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STATEMENT OF FACTS

Respondent Timothy D. Tipton is a married, 43 year old attorney with four children (T. 94). He graduated from Central Missouri State University in 1979 and went to Jefferson City where he worked for the legislature for the Committee on Fiscal Affairs for approximately three years, and then went to work for Senator John Scott, the President Pro Tem for six years (T. 74). He went to law school while working for Senator Scott and graduated from the University of Missouri, Columbia Law School, in 1986. He was admitted to the Missouri Bar in 1987 and continued to work for Senator Scott until February of 1988 (T. 75).

In February of 1988, Respondent opened his first law office in Gladstone in an office sharing arrangement (T. 75). He did not have a trust account but operated solely out of an office account (T. 76).

Respondent then moved his office to Excelsior Springs where he has continued to operate as a sole practitioner. Respondent has never had a trust account and until Respondent was advised by Ms. Rittman in 1998, he was not aware that he needed to have a trust account (T. 77). When he was advised by Ms. Rittman of the need for a trust account he opened one (Exh. 3, p. 65).

Respondent had always believed he did not need a trust account and had always indicated on his annual enrollment that he did not have a trust account (T. 77, 78). Respondent believed he was exempt from having a trust account because he did not receive retainers and when he had personal injury cases he deposited the draft in his operating account and as soon as the funds were available he distributed them (T. 79).

Respondent was in a dispute with his bank over the balance in his operating account at the time of the matters here in question, but no check was ever dishonored and no client ever lost money (T. 92, 112,

and D.H.P. Finding 73).

The Chief Disciplinary Counsel charged Respondent by Information with violation of the Rules of Professional Conduct in December of 1999 for violations which occurred in 1997 and 1998 relating to the Pringle family and to Sherry Holder. On August 3, 2000, a hearing was held before the Disciplinary Hearing Panel at which Complainants Sandra Pringle and Sherry Holder testified. The Disciplinary Hearing Panel did not issue its decision until more than eight months later on March 14, 2001.

Mrs. Pringle testified the only complaint she had was that her medical bills were to have been paid by Respondent from her settlement but they were not timely paid (T. 43). Respondent explained that he took full responsibility for the delay and the payment (T. 79, 80). Respondent thought the bills had been paid and if regular procedure had been followed they would have been. His main secretary and paralegal was on vacation at the time and the normal procedure was not followed (T. 80). If the regular procedure had been followed, the secretary would have drafted letters to the healthcare providers and Respondent would have prepared and sent the checks to the healthcare providers (T. 69). Respondent was also moving his office at this time and the Pringle file was temporarily lost (T. 69). When Respondent learned that the bills had not been paid he saw to their payment and ultimately Mrs. Pringle received a refund (T. 44). Although Mrs. Pringle did not complain about it Respondent took a fee on the medical payments portion of the Pringle recovery. Respondent testified he had some difficulty with the collection of medical pay on the Pringle claims and the Holder claim and therefore he felt entitled to a fee and charged a fee. Respondent does not normally take a fee for medical pay recovery (T. 81, T. 68). Mrs. Pringle was satisfied with the amount of the recovery as Respondent obtained the policy limits (T. 42).

On the Holder claim, Respondent entered into a written contingent fee contract with Mrs. Holder

which was for a 60 day period. Mrs. Holder claimed the agreement was not extended. Respondent and Angela Bowers both testified the contract was extended (T. 66, 86). The Disciplinary Hearing Panel found the contract was extended and that Respondent obtained a policy limits recovery and that Mrs. Holder signed a release (D.H.P. Finding III). Mrs. Holder also complained that Respondent did not timely pay Dr. Kelling. Respondent testified the reason for not paying Dr. Kelling was because Mrs. Holder disputed the bill and did not authorize payment (Exh. 3, p. 74, T. 91).

Three experienced attorneys in the Clay County area where Respondent practices were called as character witnesses and all testified to Respondent's good reputation and good character (T. 48, 53, 59).

The Disciplinary Hearing Panel found that Respondent's conduct involved negligent mishandling of client funds, negligent co-mingling of funds and unintentional misappropriation of client funds (D.H.P. Findings IV B). The Disciplinary Hearing Counsel also found Respondent has no prior disciplinary history, has cooperated with the investigation and has forthrightly admitted his mistakes and demonstrated remorse and expressed openly his regret for his conduct (D.H.P. Findings IVA). The Disciplinary Hearing Panel recommended a 90 day suspension. The Office of the Chief Disciplinary Counsel advised it was unwilling to concur with such a disposition and so the parties have never had an opportunity to concur and have not concurred.

POINT RELIED ON

**THE DISCIPLINARY HEARING PANEL ERRED IN RECOMMENDING
RESPONDENT BE SUSPENDED FOR 90 DAYS BECAUSE THE APPROPRIATE
SANCTION FOR NEGLIGENT HANDLING OF CLIENT PROPERTY IS EITHER
ADMONITION OR REPRIMAND.**

In Re: Forge, 747 S.W.2d 141 (Mo. banc 1988)

In Re: Elliott, 694 S.W.2d 262 (Mo. banc 1985)

In Re: McBride, 938 S.W.2d 905 (Mo. banc 1997)

Matter of Cupples, 952 S.W.2d 226 (Mo. banc 1997)

ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS

ARGUMENT

POINT

THE DISCIPLINARY HEARING PANEL ERRED IN RECOMMENDING RESPONDENT BE SUSPENDED FOR 90 DAYS BECAUSE THE APPROPRIATE SANCTION FOR NEGLIGENT HANDLING OF CLIENT PROPERTY IS EITHER ADMONITION OR REPRIMAND.

The Disciplinary Hearing Panel made five findings of misconduct. The first three deal with the failure to have a trust account, the fourth with a lack of diligence in paying the Holder and Pringle medical expenses and the fifth with taking a contingent fee on the proceeds of the settlement related to medical payments.

The Disciplinary Hearing Panel made no finding of misconduct as to the alleged failure to have a written contingent fee contract with Mrs. Holder and, in fact, found affirmatively after hearing the evidence and viewing the witnesses that there was an oral modification and extension of the contract by the parties (D.H.P. Finding III). The Disciplinary Hearing Panel pointed out Mrs. Holder had received the policy limits and signed a Consent and Settlement Agreement. The testimony of Respondent (T. 86) and Angie Bowers (T. 66) supports the finding of the Disciplinary Hearing Panel.

Likewise, the Disciplinary Hearing Panel made no finding of misconduct that Respondent failed to cooperate or failed to respond with or to the disciplinary authority. In fact, the Disciplinary Hearing Panel specifically found Respondent had cooperated with the investigation (D.H.P. Finding Aggravating and Mitigating Factors). That finding is supported by the testimony of Respondent (Exh. 3, pp. 62-65; T. 114).

Respondent agrees with Finding IV of the Disciplinary Hearing Panel that he failed to act with

reasonable diligence and promptness in paying the Pringle medical expenses and Respondent takes responsibility for that conduct (T. 79, 80). Respondent also agrees that Mrs. Pringle sustained harm as a result of the collection efforts by the medical providers, but she sustained no financial harm and even received a refund (T. 44).

Respondent denies he failed to act with reasonable diligence in regard to the payment of medical expenses on the Holder claim. The only bill in question was a bill from Dr. Kelling, the chiropractor. Respondent testified the reason the bill was not paid was because Mrs. Holder disputed the bill and didn't want it to be paid. When Mrs. Holder authorized the payment it was paid (T. 91; Exh. 3, p. 74 and 75).

In Finding No. 5 the Disciplinary Hearing Panel found Respondent took an excessive and inappropriate fee by taking a contingent fee on medical payments proceeds. Respondent testified he had difficulty collecting the medical payment proceeds but was unable to support his position with documentation. The Chief Disciplinary Counsel has cited no case and presented no evidence on the reasonableness or the appropriateness of the fee charged. However, in view of the findings by the Disciplinary Hearing Panel, Respondent will return to the Pringles and Mrs. Holder the fees charged for the collection of the medical payment claims.

The real question presented in this case is what is the appropriate sanction for Respondent's failure to have a trust account which resulted in co-mingling of funds and negligent or inadvertent misappropriation of client funds. The Chief Disciplinary Counsel suggests disbarment is the appropriate sanction. Respondent submits the appropriate sanction is either an admonition or a reprimand.

The Chief Disciplinary Counsel cited to the Disciplinary Hearing Panel, and the Disciplinary Hearing Panel utilized, the ABA Standards for Imposing Lawyer Sanctions. Standard 3.0 states the court should

consider (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors.

The duty violated here is the duty found at Standard 4.1, Failure to Preserve the Client's Property. The proper sanctions for violation of the duty absent aggravating or mitigating circumstances, are then set out. The Disciplinary Hearing Panel found Respondent's conduct to be negligent or inadvertent. No client lost any money so there was little actual injury to a client. Those findings would justify either a reprimand pursuant to Standard 4.13 or an admonition pursuant to Standard 4.14. The lawyer's mental state in this case was either negligence or inadvertence as found by the Disciplinary Hearing Panel and the actual injury was minimal. There are factors to be considered as to aggravation or mitigation.

It is submitted that under Standard 4.0 dealing with preservation of the client's property that the appropriate sanction is a reprimand. This is especially true because of the presence of mitigating factors and the absence of substantial aggravating factors.

Standard 9 deals with aggravation and mitigation. The only aggravating factors cited by the Disciplinary Hearing Panel were 9.22 (b) and 9.22 (i). It is submitted that Standard 9.22 (b), a dishonest or selfish motive, is not present here and that there is no basis in law or fact that Standard 9.22 (i), substantial experience in the practice of law, is applicable.

This court, in In Re: Forge, 747 S.W.2d 141 (Mo. banc 1988) l.c. 145, found no aggravating factors where the attorney had practiced for 25 years without benefit of a trust account and where no client had suffered a financial deprivation. If selfish motive was not present in that case, then it is not present here. All of Respondent Tipton's checks were honored and no client lost any money. Respondent thought he had funds to cover his checks, but was mistaken (T. 111, 112).

In Forge, supra, this court found no aggravating factor as a result of Forge having been in practice for 25 years. Here Respondent had been in practice for 10 years, had never had any direction that he needed a trust account, thought he didn't need one and had never been in anything but a solo practice. Neither his background nor his 10 years of practice informed him of his need for a trust account. Certainly if 25 years of practice in Forge is not an aggravating factor, then 10 years of practice in this case is not an aggravating factor.

Standard 9.32 lists thirteen mitigating factors. It is submitted that at least 7 are present here. **First, there is an absence of a prior disciplinary history.** **Second, there is timely effort to make restitution or to rectify the consequences of the misconduct.** That is shown because when Respondent learned of the failure to pay the Pringle medical providers he paid them. Further, when advised of the need for a trust account he opened one. **Third, full and free disclosure to the Disciplinary Hearing Panel or a cooperative attitude toward the proceedings.** The Disciplinary Hearing Panel specifically found such cooperation and the agreement of Respondent to the facts set forth in the Information as shown by his Answer shows cooperation. **Fourth, character or reputation.** Three well qualified attorneys who were familiar with Respondent testified as to Respondent's reputation. The Disciplinary Hearing Panel found Respondent enjoyed a good reputation as is shown in D.H.P. Finding No. 77. **Fifth, delay in disciplinary proceedings.** The Office of the Chief Disciplinary Counsel started its investigation in 1998, charged Respondent in December of 1999, took his deposition in 2000, a hearing was held in August of 2000 and no decision was handed down for over 8 months until March of 2001. **Sixth, interim rehabilitation.** Respondent has rectified the problem and has opened a trust account and understands the need for a trust account (T. 95, 96). **Seventh, remorse.** The Disciplinary Hearing

Panel found remorse on the part of the Respondent which is supported by the record (D.H.P. Findings, Aggravating and Mitigating Factors).

Under the ABA Standards it is clear that appropriate sanctions in this case would be reprimand.

Leaving the Standards and looking at the Missouri cases it is clear that neither disbarment nor suspension is the appropriate sanction. In In Re: Forge, supra, the conduct of Forge was much more egregious than that of Respondent. This court found, l.c. 144 “Respondent’s conduct before the Committee consisted of initial failure to cooperate and, after his decision to cooperate, testimony which hardly skimmed the surface of the truth. Specifically, respondent failed to respond to the Committee’s initial formal request for an accounting of the \$1500 and failed to appear at the October 31, 1985, hearing set by the Committee. When respondent finally appeared at a hearing, he attempted to mislead the Committee by typing the words, ‘Trust Account’ on his bank statement; the original statement bore no such notation. Further, respondent told the Committee that he paid interest to his client on the funds in his ‘trust account.’ Bohm ultimately received his \$1500 from Forge after a four-year wait-without interest.”

Unlike Forge, Respondent has cooperated and appeared, has told the truth and accepted responsibility, and has actually opened a trust account. This court administered a suspension to Forge but noted, l.c. 145 “We believe that absent respondent’s attempts to mislead the Committee, a less severe sanction would be sufficient. However, respondent chose to trifle with the Committee by embarking upon a consciously chosen course of prevarication and attempted obfuscation.” Because there is no attempt on Respondent’s part to mislead the Disciplinary Hearing Panel than a less severe sanction of reprimand would be appropriate.

In Re: Elliott, 694 S.W.2d 262 (Mo. banc 1985) involved a situation where funds were co-mingled

and in fact a check was written to a client which was dishonored because of a lack of funds in the account. In addition there was no evidence of any mitigating factor which is mentioned in the court's opinion. The court in that case issued a reprimand.

In In Re: McBride, 938 S.W.2d 905 (Mo. banc 1997), Respondent was convicted of the felony of assault in the second degree by use of a firearm. This court imposed a reprimand noting that McBride had no prior disciplinary history, had a good reputation, exhibited remorse, and that his honesty was not in question. All of those same factors are present here. Just as in McBride, there is no reason why Respondent should not be allowed to continue to practice. He clearly offers no threat or danger to the public and is a competent and able practitioner.

In the Matter of Cupples, 952 S.W.2d 226 (Mo. banc 1997), this court found Cupples was involved in dishonesty, fraud, deceit and misrepresentation. In addition, Cupples never showed any remorse and continued to deny responsibility, denied the Master's authority to act, and failed to cooperate. The essence of the charge was that Cupples stole files from his employer, secreted them, lied about his conduct, accused his partner of criminal conduct and received a reprimand. By contrast, Respondent has accepted responsibility, shown remorse, taken corrective action and has been cooperative. This court found that a reprimand was appropriate for Cupples. Certainly if a case precedent is to be followed, Respondent should receive no more than a reprimand in this case.

CONCLUSION

It is respectfully submitted to this court that under either the ABA Standards for Imposing Lawyer Sanctions or the Missouri case law the appropriate sanction in this case is a reprimand. This court has specifically found in Forge supra that 25 years of practice is not an aggravating factor and in Cupples supra, found that dishonesty, fraud, deceit, misrepresentation and lack of cooperation and lack of remorse warranted a reprimand. In this case no client's check was ever dishonored and no client ever lost a penny. Respondent has taken the steps necessary to prevent further problems and this court should impose a reprimand.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above and foregoing was mailed, via United States mail, postage prepaid, to Sara Rittman, Office of Chief Disciplinary Counsel, 335 American Avenue, Jefferson City, MO 65109, this _____ day of June, 2001.

Robert G. Russell

CERTIFICATION: SPECIAL RULE NO. 1(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 Special Rule No. 1(b);
3. Contains 3154 words, according to Word Perfect 9, which is the word processing system used to prepare this brief; and
4. Respondent does not have the software available to scan the disk for viruses but states to the court that the disk used is a new disk that has never been used for any other purpose and that to the best of our knowledge the disk is virus free.

Robert G. Russell