ADVANCE SHEET HEADNOTE
April 22, 2024

2024 CO 21

No. 23SA137, *Matter of Kennedy*—Conduct and Discipline—Reciprocal Discipline—Limitation of Actions—Disbarment—Summary Judgment.

The supreme court concludes that the rule of limitation set forth in C.R.C.P. 242.12 does not apply to reciprocal disciplinary proceedings brought pursuant to C.R.C.P. 242.21. Accordingly, the supreme court holds that in this case, the PDJ did not err in declining to find the respondent attorney's reciprocal disciplinary case barred by Rule 242.12. The supreme court further holds that the PDJ properly granted the People's motion for summary judgment and therefore affirms the PDJ's order that the respondent attorney be reciprocally disbarred in Colorado.

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

2024 CO 21

Supreme Court Case No. 23SA137
Original Proceeding in Discipline
Appeal from the Presiding Disciplinary Judge, 22PDJ63

In the Matter of Attorney-Respondent:

John F. Kennedy.

Order Affirmed
en banc
April 22, 2024

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

JUSTICE MÁRQUEZ delivered the Opinion of the Court.

¶1 This is an attorney reciprocal disciplinary proceeding that provides an opportunity to clarify whether the five-year limitation period in C.R.C.P. 242.12 for bringing an attorney disciplinary action applies to reciprocal disciplinary proceedings brought under C.R.C.P. 242.21.

¶2 In July 2016, the District of Columbia Office of Bar Counsel ("D.C. Bar Counsel") initiated formal disciplinary proceedings against Respondent, John F. Kennedy, for alleged misconduct that occurred from 2008 through 2009. These proceedings were not resolved until August 25, 2022, when the District of Columbia Court of Appeals ("D.C. Court of Appeals") issued an order disbarring Kennedy in the District of Columbia. D.C. Bar Counsel notified Colorado's Office of Attorney Regulation Counsel ("OARC") of Kennedy's disbarment that same day.

¶3 Less than three months later, on November 14, 2022, OARC filed a reciprocal disciplinary complaint against Kennedy under Rule 242.21. Following cross-motions for summary judgment in the resulting proceedings, the Presiding Disciplinary Judge ("PDJ") ordered Kennedy to be reciprocally disbarred in Colorado.

¶4 Kennedy now appeals the PDJ's order pursuant to C.R.C.P. 242.33, raising two arguments. First, he contends that this reciprocal disciplinary case is

time-barred under Rule 242.12's five-year rule of limitation because it was initiated more than five years after the underlying conduct was discovered. Second, he contends that the PDJ erred in granting OARC's motion for summary judgment when there were genuine issues of material fact concerning his affirmative defenses under Rule 242.21(a)(3) and (a)(4). Specifically, Kennedy argues that the D.C. Court of Appeals did not determine that his misconduct was committed intentionally, and because both of his affirmative defenses turned on his state of mind, resolution of the case on summary judgment was improper.

¶5 We conclude that the PDJ did not err in declining to apply the five-year limitation period in Rule 242.12 to bar OARC's reciprocal disciplinary action here. We further conclude that the PDJ properly granted OARC's motion for summary judgment. Accordingly, we affirm the PDJ's order that Kennedy be reciprocally disbarred in Colorado.

I. Facts and Procedural History

¶6 Kennedy was admitted to the Bar of the D.C. Court of Appeals by motion on April 27, 1988, and assigned bar number 413509. He was later admitted to practice law in Colorado on April 24, 1990, and assigned bar number 19291. We draw the following facts from the disciplinary proceedings conducted before the D.C. Court of Appeals and its Board on Professional Responsibility.

A. Inter-Con Litigation and Arbitration

¶7 Kennedy and his wife, Kathleen A. Dolan, were partners in the two-person law firm Kennedy & Dolan.[1] Between late 2000 and 2002, several employees of Inter-Con Security Systems, Inc., engaged Kennedy & Dolan to pursue wage claims against the company. Kennedy entered into written attorney-client agreements with three employees who went on to become the named plaintiffs in the Inter-Con litigation. Those agreements entitled Kennedy to a contingency fee of 40% if the case was filed, mediated, or arbitrated.

¶8 Kennedy initiated the Inter-Con litigation in the Superior Court for the District of Columbia in August 2001, but the action was dismissed in March 2003 because of a mandatory arbitration clause in one of the named plaintiffs' employment contracts. Kennedy pursued the arbitration as a collective action,[2] and began circulating opt-in notices to similarly situated employees in March 2004. Importantly, these notices informed potential claimants that they would *not*

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[1] The D.C. disciplinary proceedings involved disciplinary charges filed against both Kennedy and Dolan, and the D.C. Court of Appeals ultimately suspended Dolan. This reciprocal disciplinary proceeding involves only Kennedy. Although the D.C. proceedings made factual findings regarding both Kennedy and Dolan, for purposes of this opinion, we focus on Kennedy's actions.

[2] The District of Columbia Code and the Fair Labor Standards Act permit an arbitration to proceed as a "collective action" in which a named claimant can sue an employer on behalf of themselves and other employees who are "similarly situated." D.C. Code Ann. §§ 32-1012, -1308 (West, Westlaw through Jan. 5, 2024); 29 U.S.C. § 216(b) (Fair Labor Standards Act).

be required to pay for attorney fees directly, and that the plaintiffs' attorneys would receive a part of any money judgment entered in favor of the class.

¶9 Following a change of arbitrators in February 2007, JAMS (the arbitration service) sent new notice and opt-in forms to all potential claimants. These notices explained to claimants that if their claim did not prevail, they might be responsible for paying their attorney fees and costs, depending on the terms under which the attorney agreed to represent them. Kennedy did not provide a written fee agreement to the claimants who chose Kennedy to represent them in the arbitration.

¶10 In January 2008, the arbitrator issued a summary judgment ruling that effectively dismissed the claims of over half the claimants. Following this setback, Kennedy initiated settlement negotiations with Inter-Con's counsel on January 23, 2008. He offered to settle his clients' claims, attorney fees, and costs for $700,000, while noting that his hourly fees were approaching $1 million. At the time, Kennedy knew that the only existing fee agreements (with the three lead claimants) entitled his firm to a 40% contingency fee. On January 26, 2008, Kennedy sent attorney-client agreements to each of his clients in the collective action, providing that Kennedy's attorney fees would be paid as either a 40% contingency fee or at an hourly rate—subject to Kennedy's choice. Kennedy

neither informed his clients that he had initiated settlement negotiations, nor that his hourly fees were approaching $1 million.

¶11 After continued settlement negotiations with Inter-Con—and without settlement authority from any clients—Kennedy guaranteed Inter-Con on January 31, 2008, that the matter could settle for $330,000. On February 2, 2008, he sent letters to his clients requesting authorization to settle their claims "for as much as he believes is reasonable." On February 5, 2008, Kennedy signed a memorandum of understanding ("MOU") with Inter-Con, agreeing to a settlement of $320,000, contingent upon Kennedy obtaining a signed individual release of all claims from each client.

¶12 On February 6, 2008, Kennedy sent an update letter to his clients notifying them that the arbitration had settled. He did not include a copy of the MOU, inform his clients of the settlement's terms, disclose the amount he would take as his fee, or explain that he would determine the amount that would be distributed to each client. And despite having initially informed his clients that they would not be required to pay his attorney fees directly, Kennedy did not disclose that the MOU specifically stated that each side would bear its own costs and attorney fees. Kennedy later testified that he did not disclose the settlement's details because he feared doing so might deter the claimants from agreeing to the settlement:

> [E]verybody had to sign on. That's clear, absolutely clear. And disclosing to them the amounts of what everybody else got, what they got, the attorney's fees probably, would have put that at risk.

¶13 Kennedy and Inter-Con began finalizing the terms of the settlement on February 28, 2008. Over the next several months, Kennedy worked to obtain authorization to sign the final settlement on behalf of all his clients—but at no point did he disclose the settlement's terms to them. On July 15, 2008, Kennedy signed the final settlement of $310,000 on behalf of 90 clients; this final amount reflected a $10,000 reduction from the MOU's terms to account for clients who had failed to sign releases. Without seeing or reviewing the terms of the settlement, the arbitrator dismissed the claimants from the arbitration.

¶14 The following day, Inter-Con asked Kennedy to provide a breakdown of the settlement amounts due to each claimant and Kennedy's firm. Kennedy calculated each claimant's settlement amount, but did not tell claimants about the $310,000 lump-sum settlement, explain that he was responsible for apportioning the individual awards, describe how he had calculated their awards, or disclose that he planned to take $210,000—67.7% of the settlement—as his firm's fee.

¶15 On November 12, 2008, Kennedy sent Inter-Con a letter setting forth the amount to be paid to each client, totaling $100,086.88, and instructed Inter-Con to issue a check for attorney fees payable to Kennedy's firm for the remaining balance of $209,913.32. Kennedy did not calculate his fee as 40% of the $310,000 settlement

($124,000), or by using a standard hourly rate; instead, he testified that his fee was based upon "the amount of costs we had and the number of hours over the eight-year period." Inter-Con delivered the settlement checks to Kennedy's office on December 31, 2008.

¶16 Kennedy deposited the $209,913.32 check into his firm's IOLTA trust account on January 5, 2009. Between January 5 and February 20, 2009, Kennedy withdrew from that account $72,000 identified as Inter-Con attorney fees, without giving notice to or receiving authorization from his clients. Kennedy paid himself the remaining $138,000 over the next eight months.

B. D.C. Ad Hoc Committee Investigation and Report

¶17 D.C. Bar Counsel first docketed an investigation into Kennedy's management of his trust account in June 2010. The investigation broadened in scope over the course of the next several years, and, in a subpoena issued on August 13, 2013, D.C. Bar Counsel requested that Kennedy produce his Inter-Con client files. D.C. Bar Counsel received the Inter-Con files in November 2013, and sent Kennedy a detailed list of questions regarding the Inter-Con settlement on January 9, 2014. On July 8, 2016, D.C. Bar Counsel served Kennedy with a Specification of Charges, alleging that Kennedy had violated several rules of attorney conduct during the Inter-Con litigation and arbitration. As relevant here, Kennedy was charged with violating D.C. Rule of Professional Conduct 1.15(a),

which prohibits the intentional, reckless, or negligent misappropriation of entrusted funds. The Committee heard evidence regarding these allegations over the course of several dates in 2017, and at a post-hearing conference in April 2018.

¶18 On July 31, 2019, the Committee issued its report and recommendation, concluding that Kennedy had committed "dishonest and intentional misappropriation warrant[ing] disbarment." The Committee observed that a finding of misappropriation requires proof of two elements: (1) the unauthorized use of client funds, and (2) the attorney's specific *mens rea* (intentional, reckless, or negligent). The Committee explained that "[*i*]*ntentional* misappropriation most obviously occurs where an attorney takes a client's funds for the attorney's personal use."

¶19 As to the first element, the Committee found that the $210,000 Kennedy deposited in his firm's IOLTA account constituted client funds subject to Rule 1.15(a). The Committee construed the settlement to be jointly payable to both the claimants and attorneys, giving both parties an interest in the proceeds. Thus, the Committee reasoned, all settlement funds were client property until proper accounting and severance of the funds occurred. Kennedy's clients could not have authorized his fee, however, because he "deliberately withheld" the fact he would be taking any attorney fees from the settlement to avoid putting those fees at risk.

The Committee therefore concluded that Kennedy had taken entrusted client funds without authorization.

¶20 Turning to the second element, the Committee found that Kennedy's dishonest conduct was intentional: he hid the source of his fee from his clients because he intended to take settlement funds for himself, but knew he lacked client authorization to do so. He then paid himself with the $210,000 in settlement funds he had withdrawn from the IOLTA account. This demonstrated that Kennedy treated client funds as his own, constituting intentional misappropriation.[3]

C. D.C. Board on Professional Responsibility Report

¶21 Pursuant to D.C. Bar procedural rules, the Committee filed its report and recommendation with the D.C. Board on Professional Responsibility ("the Board") for its review. Though Kennedy did not contest the Committee's factual findings, he took exception to the Committee's ultimate conclusions, including that he had intentionally misappropriated client funds. He argued there had been no misappropriation because he was entitled to the attorney fees under his good faith understanding of the Fair Labor Standards Act ("FLSA").

[3] In contrast to its findings concerning Kennedy's conduct, the Committee found that Kennedy's wife, Dolan, committed *negligent* misappropriation of Inter-Con settlement funds.

¶22 The Board filed its report and recommendation with the D.C. Court of Appeals on November 16, 2020, rejecting Kennedy's arguments. First, the Board explained that nothing in the FLSA permitted Kennedy to award himself fees from client settlement funds without oversight. The Board also agreed with the Committee's conclusions that Kennedy's dishonest conduct constituted intentional misappropriation, rather than actions taken in good faith.[4]

> Kennedy's misappropriation flows directly from his false statements and misrepresentation to the clients. He deliberately did not share settlement details with clients to ensure that the settlement would be finalized. He misrepresented to the clients that Inter-Con would pay his fees. He then calculated his own fee from the clients' settlement proceeds and paid his firm with no authorization or oversight. *These are intentional acts.*
>
> Kennedy's pattern of dishonesty contradicts his argument that he acted on a "good faith belief" that the FLSA permitted his unilateral withdrawal of fees.

(Emphasis added.)

¶23 Finally, the Board concluded by recommending that the D.C. Court of Appeals impose the presumptive sanction of disbarment for Kennedy's intentional misappropriation.

[4] The Board agreed with the Committee's finding that Dolan's misappropriation had been merely negligent.

D. D.C. Court of Appeals Opinion

¶24 In a decision issued on August 25, 2022, the D.C. Court of Appeals considered and rejected Kennedy's arguments that (1) his clients had no interest in the portion of settlement funds that Kennedy took as attorney fees, and (2) the FLSA authorized his use of client funds.

¶25 First, the court concluded that Kennedy's fees came "out of the settlement award—funds in which the clients surely had an interest." Although Kennedy also may have had an interest in the funds, he had no right to take settlement funds absent client authorization. Thus, "until such an agreement was reached, the entire settlement award was client funds" that were "entrusted" to Kennedy.

¶26 Second, the court determined that no part of the FLSA states or implies that an attorney is entitled to unilaterally take any portion of an out-of-court settlement as their fee. The court also agreed with the Board and the Committee that Kennedy's clients "could not have provided informed consent" for Kennedy's fees, given that Kennedy withheld settlement details from them to avoid putting the settlement at risk.

¶27 Finally, the D.C. Court of Appeals reviewed and upheld the Board's conclusion that Kennedy's deliberate actions throughout the settlement process constituted *intentional* discrimination warranting disbarment:

> [T]he Board in this case determined that Kennedy "deliberately did not share settlement details with clients to ensure that the settlement

> would be finalized." We must *agree with the Board that Kennedy's conscious actions throughout the settlement process rendered a conclusion of intentional misappropriation* requiring disbarment. . . . Because we determine that *Kennedy engaged in intentional misappropriation* and see no extraordinary circumstances that mitigate his misconduct, we agree with the Board's recommendation that he be disbarred.

(Emphases added.) (Footnote omitted.) The court therefore ordered that Kennedy be disbarred, *nunc pro tunc* to May 4, 2021. D.C. Bar Counsel notified Colorado of Kennedy's disbarment that same day.

E. Reciprocal Disciplinary Proceedings in Colorado

¶28 Less than three months later, OARC filed the reciprocal disciplinary complaint at issue here. In an amended answer filed on January 20, 2023, Kennedy asserted that the five-year rule of limitation in Rule 242.12 barred the reciprocal disciplinary complaint because it was initiated more than five years after the underlying conduct was discovered. Following the parties' cross-motions for summary judgment, the PDJ issued an order on May 4, 2023, granting OARC's cross-motion and ordering reciprocal disbarment in Colorado.

¶29 In denying Kennedy's motion for summary judgment, the PDJ first concluded that, to the extent the rule of limitation even applies to reciprocal disciplinary actions, the relevant five-year period was triggered by the final adjudication of misconduct in the originating jurisdiction, rather than the date the conduct was discovered or reasonably should have been discovered.

¶30 The PDJ next considered Kennedy's arguments concerning defenses to reciprocal discipline under Rule 242.21(a). Kennedy primarily argued that under Rule 242.21(a)(4), reciprocal disbarment in Colorado was unwarranted because his proven misconduct warranted discipline substantially different from disbarment in Colorado. Kennedy noted that Colorado presumptively disbars attorneys *only* for intentional or knowing conversion of client funds. Yet, he asserted, the D.C. Court of Appeals did not specifically hold that Kennedy acted intentionally or knowingly, but instead concluded that Kennedy acted with an unspecified *mens rea* exceeding negligence. Thus, he argued, the court's ruling left open the possibility that his misappropriation was merely reckless and did not warrant disbarment in Colorado.

¶31 The PDJ observed that Kennedy's assertion was not an established and undisputed material fact, which precluded the PDJ from reaching legal conclusions on that basis at the summary judgment stage. The PDJ also reasoned that to the extent Kennedy's assertion was instead a legal argument interpreting the D.C. opinion, such an argument amounted to an improper collateral attack relitigating the D.C. opinion itself. Thus, the PDJ concluded, neither theory entitled Kennedy to summary judgment.

¶32 Turning to OARC's cross-motion, the PDJ found that Kennedy's disbarment in D.C. conclusively established his misconduct for the purposes of the Colorado

reciprocal disciplinary case. That finding satisfied OARC's initial burden for summary judgment, which shifted the burden to Kennedy to establish a disputed issue of material fact regarding his defenses. Kennedy reiterated his arguments in support of his own motion for summary judgment on this point; in turn, the PDJ incorporated by reference the rulings it made against Kennedy on those issues.

¶33 Kennedy also argued that imposition of the same discipline imposed in D.C.—disbarment—would "result in grave injustice" because a substantially different form of discipline was warranted for his misconduct. The PDJ rejected this argument. First, it noted that Kennedy had failed "to point to any actual evidence sufficient to make out a triable issue of fact relevant to this 'grave injustice' defense," and had instead simply insisted that the D.C. Court of Appeals' several references to *intentional* misappropriation did not actually describe his mental state. Contrary to Kennedy's contentions, the PDJ found that the D.C. Court of Appeals had specifically concluded that Kennedy's misappropriation was intentional. And because Colorado invariably imposes the same discipline—disbarment—for intentional conversion of client funds, the PDJ concluded that Kennedy's disbarment in Colorado would not result in grave injustice.

¶34 Having found no evidence of a triable issue of material fact in support of Kennedy's defenses, the PDJ granted OARC's motion for summary judgment, concluding that (1) the rule of limitation set forth in Rule 242.12 did not bar

OARC's complaint, (2) none of the defenses set forth in Rule 242.21(a) applied, and (3) Kennedy should be disbarred.

¶35 Pursuant to Rule 242.33, Kennedy appealed the PDJ's order to this court, presenting two issues for our review: (1) whether the PDJ erred by declining to apply the rule of limitation in Rule 242.12 to his reciprocal disciplinary proceedings, and (2) whether the PDJ erred in granting OARC's motion for summary judgment. Kennedy moved to stay the PDJ's disbarment order pending appeal, which this court denied.

II. Standard of Review

¶36 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)). "In connection with this exclusive jurisdiction, this court has 'the ultimate and exclusive responsibility for the structure and administration of disciplinary proceedings against lawyers.'" *Chessin v. Off. of Att'y Reg. Couns.*, 2020 CO 9, ¶ 11, 458 P.3d 888, 890 (quoting *People v. Kanwal*, 2014 CO 20, ¶ 6, 321 P.3d 494, 495–96).

¶37 In attorney disciplinary proceedings, this court reviews conclusions of law de novo and factual findings for clear error. *In re Storey*, 2022 CO 48, ¶ 34, 517 P.3d 1243, 1252 (citing C.R.C.P. 242.33(c)). Both the PDJ's statutory interpretation of

Rule 242.12 and its order denying Kennedy's motion for summary judgment are conclusions of law that we review de novo. *Edwards v. New Century Hospice, Inc.*, 2023 CO 49, ¶ 14, 535 P.3d 969, 972–73 (first citing *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 2020 CO 51, ¶ 19, 467 P.3d 287, 291, and then citing *People v. Perez*, 2016 CO 12, ¶ 8, 367 P.3d 695, 697).

III. Analysis

¶38 We begin by reviewing whether the PDJ erred by declining to apply the five-year limitation period in Rule 242.12 to bar Kennedy's reciprocal disciplinary case. To answer this question, we examine the text and purpose of Rule 242.12 and conclude the PDJ did not err by declining to apply the rule to bar the disciplinary proceeding here. We next review whether the PDJ erred in granting OARC's motion for summary judgment and conclude that it did not.

A. The PDJ Properly Declined to Bar Kennedy's Reciprocal Disciplinary Case under Rule 242.12

¶39 Kennedy argues that the rule of limitation in Rule 242.12 bars his reciprocal disciplinary case because OARC initiated the action more than five years after D.C. Bar Counsel's discovery of Kennedy's conduct (which occurred between November 2013 and January 2014). C.R.C.P. 242.12 states:

> Disciplinary sanctions or diversions may not be based on conduct reported more than five years after the date the conduct is discovered or reasonably should have been discovered. But there is no rule of limitation where the allegations involve fraud, conversion, or

> conviction of a serious crime, or where the lawyer is alleged to have concealed the conduct.

¶40 We begin by noting that no Colorado court has squarely considered the threshold question of Rule 242.12's applicability to reciprocal discipline proceedings. Though Kennedy reads *People v. Freedman*, 507 P.3d 1096 (Colo. O.P.D.J. 2022), to suggest that the rule of limitation *may* apply in reciprocal disciplinary cases, this reading overstates the scope of that decision. In *Freedman*, the PDJ declined to time-bar a reciprocal disciplinary proceeding because the respondent attorney had failed to raise the rule of limitation as an affirmative defense; the PDJ ultimately never addressed the applicability of Rule 242.12 one way or another. 507 P.3d at 1100. But the case now before us gives this court an opportunity to resolve the question left unanswered in *Freedman*: Does our rule of limitation enshrined in Rule 242.12 apply to reciprocal disciplinary proceedings brought under Rule 242.21? Drawing from the text and purpose of the rules, we conclude that it does not.

¶41 Statutes of limitation serve "important purposes" within the judicial system: they "promote justice, discourage unnecessary delay and forestall prosecution of stale claims." *Lake Canal Reservoir Co. v. Beethe*, 227 P.3d 882, 886 (Colo. 2010) (quoting *Jones v. Cox*, 828 P.2d 218, 224 (Colo. 1992)). Specifically, statutory limitation periods "prevent[] surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and

witnesses have disappeared." *W. Colo. Motors, LLC v. Gen. Motors, LLC*, 2019 COA 77, ¶ 29, 444 P.3d 847, 854 (quoting *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944)). Rule 242.12 reflects these policy goals in the context of attorney disciplinary proceedings, preventing—with certain exceptions—the untimely initiation of disciplinary sanctions. The rule of limitation therefore encourages timely reporting of attorney misconduct while averting disciplinary proceedings likely to be stymied by lost evidence or missing witnesses.

¶42 But reciprocal disciplinary proceedings do not implicate the concerns that animate our rule of limitation. The goal of reciprocal disciplinary proceedings is not to prosecute attorney misconduct already conclusively established in another jurisdiction. Instead, as the PDJ correctly observed in this case, reciprocal discipline is designed "to prevent a lawyer admitted to practice in more than one jurisdiction from avoiding the effect of discipline by simply practicing in another jurisdiction, to prevent relitigation of misconduct that already has been established in another jurisdiction, and to protect the public from lawyers who commit such misconduct." Ellyn S. Rosen, ABA Ctr. For Pro. Resp., *Annotated Standards for Imposing Lawyer Sanctions* 112 (2d ed. 2019).

¶43 The text of Colorado's reciprocal discipline rule, Rule 242.21, reflects this purpose. Rather than provide a framework for re-litigation of misconduct or final sanctions imposed by other jurisdictions, the reciprocal disciplinary process

functions to give effect to those orders and sanctions in Colorado, unless a disciplined attorney establishes, by clear and convincing evidence, one of four possible defenses:

> (1) The procedure followed in the other jurisdiction did not comport with Colorado's requirements of due process of law;
>
> (2) The proof upon which the other jurisdiction based its determination of misconduct is so infirm that the determination cannot be accepted;
>
> (3) The imposition of the same discipline as was imposed in the other jurisdiction would result in grave injustice; or
>
> (4) The misconduct proved warrants a substantially different form of discipline in Colorado.

C.R.C.P. 242.21(a). The text of the rule therefore does not permit the reassessment of any evidence or testimony underpinning the initial disciplinary proceeding. The sole exception is the extreme circumstance contemplated by Rule 242.21(a)(2), where the proof underlying the initial discipline finding "is so infirm" that it renders that determination unreliable.

¶44 Beyond that scenario, however, Colorado reciprocal disciplinary proceedings simply do not revisit the evidence associated with the initial finding of misconduct. A reciprocal disciplinary hearing board will almost never have reason to re-hear evidence or arguments from the original proceeding. Nor should they. The proper forum for litigating such concerns is the jurisdiction that initiated the disciplinary proceeding, where an attorney may invoke statutory limitation

arguments to guard against unfairly delayed punishment in the first instance. Once that proceeding is concluded, however, a reciprocal disciplinary proceeding does not afford the disciplined attorney the opportunity to retry their case. *See People v. Calder*, 897 P.2d 831, 832 (Colo. 1995) (noting that a reciprocal discipline hearing board "appropriately declined" to retry another jurisdiction's disciplinary proceedings). Because reciprocal disciplinary proceedings do not implicate the concerns regarding the passage of time that underlie our rule of limitation, it would make little sense for the rule to apply to reciprocal discipline.

¶45 Moreover, the text of the rule of limitation reflects that it was never intended to apply to reciprocal disciplinary proceedings. Rule 242.12 prohibits the imposition of disciplinary sanctions or diversions "based on *conduct* reported more than five years after the date the conduct is discovered or reasonably should have been discovered." C.R.C.P. 242.12 (emphasis added). As used in that rule, "conduct" refers to the lawyer's "behavior in a particular situation or relation or on a specified occasion." *Conduct*, Webster's Third New International Dictionary (2002). Therefore, the rule of limitation applies to an attorney's behavior or actions in a particular situation.

¶46 Although reciprocal discipline is a type of "disciplinary sanction," it is based on the "final *adjudication*" of misconduct in another jurisdiction, not on the lawyer's underlying *conduct*. C.R.C.P. 242.21 (emphasis added). An adjudication

is not "conduct" as that term is used in Rule 242.12. We therefore disagree with the PDJ's conclusion that the imposition of public discipline in another jurisdiction can serve as the operative "conduct" triggering the running of our rule of limitation. The text of our rule of limitation is clear, and we decline to stretch our interpretation of that text beyond its plain meaning.

¶47 We therefore conclude that our rule of limitation set forth in Rule 242.12 does not apply to reciprocal disciplinary proceedings brought pursuant to Rule 242.21.[5] Accordingly, we hold that the PDJ did not err in declining to find Kennedy's reciprocal disciplinary case barred by Rule 242.12.

B. The PDJ Correctly Denied Kennedy's Motion for Summary Judgment

¶48 We turn now to Kennedy's argument that the PDJ erred in granting OARC's motion for summary judgment. "Summary judgment is appropriate when the pleadings and supporting documents demonstrate that no genuine issue as to any material fact exists and that the moving party is entitled to summary judgment as a matter of law." *Martini v. Smith*, 42 P.3d 629, 632 (Colo. 2002); C.R.C.P. 56(c). "In

[5] We acknowledge that our holding today means that—absent an amendment to Rules 242.12 or 242.21—no limitation period applies to reciprocal disciplinary proceedings. That said, given OARC's obligation to protect the public, it lacks any incentive to delay in such proceedings. We also note that OARC proceeded in this case with all due speed, filing charges against Kennedy less than three months after the imposition of final discipline in D.C.

considering whether summary judgment is appropriate, a court grants the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts and resolves all doubts against the moving party." *Rocky Mountain Planned Parenthood, Inc.*, ¶ 20, 467 P.3d at 291.

¶49 Kennedy argues summary judgment was improper because, in response to OARC's motion, he asserted affirmative defenses under Rule 242.21(a)(3) and (a)(4) raising genuine issues regarding his mental state. These rules provide affirmative defenses against reciprocal discipline if the attorney can show by clear and convincing evidence either that imposition of the same discipline first imposed in the other jurisdiction "would result in grave injustice," C.R.C.P. 242.21(a)(3), or that "[t]he misconduct proved warrants a substantially different form of discipline in Colorado," C.R.C.P. 242.21(a)(4).

¶50 Although Kennedy invokes two separate affirmative defenses, the gravamen of both claims is that the D.C. Court of Appeals did not specifically find that he committed *intentional* misconduct, and instead merely concluded that he acted either recklessly *or* intentionally. This issue is material to the present proceedings, Kennedy contends, because in Colorado disbarment is the presumptive sanction only for *intentional* conversion, whereas negligent or reckless conversion generally results in suspension. Accordingly, Kennedy argues that if the D.C. Court of Appeals did not make a specific finding of intentional

misconduct, reciprocal disbarment in Colorado would therefore either be gravely unjust under Rule 242.21(a)(3), or unwarranted under Rule 242.21(a)(4).

¶51 Kennedy's twin arguments both fail because, as set forth at length above, the D.C. Court of Appeals found that his misconduct was intentional—as did every entity at each level of the D.C. disciplinary proceedings. When determining Kennedy's mental state, both the Committee and the Board set forth the standards for reckless and intentional misappropriation and found that Kennedy's actions had been intentional. In turn, the D.C. Court of Appeals adopted these findings, specifically connecting Kennedy's dishonest conduct to intentionality. And the decisions at all three stages of review specifically distinguished Kennedy's intentional misappropriation from his wife's negligent misappropriation.

¶52 Because there was no genuine issue as to whether the D.C. Court of Appeals found Kennedy's misconduct to be intentional (rather than merely reckless), the PDJ correctly granted OARC's motion for summary judgment. The D.C. Court of Appeals' specific finding of intentional misconduct also forecloses the merits of Kennedy's affirmative defenses: because Colorado's presumptive sanction for intentional conversion, disbarment, matches the sanction imposed in the D.C. proceedings, it would neither be a grave injustice nor unwarranted to disbar Kennedy in Colorado.

IV. Conclusion

¶53 We affirm the PDJ's conclusions of law and uphold its order disbarring Kennedy under our reciprocal disciplinary rule.

JUSTICE HOOD, joined by JUSTICE GABRIEL, concurring in the judgment.

¶54 The majority concludes that our rule of limitation set forth in Rule 242.12 does not apply to reciprocal disciplinary proceedings brought pursuant to Rule 242.21. Maj. op. ¶¶ 44–45. Because the majority cites no persuasive authority for simply removing reciprocal discipline from the reach of this court's longstanding rule of limitation, I cannot join its opinion.

¶55 The rule of limitation mandates that "[d]isciplinary sanctions . . . may not be based on conduct reported more than five years after the date the conduct is discovered or reasonably should have been discovered." C.R.C.P. 242.12. Reciprocal discipline involves the application of "[d]isciplinary sanctions." *Id.*; *see also* C.R.C.P. 242.21(a). Therefore, the rule applies here.

¶56 That said, I also disagree with Kennedy that the triggering "conduct" under the rule of limitation is his wrongdoing in the originating jurisdiction. I would instead embrace the presiding disciplinary judge's conclusion that "in reciprocal discipline proceedings, the operative conduct triggering the running of the rule of limitations *must necessarily be* the imposition of public discipline in the originating jurisdiction." *People v. Kennedy*, No. 22PDJ063, at *7 (O.P.D.J. May 4, 2023) (emphasis added). After all, until the District of Columbia imposed discipline, Colorado had no cause of action for reciprocal discipline, and the Office of Attorney Regulation Counsel ("OARC") could not even file a complaint.

C.R.C.P. 242.21(b)(1). Taking Kennedy's approach would yield an illogical result: the limitation period would begin to run—and might expire—before OARC could do anything other than bring a duplicative claim (thereby defeating the purpose of reciprocal discipline). We read court rules to avoid such an illogical result. *See Schaden v. DIA Brewing Co., LLC*, 2021 CO 4M, ¶ 32, 478 P.3d 1264, 1270.

¶57 Equally illogical, however, is excusing OARC from the limitation rule altogether. Under C.R.C.P. 242.21(a), a party challenging the imposition of reciprocal discipline must establish, by clear and convincing evidence, (1) a lack of due process, (2) insufficient evidence, (3) grave injustice, or (4) different discipline under Colorado law. So, staleness concerns persist for respondents. Rules of limitation seek to mitigate those concerns. *See City & Cnty. of Denver v. Bd. of Cnty. Comm'rs*, 2024 CO 5, ¶¶ 53–56, 543 P.3d 371, 381–82. Therefore, even as a policy matter, I question the prudence of giving OARC carte blanche to file a reciprocal case *any time* after a final adjudication of misconduct in a foreign jurisdiction.

¶58 Still, I concur in the judgment because OARC timely filed its reciprocal disciplinary action against Kennedy. On September 1, 2022, the D.C. Court of Appeals ordered that Kennedy be disbarred effective May 4, 2021. Colorado filed its complaint against Kennedy on November 14, 2022, well within the five-year limitation period imposed by Rule 242.12.

¶59 For these reasons, I respectfully concur in the judgment only.