretion "only when its ruling is manifestly arbitrary, unreasonable, or unfair." *Id.*

III. Analysis

¶36 We begin by considering the Board's conclusion that Storey's conduct violated Rule 1.7(a)(2) when she urged her client to sell marital property and accepted payment from funds derived from a significant, undisclosed marital asset without advising her client appropriately about the associated risks in light of her disclosure obligations and the temporary injunction. Next, we turn to the Board's conclusion that Storey violated Rules 1.15A(a) and 1.15A(c) by transferring the funds from the IRS check out of her trust account into her operating account without ensuring that those funds were disclosed to Caldwell and his counsel. We

then explore whether the Board was correct in concluding that Storey's failure to disclose the IRS check constituted "fraud, deceit or misrepresentation" in violation of Rule 8.4(c). Finally, we turn to the Board's conclusion that Storey violated Rule 3.4(c) when she did not immediately comply with the court's September 27 order directing her to return the IRS check funds to Cynthia and Caldwell.

¶37 We conclude that the Board's factual findings were not clearly erroneous and we defer to those factual findings where relevant. We further conclude that the Board correctly found clear and convincing evidence that Storey violated Rules 1.7(a)(2), 1.15A(a) and (c), and 8.4(c) through her conduct in this matter. However, we do not believe that the evidence clearly demonstrates a violation of Rule 3.4(c). Accordingly, we remand the case to the Board for an assessment of whether the reversal of the Rule 3.4(c) claim warrants imposition of a different sanction.

A. Violation of Rule 1.7(a)(2)

¶38 Rule 1.7(a)(2) forbids an attorney from representing a client if "there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer." This prohibition grows out of the understanding that "[l]oyalty and independent judgment are essential elements in the lawyer's

relationship to a client." Rule 1.7 cmt. 1.[4] To ensure this loyalty and independent judgment, it is axiomatic that "[t]he lawyer's own interests should not be permitted to have an adverse effect on representation of a client." Rule 1.7 cmt. 10.

¶39 The Board correctly concluded that Storey's engagement agreement did not itself constitute a violation of Rule 1.7(a)(2) simply because it anticipated monthly payments of earned fees. While an attorney could ethically contract for—or accept—payment of fees at the conclusion of a divorce proceeding, nothing in the Rules obligates an attorney to forego regular ongoing payments during the proceeding. But the Board did conclude that Storey violated Rule 1.7(a)(2) by the "manner" in which she sought payment.

¶40 The Board identified three instances in which Storey's "dogged demands for payment created a conflict of interest." First, Storey insisted that Cynthia sell furniture and other personal property that she would not want in the division of property in order to cover Storey's fees. Storey did this without considering or discussing with her client the possibility that these sales might violate the section 14-10-107(4)(b)(I)(A) temporary injunction. Second, Storey accepted the

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[4] The comments to the Rules of Professional Conduct inform our interpretation of a rule, even though they "do not create ethical obligations independent from the text of the rule." *Persichette v. Owners Ins. Co.*, 2020 CO 33, ¶ 20 n.4, 462 P.3d 581, 587 n.4.

IRS check from her client and deposited funds into her operating account without investigating the context for the check and discussing the possible consequences of using undisclosed assets to pay her fees in light of the C.R.C.P. 16.2 mandatory disclosure requirements. And, third, Storey did not advise Cynthia adequately about her duty to disclose the check—effectively delaying its disclosure until after Storey had applied the entire balance to her earned fees. As we explain further below, we agree with the Board that Storey's interactions with her client regarding the sale of marital property and the handling of the IRS check demonstrated an impermissible conflict of interest in violation of Rule 1.7(a)(2).

1. Pushing the Sale of Marital Furniture and Other Assets While Failing to Advise on the Risks

¶41 Beginning as early as June 13 and continuing into August, Storey persistently instructed Cynthia to sell furniture and other valuable possessions in the marital home in order to pay her fees. Her requests were aggressive and included demands that her client show her screenshots of the items' listings on websites. Storey's communications also advised Cynthia to sell anything that she would not want to retain after the division of property and made no reference to the possibility that Caldwell might have an interest in any of the items, even when her client expressed discomfort about selling valuables that might have personal significance to Caldwell. In doing so, the only advice that Storey gave was that selling this property would not violate the temporary injunction because "[i]t is

not a violation of the Automatic Temporary Injunction to pay your lawyer from marital funds/assets."

¶42 Recall that section 14-10-107(4)(b)(I)(A) enjoins the parties to a divorce "from transferring, encumbering, concealing, or in any way disposing of, without the consent of the other party or an order of the court, any marital property, except in the usual course of business or for the necessities of life." Storey asserted, both before the Board and on appeal, that this injunction on the disposal of marital property does not apply if the marital property is being used to pay attorney's fees. We agree with the Board's conclusion that this assertion goes too far.

¶43 Section 14-10-107(b)(I)(A)'s injunction is broad and unambiguous: parties to a divorce may not "in any way dispos[e] of" marital property without consent or a court order "except in the usual course of business or for the necessities of life." Selling family furniture and other valuable property without consent from—or even notice to—the opposing party, and without regard to whether the opposing party may have an interest in the property is simply not "the usual course of business" and is not reconcilable with the injunction's directive.[5] Of

[5] The People's expert, attorney Steven Lass, opined that he had "never seen" a case in which a lawyer advised their client to sell family furniture to pay fees. Storey's expert did not suggest otherwise, though he did offer an example of one party selling their car to cover fees. In either instance, an attorney exercising loyalty and

course, marital assets can be, and regularly are, used to pay attorney's fees during the course of a divorce proceeding. For example, in this case, the court entered an order providing that the parties could draw on equity in the marital home to pay their lawyers.[6] And parties might agree that income or other assets will be used to cover fees. But absent a court order or agreement, section 14-10-107(4)(b)(I)(A) would be meaningless if it permitted the sale of family furniture and other valuables by one party during a divorce proceeding.

¶44 We agree with the Board's conclusion that Storey violated Rule 1.7(a)(2) because her personal interest in receiving payment from Cynthia limited her representation of her client in that she did not advise her client as to the potential risk that selling this marital property would—or at the very least might—violate the plain language of the temporary injunction.

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independent judgment would advise their client that there was at least some risk that a court would perceive those sales as violating the Automatic Temporary Injunction.

[6] In this case, unfortunately, the court declined to enter Temporary Orders when initially asked. C.R.C.P. 16.2(b) directs courts in divorce proceedings to engage in "active case management" in order "to provide the parties with a just, timely, and cost effective process." Active case management can help to avoid circumstances like those presented here by ensuring that court orders will define how matters such as the payment of attorney's fees will be handled during the pendency of the proceedings.

2. Accepting the IRS Check and Delaying Disclosure of the Check While Failing to Advise on the Risks

¶45 Colorado Rule of Civil Procedure 16.2 was significantly amended, effective beginning in 2005, to recognize that parties in a dissolution of marriage are not similarly situated to adverse parties in civil litigation. Instead, "[f]amily members stand in a special relationship to one another and to the court system." C.R.C.P. 16.2(a). For that reason, "[i]t is the purpose of Rule 16.2 to provide a uniform procedure for resolution of all issues in domestic relations cases that reduces the negative impact of adversarial litigation wherever possible." *Id.* One of the most important changes effectuated by the amendments to Rule 16.2 is the recognition that "[p]arties to domestic relations cases owe each other and the court a duty of full and honest disclosure of all facts that materially affect their rights and interests and those of the children involved in the case." C.R.C.P. 16.2(e)(1). This obligation requires that "a party must affirmatively disclose all information that is material to the resolution of the case without awaiting inquiry from the other party" and that disclosures "shall be conducted in accord with the duty of candor owing among those whose domestic issues are to be resolved under this Rule 16.2." *Id*. The duty to disclose embodied in this Rule continues throughout the dissolution proceeding, such that each party "is under a continuing duty to supplement or amend any disclosure in a timely manner." C.R.C.P. 16.2(e)(4).

¶46 Although Rule 16.2's disclosure obligation rests with the parties to a divorce rather than the lawyers representing the parties, the Board concluded that Storey had an obligation to advise her client about this disclosure requirement—and to do so before depositing funds from the IRS check into her firm's operating account. Instead, Storey immediately accepted Cynthia's offer to use the check to pay her fees. She did so without asking Cynthia any questions about the check. Storey did not try to ascertain why the apparent refund had arrived from the IRS or whether it actually was a refund. Storey did not say anything to Cynthia about any possible risk of signing the check over without disclosing it to Caldwell. Instead, Storey said only that "[u]nfortunately, that IRS refund may not last long. Once that check clears, and you tell us what you need to do to access equity in the house, we will withdraw our Motion to Withdraw."

¶47 The Board concluded that Storey's focus on getting her own fees paid materially limited her independent judgment and loyalty to her client. Instead of pausing to consider the context surrounding the IRS check and the impact that distributing the funds without disclosing the check might have on the divorce proceedings, Storey accepted the check without question and immediately focused on what her next source of revenue would be.

¶48 Storey asserts that it was appropriate for her to accept the check because attorney's fees can be paid from marital assets. While we again acknowledge that

marital assets will often be used to pay attorney's fees in divorce cases, that fact must co-exist with C.R.C.P. 16.2's strong disclosure obligations. Recall that Rule 16.2 emphasizes the importance of candor between parties to a divorce; they essentially stand in a fiduciary relationship with each other. *See In re Marriage of Schelp*, 228 P.3d 151, 156 (Colo. 2010) (noting that 16.2(e) "embraces the principle that spouses are in a fiduciary relationship with each other."); *In re Marriage of Manzo,* 659 P.2d 669, 674 (Colo. 1983).

¶49 Although we decline to define what "timely disclosure" of a previously undisclosed asset requires in every case, we can say that an asset is not timely disclosed if a significant event in the proceedings takes place and the asset remains undisclosed. The parties and their experts appear to agree to this general principle; their disagreement centers on what kind of event is sufficiently significant to require disclosure. Here, we agree with the Board that accepting the IRS check as payment and transferring the funds from Storey's trust account to her operating account was the kind of event that should have been preceded by disclosure. This does not mean that Cynthia would have required permission from Caldwell to use the IRS funds to pay her attorney's fees. Instead, we make the more limited point that Storey should have advised Cynthia to disclose the IRS check before attempting to use it to pay her attorney's fees. At that point, the parties would have had an opportunity to determine what the IRS check was and

whether it could appropriately be used to pay Storey's fees. If needed, they could have asked the court to intervene to resolve this question.

¶50 Moreover, after transferring a significant portion of the IRS check into her operating account on August 6, before having any conversation with Cynthia about her disclosure obligations, Storey continued to offer inadequate advice about the importance of disclosure. As a result, the Board concluded that Storey further violated Rule 1.7(a)(2) by effectively delaying disclosure until after she had transferred the entirety of the IRS funds into her own account. We agree with the Board's conclusion.

¶51 We acknowledge that there was conflicting testimony about exactly what occurred during the one in-person conversation that Storey and Cynthia had about disclosure.[7] When the two met on August 7, both agree that they discussed the need to disclose the check at some point. Storey testified that she informed Cynthia of her disclosure obligation and Cynthia said she did not want to disclose

[7] Storey asks us to reverse the PDJ's decision to exclude her notes from this meeting as hearsay and asserts that they should be accepted to prove the truth of what happened at the meeting. We will only reverse the PDJ's evidentiary determinations if they are an abuse of discretion. *Bly v. Story*, 241 P.3d 529, 535 (Colo. 2010). Here, even if we thought the PDJ's decision constituted an abuse of discretion, because the notes were admitted to prove Storey's state of mind and they were reviewed by the Board, any error was harmless.

"yet." Cynthia says that she left the conversation understanding that Storey would be disclosing the check. Regardless of what happened during that conversation, the Board concluded that the events in the following weeks presented Storey with multiple opportunities to properly counsel her client about the need to disclose this asset and she took none of them.

¶52 The first such moment occurred on August 12, when Cynthia emailed Storey and told her that Caldwell had received mail from the IRS regarding the check and asking for her advice on whether to give it to him, which would disclose the check's existence. Storey responded eight days later, advising Cynthia only to "[d]o whatever you want on this issue."

¶53 A second moment when Storey should have counseled Cynthia on her disclosure obligations, or disclosed the IRS check herself, was when Storey sent Caldwell's counsel a proposed separation agreement on August 23. That proposal contained no mention of the IRS check, despite the fact that it included extensive details on how to handle tax matters. Storey's email conveying the settlement proposal was similarly silent on the existence of the IRS check.

¶54 And, finally, disclosure of the check should have been raised before or at the August 27 telephonic status conference with the court, at which the parties discussed payment of attorney and other professional fees.

¶55 We agree with the Board that each of these moments presented Storey with the opportunity to counsel her client about her affirmative disclosure obligations. The fact that Storey took none of these opportunities—effectively delaying disclosure until after she had transferred the remaining funds into her own account—demonstrated a conflict of interest between her personal desire for payment and her obligations of loyalty and independent judgment in violation of Rule 1.7(a)(2).

B. Violation of Rules 1.15A(a) and (c)

¶56 The Board concluded that Storey violated Rules 1.15A(a) and (c) when she transferred funds from the IRS check into her firm's operating account despite knowing that the check had not been disclosed to Caldwell or his counsel.

¶57 Rule 1.15A sets forth lawyers' duties regarding the property of their clients and third parties. Subsection (a) obligates a lawyer to "hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property." Colo. RPC 1.15A(a). Subsection (c) requires lawyers to keep "separate" any property in their possession that is disputed or in which another person claims an interest.

¶58 It is undisputed that on August 6, 2019, and again on September 1, 2019, Storey authorized her firm's office manager to transfer the IRS check funds from the firm's trust account to the firm's operating account and that she did this

knowing that the existence of the check had not been disclosed. It is also undisputed that Caldwell had an interest in the IRS funds because they were marital assets. What is disputed is whether Storey's actions violated Rules 1.15A(a) and (c).

¶59 Storey suggests that Rule 1.15A does not apply when a marital asset is used to pay attorney's fees, arguing that even though Caldwell could have asserted an interest in those funds had he been aware of them, she would still be entitled to take them as payment for earned fees. This is because, Storey asserts, parties in a divorce proceeding can use marital assets to pay attorney's fees even though both parties can claim an interest in those assets. Further, she argues that there is no difference between disclosed and undisclosed assets and that using undisclosed assets to pay fees is an accepted practice among family law attorneys in Colorado. Therefore, she concludes, even if we disagree with her, she should not be sanctioned for violations of Rule 1.15A because no decision of this court had ever explained that a divorce attorney had to ensure that a marital asset was disclosed before taking it as payment for fees.

¶60 In reaching the conclusion that an attorney's conduct must be explicitly prohibited by this court in order to warrant sanctions, Storey points to our decision in *In re Sather*, 3 P.3d 403 (Colo. 2000). There, we explained that flat fees had to be placed in an attorney's trust account and only drawn on once earned. However,

we declined to sanction an attorney who treated the fees as earned on receipt because it was common practice before our decision to treat flat fees as earned on receipt. *Id.* at 405–06. Storey argues that this is an analogous circumstance; we have not had occasion to prohibit the specific circumstances described here and therefore they should not lead to sanctions.

¶61 The People, supported by their expert, argue that Storey mischaracterizes the regularly accepted practice among family lawyers. While the People concede that it is common practice to pay attorney's fees with disclosed marital assets, their expert opined that the regular practice with an undisclosed asset—particularly one as large as the IRS check—would have been to place the funds in trust and disclose them so that Caldwell could have asserted any interest he may have had, and, if necessary, the court could have entered an order related to the funds.

¶62 In addressing these competing views, the Board relied significantly on its view that the People's expert credibly testified that accepted practice in Colorado would have been to disclose an asset like the IRS check before seeking to use it to pay attorney's fees. Further, the Board concluded that Storey knew Caldwell would have claimed an interest in the IRS check had he known of its existence, but that he was deprived of the opportunity because Storey consumed all of the funds before the check was disclosed. The Board therefore concluded that Storey had ignored her obligation to safeguard the "property of others with the care required

of a professional fiduciary," Colo. RPC 1.15A cmt. 8, particularly in light of the affirmative disclosure obligation and the duty of candor underpinning Rule 16.2.

¶63 We agree with the Board's conclusion that use of an undisclosed marital asset like the IRS check to pay attorney's fees is a violation of Rules 1.15A(a) and (c). In reaching this conclusion, we distinguish the circumstances in *Sather* from those here. In *Sather*, we concluded that the evidence credibly demonstrated that it had been accepted practice in Colorado to treat lump-sum fees as earned on payment, and because we were clarifying that the accepted practice was a violation of the Rules of Professional Conduct, we declined to sanction Sather for his conduct. 3 P.3d at 412 n.11. Here, the Board made a credibility determination in evaluating conflicting expert testimony and concluded that the common practice under these circumstances would have been to disclose the check before transferring it into a firm operating account. We will only reverse this kind of credibility determination by the Board if it is clearly erroneous and not supported by substantial evidence in the record. *In re Haines*, 177 P.3d 1239, 1244 (Colo. 2008). In light of the strong disclosure obligation set forth in C.R.C.P. 16.2(e), we now conclude that the Board reasonably credited the testimony of the People's expert. Accordingly, we affirm the Board's conclusion that Storey violated Rules 1.15A(a) and (c) when she transferred the IRS check funds into her firm's operating account without first ensuring they had been disclosed to Caldwell and his counsel.

C. Violation of Rule 8.4(c)

¶64 Colorado Rule of Professional Conduct 8.4(c) prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation. An omission such as a failure to disclose information that should be disclosed can constitute a violation of the rule. *In re Cardwell*, 50 P.3d 897, 898 (Colo. 2002); *People v. Steinman*, 452 P.3d 240, 251 (Colo. O.P.D.J. 2019). A showing of actual knowledge is not required to demonstrate a violation of Rule 8.4(c); instead, a lawyer acts recklessly by closing their eyes to information they have a duty to understand may violate the rule. *People v. Rader*, 822 P.2d 950, 953 (Colo. 1992).

¶65 The Board concluded that Storey violated Rule 8.4(c) by avoiding her obligation to ensure timely disclosure of the IRS check. The Board found that Storey failed to properly advise her client on the need to disclose the check when she accepted payment with the IRS funds and then "sidestepped" discussion about the check by avoiding the topic in her proposed settlement agreement and a telephonic status conference at which fees and costs were a prominent topic. The Board further found that throughout this time Storey avoided consideration of facts that she had an obligation to consider. For example, she did not inquire into the reason the IRS sent the refund check despite having extensive knowledge of the Sullivans' tax circumstances as part of the divorce proceedings. And she waited eight days to respond to her client's August 12 question about handing

mail to Caldwell that would disclose the IRS check. She then responded with a refusal to offer advice about what her client should do. From these facts, the Board concluded that Storey recklessly concealed the check in violation of Rule 8.4(c).

¶66 Storey asks us to reverse the Board's finding on this claim, arguing that the total time that elapsed between her learning of the check and her withdrawal from the representation was only thirty-three days and that the obligation of "timely" disclosure, C.R.C.P. 16.2(e)(4), was not triggered within that timeframe. She notes that it took Alldredge, Cynthia's new counsel, only a few days less than that to disclose the check after she first learned of its existence. However, the Board reasonably concluded that what made Storey's failure to disclose a violation of Rule 8.4(c) was her conduct during those thirty-three days.

¶67 The Board found that, whereas Alldredge was trying, during her delayed disclosure, to determine what her ethical obligations were by consulting with other lawyers and with the Colorado Bar Association Ethics Committee, Storey's delay had no such justification. Indeed, Storey missed several key moments when she should have disclosed or advised her client of her obligation to disclose, but declined to do so. Instead, she delayed disclosure while transferring the funds from her trust account into her firm's operating account. We agree with the Board that this course of conduct demonstrated a reckless omission and was therefore a violation of Rule 8.4(c).

D. Violation of Rule 3.4(c)

¶68 The Board concluded that Storey violated Rule 3.4(c), which prohibits a lawyer from knowingly disobeying an order of a tribunal "except for an open refusal based on an assertion that no valid obligation exists," when she did not return the funds from the IRS check as directed by the court in its September 27, 2019 order. Colo. RPC 3.4(c). Storey challenges this conclusion on several grounds. First, she argues that the motion asking the court to order return of the funds was misleading because it was styled as an "Unopposed Forthwith Motion for Return of IRS Funds," and yet neither Caldwell's counsel nor Alldredge had conferred with her about the motion, which she would have opposed if given the opportunity. Second, she argues that she did not believe she could file an "open refusal" with the court because the court no longer had jurisdiction over her since she was no longer an attorney in the case. She made a limited appearance at a show cause hearing scheduled on October 9, 2019, to allow her to respond to the motion for return of funds and argued the court lacked jurisdiction. At that time, the court agreed. Later, the court concluded that it did in fact have jurisdiction over the funds at issue, and therefore over Storey.

¶69 The facts and legal arguments surrounding this series of events are, at a minimum, confusing. Under these contested circumstances, we disagree with the

Board's conclusion that there was clear and convincing evidence that Storey knowingly disobeyed an order of the court.

IV. Conclusion

¶70 We affirm the conclusion of the Board that Storey's conduct in this matter violated Rules 1.7(a)(2), 1.15A(a) and (c), and 8.4(c). However, because we conclude that the Board erred in finding that Storey violated Rule 3.4(c), the Board must reassess its sanction, giving appropriate weight to aggravating and mitigating factors, and using the ABA Standards for Imposing Lawyer Sanctions "as the guiding authority for selecting the appropriate sanction." *In re Fischer*, 89 P.3d 817, 819–20 (Colo. 2004). We therefore remand this matter to the Board for reconsideration of the sanction imposed.