IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
BRIAN A. MCKINSEY,	)	**Supreme Court #SC87056**
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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ATTORNEYS FOR INFORMANT

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Disciplinary History

Respondent was licensed as an attorney in Missouri on September 13, 1980. On December 29, 1995, he accepted an admonition from the Circuit Bar Committee for the 22nd Judicial Circuit (City of St. Louis) for failure to maintain an operating account separate and distinct from a client trust account in which client funds were placed, in violation of Rule 4-1.15(a). **App. 180-181**.

Procedural History

September 17, 2003	Information Filed with Advisory Committee.
October 15, 2003	Answer Filed with Advisory Committee (hearing requested) (Respondent represented by John J. Allan).
January 13, 2004	Assigned to Disciplinary Hearing Panel (DHP): Ron Willenbrock-Chair, David Korum, Robert Dakich.
April 9, 2004	Stipulation as to Facts, Partial Stipulation as to Conclusions of Law
April 9, 2004	Joint Statement regarding Aggravation and Mitigation; Other Factors for Consideration

April 9, 2004	DHP Hearing Held (Admissions concerning the Whitely matter – made during Respondent's testimony - lead to the Panel to continue the hearing, and to permit the OCDC to amend Information to include additional violations.
May 24, 2004	First Amended Information Filed
June 22, 2004	Answer to First Amended Filed
April 1, 2005	DHP Hearing completed
June 23, 2005	DHP: Findings of Fact, Conclusions of Law and Recommendations Regarding Discipline (Recommendation: Disbarment)

Facts

Background

This case was initiated upon receipt of a single complaint from Respondent's client, Raymond Shoemaker. During the investigation into Mr. Shoemaker's complaint, and in preparation for a hearing, Respondent stipulated to facts supporting violations relating to Mr. Shoemaker's complaint. **App. 42-43**. He further stipulated that he commingled personal funds with several other clients' funds in his trust account, and, consequently that his trust account was levied by the Internal Revenue Service (IRS). **App. 43-47**. He admitted that those facts established that he violated the Rules of Professional Conduct by failing to safeguard those other clients' funds and failing to maintain personal funds separate from those of his clients. **App. 43-47**.

During the initial hearing in those matters (April 9, 2004), Respondent told the Disciplinary Hearing Panel that he used another client's funds for his own purposes. **App. 59 (T. 23)**. The OCDC learned of those incidents at that time. **App. 65 (T. 46)**. The Panel continued the hearing, required Respondent to provide his files related to those additional clients, and permitted Informant to amend the Information. At the later hearing in the matter (April 1, 2005), Respondent admitted consciously using that client's funds to reimburse other clients and to pay his own personal expenses, without notification to the client that he had received money on her behalf. **App. 173-175**.

Counts I – IV (Raymond Shoemaker)

In September 1998, Raymond Shoemaker hired Respondent to represent him in a personal injury matter. **App. 41**. Shoemaker signed a retainer agreement employing Respondent and advanced the sum of $500.00 to Respondent for costs. **App. 41**.

In early February 1999, Respondent received a letter from defendants that no voluntary payment would be made to Shoemaker on behalf of American or Hefele. One week later, on February 17, 1999, Respondent sent a copy of that letter to Shoemaker and asked Shoemaker to contact him to discuss the matter. **App. 41-42**. After that letter, Respondent failed to pursue Shoemaker's claim. Between February 1999 and October 2002, Shoemaker contacted Respondent periodically inquiring as to the status of his matter. Each time Shoemaker called Respondent, he would leave a message requesting Respondent to return his call. In or about August 2001, Shoemaker moved his residence to Minnesota and called Respondent to advise him of his new address and telephone

number. Respondent did not communicate with Shoemaker during that period or respond to his inquiries. Respondent did not advise Shoemaker that he had decided not to pursue Shoemaker's claim. **App. 40-43**.

Count V (IRS Levy)

Between March 22, 1999, and March 13, 2002, Respondent maintained his client trust account at the First National Bank of St. Louis. Respondent was the only signer on the account. During that same period, Respondent maintained a personal account at the same bank. **App. 43**. In those years, Respondent had federal income tax delinquencies (not including statutory additions) in the following amounts:

a. 1040 – 1997 $62,140.03 - assessed 5/31/99

b. 1040 - 1998 $30,050.13 - assessed 5/8/00

c. 1040 - 1999 $78,598.88 - assessed 2/12/01.

App. 43.

To collect the delinquent taxes, the IRS levied on Respondent's personal bank account. The bank attached funds in Respondent's personal account in the amount of $2,649.39 and paid that amount to the IRS on June 3, 2001. **App. 44**.

Between June 2000 and March 2002, Respondent utilized his client trust account for personal and business purposes. **App. 44-45**.

He used funds in his client trust account to pay:

- Rent
- Telephone

- Child Support
- Seminars
- Office Expenses
- Car Repairs and Towing Services
- Utilities
- Health Insurance
- Advertising
- Credit Card and other personal bills.

App. 44-45.

The IRS again levied Respondent's personal account in January 2002, but no funds were available; the IRS quickly notified the bank of an intent to also levy Respondent's client trust account. **App. 45-46**. Because the trust account was set up as an IOLTA account, pursuant to Missouri Supreme Court Rule 4-1.15, and believing that Respondent was not the owner of the funds in said account, the bank filed a Petition for Interpleader in the Circuit Court for the County of St. Louis in regard to the $10,551.98 in funds held in Respondent's client trust account at the time of the levy. Later, on April 16, 2001, the United States District Court for the Eastern District of Missouri accepted jurisdiction over the matter. Upon motion filed by the IRS, the interpled funds were ordered transferred to the United States District Court Clerk. The IRS filed an Answer and Affirmative Claim alleging that Respondent had failed to fully pay tax assessments. The IRS further alleged that Respondent had utilized his trust account to pay his personal

expenses, had co-mingled personal funds with trust funds in said account, and had converted trust funds from the account to his own use. **App. 45-46**.

Respondent and the IRS eventually entered into a stipulation in which they agreed that the federal tax lien attached to Respondent's interest in the interpled funds entitled the United States to a priority. On March 31, 2003, the court ordered that the interpled funds (from Respondent's client trust account) be paid to the United States. **App. 45-46**.

Counts VI - X (Trust Account Use)

Respondent received funds into his trust account on behalf of five clients (between July 2000 and February 2002) that were not distributed before the account was closed in March 2002:

- $225.00 7/26/00 Joseph Otzaberger
- $25,000 7/12/01 Charles & Barbara White
- $10,000 11/16/01 Alton Rogers
- $4,242.14 10/26/01 Shawn Silvery
- $2,500 2/19/02 Diana Nokes for Donna Johnson.

App. 47.

Between March 1, 2001, and January 8, 2002, settlement funds were placed on deposit in Respondent's client trust account for four persons; prior to any distribution of funds being made to them or on their behalf, the account balance dropped below the amount for which Respondent was responsible. **App. 47-48**. A $6,800 deposit belonging to one of those clients, Joyce Morgan, dropped below $2,700 on occasion, $3,900 on another

occasion, $200 at times, and below $ Zero for at least one day, before Respondent paid her two months after he received the funds. **App. 48**. A $12,500 deposit ($9,000 of which was owed to client Thomas Cresswell) dropped as low as $305 during the six weeks Respondent was entrusted with Mr. Creswell's funds. **App. 48**. Of the $18,000 received for his client, Doyle DeWeese, almost $14,000 was payable to Mr. DeWeese. Before the $14,000 was paid out, Respondent's trust account balance fell below $12,000 at least twice. **App. 48-49**. In January 2002, Respondent received and deposited $1,741 into his trust account for his client, Gregory Edwards. Before Mr. Edwards' share was delivered to him, the account held a negative balance for almost two weeks. **App. 49**.

Also, at least fourteen times between August 2000 and February 2002, Respondent used funds in his trust account to pay the expenses of clients who had no funds then in the trust account. **App. 49-50**.

Between November 2000 and March 2002, Respondent placed personal funds into his client trust account on at least seven occasions. **App. 50**.

Counts XI – XIX (Deborah Whitely)

Respondent represented Deborah Whitely in 2002 and 2003 in a personal injury case arising from an automobile accident. After some discussion with Mrs. Whitely, Respondent settled it for $35,000 in May 2003. **App. 79, 84-85, 96; 183-185; 187**. The defendant's insurance company sent a check to Respondent on May 13, 2003. **App. 183-185**. Respondent signed the names of Mrs. Whitely and her husband (who was not his client) on the back of the check and deposited the check into his trust account. **App. 65**

(T. 48); 187; 194-212. She had never seen the check or release until they were shown to her by disciplinary counsel, more than one year later. **App. 86-87**. The endorsements on the check were neither hers nor her husbands. **App. 86-87**. Respondent also signed Mrs. Whitely's name on a Release. **App. 80; 189-192**. He had no Power of Attorney to sign either her name or her husband's on the check. **App. 164**. Mrs. Whitely testified that she had provided no authority to sign either the check or the release. **App. 98-99**. Respondent did not controvert that testimony. Both Respondent and Ms. Whitely testified that he gave no notice to her that he had received the check, endorsed it, or finally settled the case. **App. 65 (T. 48); 86-87; 105-106; 113**.

Respondent admitted that for almost a year, he: "used [Mrs. Whitely's] money as his own." **App. 59 (T. 22-24), 65 (T. 46-47); 171-175; 197, 202-203**. Two weeks after depositing her $35,000 check, he wrote a check to himself for $32,588. **App. 140; 203**. He said he used her money to reimburse other clients whose funds had been taken from his trust account pursuant to a levy by the IRS. **App. 173-175; 202**. He also used it to pay his own business expenses, including rent and Yellow Page advertising charges. **App. 65 (T. 47-48); 174-175; 202-203**.

In May 2004, during questioning by the Panel in the first DHP hearing in this case, Respondent acknowledged the Whitely incident. **App. 59 (T. 22-24), 65 (T. 46-47)**. He then reimbursed Mrs. Whitely. The reimbursement check came to Mrs. Whitely as a "complete surprise" in May 2004. **App. 88; 216-217**.

When his attorney asked him to explain why he didn't tell her that the case was settled, Respondent explained that he suffered from alcoholism, depression, and anxiety. **App. 105-106**. Respondent had settled Mrs. Whitely's case in May 2003 and written a check to his personal account for over $32,000 that same month. **App. 197-199**. He testified on cross-examination that as of mid-June 2003 he had been sober for one year. **App. 135-137**. He said he relapsed for about a month beginning mid to late June 2003, before regaining sobriety on July 15, 2003. That period of sobriety then continued through at least May 2004. **App. 135-137**.

Also, at the first hearing, Respondent explained at the time of his "conscious decision to use [his] client's funds," that he was not under influence of alcohol and could "determine right and wrong." **App. 66-67 (T. 53-54)**. He further testified that his "mental and reasoning abilities were not impaired." **App. 66-67 (T. 53-54)**.

POINTS RELIED ON

I.

VIOLATIONS

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE:

A. HE STIPULATED THAT, IN HIS REPRESENTATION OF RAYMOND SHOEMAKER, HE VIOLATED

- **RULE 1.3 (DILIGENCE);**
- **RULE 1.4 (COMMUNICATION);**
- **RULE 1.16(d) (TERMINATING REPRESENTATION);**
- **RULE 1.15(b) (ACCOUNTING FOR AND RETURNING CLIENT FUNDS);**

***(COUNTS I - IV)*;**

B. HE STIPULATED THAT HE VIOLATED RULE 1.15(A) BY UTILIZING HIS CLIENT TRUST ACCOUNT FOR PERSONAL PURPOSES AND FAILING TO SAFEGUARD CLIENT FUNDS WITH THE RESULT THAT AN IRS LEVY ON SAID ACCOUNT WAS UPHELD BY THE UNITED STATES DISTRICT COURT; ***(COUNT V);***

C. HE STIPULATED THAT HE VIOLATED RULE 1.15(B) BY FAILING TO DISTRIBUTE FUNDS TO MULTIPLE CLIENTS AND

THIRD PERSONS WHO WERE ENTITILED TO THOSE FUNDS; (*COUNTS V - X*);

D. HE STIPULATED THAT HE VIOLATED RULE 1.15(A) BY:

- **FAILING TO MAINTAIN CLIENT FUNDS IN TRUST PRIOR TO DISTRIBUTION, THEREBY FAILING TO SAFEGUARD CLIENT FUNDS;**
- **USING CLIENT FUNDS IN HIS TRUST ACCOUNT TO PAY OTHER CLIENTS' EXPENSES;**
- **COMMINGLING PERSONAL FUNDS WITH CLIENT FUNDS IN HIS TRUST ACCOUNT;**

(*COUNTS VI - X);*

E. A PREPONDERANCE OF EVIDENCE, INCLUDING RESPONDENT'S ADMISSIONS, ESTABLISHES THAT, IN THE DEBORAH WHITELY MATTER:

1. **HE VIOLATED RULE 1.4 BY FAILING TO ADVISE MRS. WHITELY THAT HER CASE HAD SETTLED AND THAT HE HAD RECEIVED AND SPENT HER FUNDS;**
2. **HE VIOLATED RULE 1.15(B) BY:**

- **FAILING TO NOTIFY MRS. WHITELY OR HER MEDICAL LIEN HOLDERS THAT HE HAD RECEIVED FUNDS PAYABLE TO THEM;**

- **FAILING TO PROMPTLY PAY MRS. WHITELY AND HER MEDICAL PROVIDERS, UPON RECEIPT OF THOSE FUNDS;**

3. HE VIOLATED RULE 1.15(A) BY FAILING TO MAINTAIN MRS. WHITELY'S FUNDS IN HIS TRUST ACOUNT UNTIL DISTRIBUTION WAS MADE TO APPPROPRIATE PAYEES;

4. HE VIOLATED RULE 8.4(C) BY:

- **MISAPPROPRIATING MRS. WHITELY'S FUNDS FOR HIS OWN USE;**
- **DECEITFULLY EXECUTING A RELEASE OF MRS. WHITELY'S CLAIM WITHOUT HER APPROVAL;**
- **SIGNING THE PURPORTED SIGNATURE OF MRS. WHITELY'S HUSBAND (WHO WAS NOT HIS CLIENT) ON A SETTLEMENT CHECK WITHOUT AUTHORITY.**

(COUNTS XI - XIV AND XVI - XIX).

COUNTS XIII AND XIX ARE DISMISSED.

Rule 4-1.3

Rule 4-1.4

Rule 4-1.16(d)

Rule 4-1.15(a)(b)

Rule 4-8.4(c)

POINTS RELIED ON

II.

SANCTION

DISBARMENT IS APPROPRIATE IN THIS CASE OF CONSCIOUS CONVERSION OF CLIENT FUNDS BECAUSE:

A. THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST DISBARMENT IN CASES OF INTENTIONAL MISAPPROPRIATION.

B. THE COURT HAS CONSISTENTLY RULED THAT ATTORNEYS WHO CONVERT FUNDS TO THEIR OWN BENEFIT SHOULD BE DISBARRED, REGARDLESS OF THE ATTORNEY'S EMOTIONAL CONDITION OR SUBSTANCE ABUSE PROBLEM.

C. THE DISCIPLINARY HEARING PANEL RECOMMENDS DISBARMENT.

In re Griffey, 873 S.W.2d 600 (Mo. banc 1994)

In re Adams, 737 S.W.2d 714 (Mo. banc 1987)

In re Kazanas, 96 S.W.3d 803 (Mo. banc 2003)

ABA Standards for Imposing Lawyer Sanctions, (1991 ed.)

Rule 5.28(e)

ARGUMENT

I.

VIOLATIONS

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE:

A. HE STIPULATED THAT, IN HIS REPRESENTATION OF RAYMOND SHOEMAKER, HE VIOLATED

- **RULE 1.3 (DILIGENCE);**
- **RULE 1.4 (COMMUNICATION);**
- **RULE 1.16(d) (TERMINATING REPRESENTATION);**
- **RULE 1.15(b) (ACCOUNTING FOR AND RETURNING CLIENT FUNDS);**

***(COUNTS I - IV)*;**

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- **DECEITFULLY EXECUTING A RELEASE OF MRS. WHITELY'S CLAIM WITHOUT HER APPROVAL;**
- **SIGNING THE PURPORTED SIGNATURE OF MRS. WHITELY'S HUSBAND (WHO WAS NOT HIS CLIENT) ON A SETTLEMENT CHECK WITHOUT AUTHORITY.**

(COUNTS XI - XIV AND XVI - XIX).

COUNTS XIII AND XIX ARE DISMISSED.

VIOLATIONS

Counts I - IV

1. By failing to pursue Mr. Shoemaker's claim for personal injuries, Respondent failed to act with reasonable diligence and promptness in representing his client in violation of Rule 4-1.3. **App. 42-43**.

2. By failing to communicate with Mr. Shoemaker and by failing to respond to his inquiries concerning the status of his case, Respondent violated Rules 4-1.4(a) and (b). **App. 42-43**.

3. By terminating his representation of Shoemaker without taking reasonable steps to protect the interests of his client and without giving notice to his client, Respondent acted in violation of Rule 4-1.16(d). **App. 42-43**.

4. By failing to promptly account for and/or return to Shoemaker the funds Shoemaker advanced to Respondent for costs to be incurred in the investigation and litigation of his claim, Respondent acted in violation of Rule 4-1.15(b). **App. 42-43**.

Count V

Respondent stipulated that, at least from early 2000 through 2001, he used his trust account for personal and business purposes. He used the account, not only for client expenses, but also to pay bills from Saks Fifth Avenue, Visa, his telephone company, an advertising agency, utility companies, rent, and car repair services. **App. 44-45**. Consequently, the IRS successfully levied client funds in that trust account. **App. 45-46**.

Respondent stipulated that his conduct violated Rule 4-1.15(a). **App. 43-47**.

Counts VI - X

1. Respondent deposited funds on behalf of several clients into his trust account and then failed to promptly distribute those funds to clients or to third persons on the clients' behalf. Respondent stipulated that his conduct violated Rule 4-1.15(b). **App. 47, 51**.

2. Between March 2001 and January 2002, Respondent's trust account balance dropped substantially below the amounts to be held on deposit for at least four clients: Joyce Morgan, Thomas Creswell, Doyle DeWeese, and Gregory Edwards. Respondent stipulated that he thereby failed to safeguard client funds in violation of Rule 4-1.15(a). **App. 47-51**.

3. Between August 2000 and February 2002, Respondent paid money out of his trust account to clients and providers who had no funds in the account. In other words, Respondent repeatedly used some clients' funds to pay the expenses of others. Respondent stipulated that he failed to safeguard client funds in violation of Rule 4-1.15(a). **App. 49-51**.

4. Respondent occasionally (at least seven times between November 2000 and March 2002) deposited his own money into his client trust account. He stipulated that by commingling personal funds with those of his clients, he violated Rule 4-1.15(a). **App. 50-51**.

Counts XI - XII AND XIV - XIX

1. For almost a year, Respondent failed to notify Mrs. Whitely or her medical lien holders that he had received $35,000 in settlement proceeds on her behalf. Respondent violated the provision of Rule 4-1.15(b) requiring attorneys to notify clients and lien holders upon receipt of funds payable to them.

2. Respondent signed Mrs. Whitely's name on a Release without her knowledge and consent. That action, taken with his admitted failure to tell Mrs. Whitely

that he received $35,000 on her behalf, and his admitted use of that money as his own, constitutes a fraudulent scheme in violation of Rule 4-8.4(c).

3. By failing to keep Whitely's funds in an account maintained for client trust account purposes until distribution and allowing the balance to drop below the amount with which he was entrusted, Respondent violated Rule 4-1.15(a).

4. By misappropriating Mrs. Whitely's money and using it for his personal purposes without his client's knowledge and/or consent, Respondent engaged in a fraudulent scheme, in violation of Rule 4-8.4(c).

5. By failing to promptly pay to Whitely and to her medical providers funds to which they were entitled, Respondent violated Rule 4-1.15(b).

6. By executing the settlement check on behalf of William Whitely, a non-client, without his knowledge and/or consent, and then using the check proceeds as his own, Respondent engaged in conduct involving dishonesty and fraud, in violation of Rule 4-8.4(c).

Counts XIII and XIX are dismissed.

ARGUMENT

II.

SANCTION

DISBARMENT IS APPROPRIATE IN THIS CASE OF CONSCIOUS CONVERSION OF CLIENT FUNDS BECAUSE:

A. THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST DISBARMENT IN CASES OF INTENTIONAL MISAPPROPRIATION.

B. THE COURT HAS CONSISTENTLY RULED THAT ATTORNEYS WHO CONVERT FUNDS TO THEIR OWN BENEFIT SHOULD BE DISBARRED, REGARDLESS OF THE ATTORNEY'S EMOTIONAL CONDITION OR SUBSTANCE ABUSE PROBLEM.

C. THE DISCIPLINARY HEARING PANEL RECOMMENDS DISBARMENT.

A.

ABA STANDARDS

This Court has indicated reliance on the ABA Sanction Standards in several cases: *In re Storment*, 873 S.W.2d 227 (Mo. banc 1994); *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994); and *In re Donaho*, 98 S.W.3d 871 (Mo. banc 2003).

The following ABA sanction standards appear to be applicable in the instant case:

4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

Respondent admitted that he consciously decided to use Mrs. Whitely's money ($35,000) for his own purposes. She was unwittingly deprived of her funds for almost a year. His fraudulent scheme involved receiving $35,000 in settlement without notifying her, forging the endorsements of both she and her husband on the check, writing a check to himself from the proceeds, forging her signature on a Release, and using the money as his own.

5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

As the Panel determined, Respondent's conduct, amounting to theft, was undoubtedly criminal. **App. 12**.

9.22 Factors which may be considered in aggravation.

Aggravating factors include:

(a) prior disciplinary offenses

Respondent was admonished in 1995 that he needed to maintain separate accounts for client and personal funds.

(b) dishonest or selfish motive

Respondent knowingly used client money to pay for firm advertising, rent, and credit card bills.

(c) a pattern of misconduct

As established by his stipulation, for several years, Respondent used his trust account as his own, paying personal bills with trust account funds, paying expenses for clients who had no funds in the account, and commingling his own funds with client funds.

(d) substantial experience in the practice of law

Respondent was admitted in 1980.

9.4 Factors Which Are Neither Aggravating or Mitigating

(a) forced or compelled restitution

Respondent reimbursed Mrs. Whitely, but only after the first DHP hearing.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.).

B.

PRINCIPLES IN MISSOURI MISAPPROPRIATION CASES

At least four principles can be derived from Missouri Supreme Court cases involving attorneys who have misappropriated funds (they are set out in bold print):

(1) It is always grounds for disbarment when an attorney has misappropriated the funds of a client, either by failing to pay over money collected by him or by appropriating to his own use funds entrusted to his care.

In re Griffey, 873 S.W.2d 600 (Mo. banc 1994)

In re Schaeffer, 824 S.W.2d 1 (Mo. banc 1992)

In re Fenlon, 775 S.W.2d 134 (Mo. banc 1989)

In re Mentrup, 665 S.W.2d 324 (Mo. banc 1989)

In re Mendell, 693 S.W.2d 76 (Mo. banc 1985)

Respondent has admitted consciously using Mrs. Whitely's $35,000 as his own for almost a year. He forged the signatures of his client and her husband on checks payable to them. He also forged his client's signature on a Release, and gave no notice to her that he had received the check.

In the *Griffey* case, this Court disbarred the attorney, and ordered that he not apply for reinstatement for at least five years. Griffey had forged clients' signatures on insurance checks and claimed the forgeries were either authorized or made by mistake. *In re Griffey*, 873 S.W.2d 600. Here, Respondent has not refuted Mrs. Whitely's testimony that he had no authority to sign her name.

The *Schaeffer* case involved an attorney who deposited a client's settlement check into his general business account instead of his trust account, and then used the operating account funds even after the balance dropped below the amount of the client's money. He was disbarred, *In re Schaeffer*, 824 S.W.2d 1.

In 1985 the Missouri Supreme Court disbarred an attorney for misrepresenting to his client that the amount of a settlement which he had accepted on the client's behalf was in the amount of $7,500.00 instead of $8,000.00. The Court recognized Respondent's evidence of good character and reputation and his efficient handling of clients' business, and his willingness to accept pro bono work but announced that those factors did not mitigate the seriousness of the offense and that the attorney should be disbarred, *In re Mendell*, 693 S.W.2d 76. The Court added: "Our conclusion is with the great of authority. Any earlier decisions indicating that a lesser sanction might be considered in cases such as this are no longer authoritative." Id. at 78.

The *Fenlon* and *Mentrup* cases are additional authority for the general principle that the appropriate sanction for conversion is disbarment.

(2) Restitution is no defense to conversion charges.

In re Staab, 785 S.W.2d 551 (Mo. banc 1990)

In re Schaeffer, 824 S.W.2d 1 (Mo. banc 1992)

In re Fenlon, 775 S.W.2d 134 (Mo. banc 1989)

In re Mentrup, 665 S.W.2d 324 (Mo. banc 1989)

Respondent may argue that his eventual repayment of the Mrs. Whitely's funds should be a mitigating factor. It should be remembered that Respondent failed to pay restitution until one year after the funds were received and not until after the first disciplinary hearing in this case.

(3) Neither substance abuse nor severe emotional problems act as mitigating factors in misappropriation cases.

In re Staab, 785 S.W.2d 551 (Mo. banc 1990)

In re Adams, 737 S.W.2d 714 (Mo. banc 1987)

In re Lechner, 715 S.W.2d 257 (Mo. banc 1986)

In the case most analogous to the instant case, attorney Adams sought refuge in Rule 16.08(b), permitting probation in disciplinary cases. Adams' sole argument to the Supreme Court was that his substance abuse should be a mitigating factor and that the Court should refer him to the Intervention Committee. The relevant portion of the *Adams* decision should be considered in deciding the instant case.

> The Intervention Committee's authority is intended to extend to a member of the bar who exhibits conduct which may lead to harm to the public and which appears to be the product of substance abuse. *Rule 16 is not intended to act as a defense for an attorney who has violated the Rules of Professional Conduct.* The provisions of Rule 16 are preventive; while recognizing the relationship between acts of professional misconduct and substance abuse, *the Rule provides no basis for mitigation or compassion when acts of professional misconduct result in harm to clients.* [emphasis added].

In re Adams, 737 S.W.2d at 717-718.

It is also important to recognize that Adams' success in recovering from his cocaine addiction was not an issue in determining a sanction:

> Respondent's success in his battle to defeat the scourge of cocaine may be an issue for consideration should he apply for readmission. *Having harmed*

his client, and brought reproach to his profession, however, respondent cannot invoke Rule 16 to save him from the just fruits of his misdeeds.

Respondent is disbarred.

All concur. [emphasis added].

In re Adams, 737 S.W.2d at 717-718.

In the instant case Respondent eventually admitted that his use of Mrs. Whitely's money was not the product of substance abuse. He said that his "mental and reasoning abilities were not impaired," that he could determine right and wrong and that his decision to use Mrs. Whitely's funds was conscious. **App. 66-67**. He had been sober for a year when he first began using Ms. Whitely's funds and remained sober for most of the next year that he continued to use her money without revealing that he ever had the funds. **App. 135-137**.

(4) Even unintentional mishandling of client funds by an attorney can justify disbarment.

In re Griffey, 873 S.W.2d 600 (Mo. banc 1994)

In re Williams, 711 S.W.2d 518 (Mo. banc 1986)

In 1986 the Missouri Supreme Court disbarred an attorney as the result of his failure to promptly pay over to the client funds which were received by the attorney. *In re Williams*, 711 S.W.2d 518. In the *Williams* case, the attorney had received a settlement check and the client had agreed that the attorney could deposit the check into his trust account, take his fee from that account, and pay over the amount due to the client from the trust account. The attorney then wrote checks to the client from the trust

account which were returned for insufficient funds. That attorney had argued that his wife (who was also his secretary) was in charge of maintaining the trust account for his law office. In that case, the Court noted "Respondent's offer of his ignorance as mitigation to harsh punishment must fail where he had knowingly and intentionally failed to correct the ongoing problems with the trust account, given that he knew of the account problems." *In re Williams*, 711 S.W.2d 518.

The *Griffey* case also involved a claim of mistake by the attorney. In disbarring Griffey, the Court restated the *Williams* ruling, that "Even an unintentional mishandling of client funds by an attorney can justify disbarment." *Griffey*, 873 S.W.2d at 603.

C.

DISCIPINARY HEARING PANEL RECOMMENDATION:

DISBARMENT

The Disciplinary Hearing Panel heard the evidence in this case and recommended varying sanctions for each group of allegations. The panel recommended a suspension for violations related to the Shoemaker case sanctions. **App. 13**. The recommendation for the cases related to failing to safeguard client funds, leading to an IRS levy of those funds, was disbarment, with no leave to apply for reinstatement for three years. **App. 13-14**. As to the cases involving commingling, the Panel recommended disbarment, with no leave to apply for reinstatement for at least three years. **App. 14.** Finally, the Panel also recommended disbarment for the theft of Mrs. Whitely's funds. In that instance, they recommended that he be not be granted leave to apply for reinstatement for at least five years. **App. 14-15**.

That five year minimum, of course, comports with Rule 5.28(e), which expressly precludes reinstatement after disbarment for five years, except for good cause shown. Rule 5.28(e); *In re Kazanas*, 96 S.W.3d 803, 807 (Mo. banc 2003).

The Panel further recommended that "no consideration be given to any application for reinstatement to the practice of law by Respondent until he has demonstrated to the satisfaction of the court that he is no longer suffering from mental depression or from alcohol or substance abuse." **App. 15**.

Additionally, both the Disciplinary Hearing Panel and this Court recognize that criminal conduct involving fraud or dishonesty constitutes a breach of fundamental duties, regardless of whether criminal charges are brought. **App. 12**; *In re Kazanas*, 96 S.W.3d 803, 808 (Mo. banc 2003).

Finally, in light of his testimony that his use of Mrs. Whitely's money was conscious, the Panel specifically rejected any suggestion by Respondent that alcoholism or depression should mitigate. **App. 14-15**.

CONCLUSION

Informant respectfully suggests that Respondent should be disbarred. He has admitted using $35,000 belonging to his client without her knowledge. Any successful recovery from his alcoholic condition should be measured against the repeated relapses he described and considered only in an application for reinstatement, after a long period of proven sobriety. **App. 66-67 (T. 50-54); 126-140**. In the most egregious case, (one of his many violations of the rules intended protect client funds) Respondent forged a $35,000 check payable to his client, did not tell her that he had her money, and used her money to pay personal bills and to reimburse other clients whose funds he had also used as his own. **App. 172-173**. His conduct cannot be mitigated by his alcoholic condition, because, as he acknowledged, his behavior was the result of a conscious decision during an extended period of sobriety. His conscious decision continued, as did his sobriety, for almost a year, while he continued to use his client's money and failed to notify her that he had even received it.

The two purposes of attorney discipline are to protect the public and to maintain the integrity of the profession, *In re Kazanas***,** 96 S.W.3d 803 (Mo. banc 2003). Under these facts, those two goals can only be met by disbarment. Application for reinstatement should not be considered for at least five years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2005, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

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_____
Sam S. Phillips

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 6,009 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

_____
Sam S. Phillips

APPENDIX

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