

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:)
)
Edward L. Pendleton,) **Supreme Court #SC83775**
)
Respondent.)

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

Jurisdiction over this attorney discipline matter 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 1994.

STATEMENT OF FACTS

Background and Disciplinary Case

Respondent was licensed to practice law in Missouri in 1973. **T.** 173. Respondent served as a Juvenile Court Commissioner from 1979 to 1984 and was on the Court's Advisory Committee for three years in the early 1980s. **T.** 174, 243-245. At the time of hearing before the Disciplinary Hearing Panel, Respondent was in a solo practice in Kansas City. **T.** 174. In November of 1999, Respondent was given an admonition for violating Rule 4-4.2 (communication with a person represented by counsel), which he accepted. **Ex. G.**¹

¹ The exhibits are collected in five black three ring notebooks. One is titled "Informant's Exhibit A Trial Exhibits," and is comprised of individual exhibits admitted during the hearing before the Disciplinary Hearing Panel. The exhibits in this notebook are designated "A- " in the brief. The next notebook is titled "Informant's Exhibit B Pleadings Volume I" and is comprised of the 1996 Information and a Voluntary Dismissal of it, the Information underlying the instant case (less amendments made during the hearing, **T.** 12-21), discovery requests and responses, the transcript of a February 14, 1996, hearing before Division 3, Missouri Supreme Court Committee, the transcript of a May 8, 1996 hearing before the same body, and exhibits admitted at the May 8, 1996, hearing. The information in this notebook is designated "B - " in the brief. A third notebook is titled "Informant's Exhibit C Pleadings Volume II" and is comprised

In October of 1995, legal counsel to the Circuit Court of Jackson County, Missouri, reported to the Office of Chief Disciplinary Counsel that Respondent had written two checks to the circuit court on Respondent's trust account and that both checks had been returned for insufficient funds, **Ex. A-28**, thereby initiating the disciplinary case against Respondent. **T. 44**. An Information was filed in late 1996, but was voluntarily dismissed without prejudice in May of 1997 so that Informant could present the developing case against Respondent in one Information after full investigation. **Ex. B-I, T. 45, 197**. A seven-count Information was filed in November of 1999. **Ex. B-II**. Hearing before the Disciplinary Hearing Panel was had on June 21 and 26, 2000. The Panel issued its decision on May 11, 2001. The Panel recommended disbarment, finding that Respondent was guilty of Rule violations under all counts of the Information save Count V. Informant is not briefing the issues alleged in Counts IV and V.

Counts I, II, and III

Between March of 1994 and June of 1997, Respondent maintained six accounts at three banks: Union Bank, Commerce Bank, and Bank Midwest. Three of the accounts were designated client trust accounts. **T. 22-23; Ex. B-IV, #1; Ex. B-VI, #1; Ex. C-I, p.**

of the transcript of the February 11, 1999, deposition of Respondent and the exhibits used during the deposition. The information in this notebook is designated "C -" in the brief.

A fourth notebook is titled "Additional Informant's Exhibits" and consists of Informant's Exhibits D, E, F, and G, which is how they are designated in the brief. The fifth notebook is titled "Respondent's Exhibits."

27-35. Approximately 150 checks written by Respondent on these six accounts between March of 1994 and June of 1997 were identified in bank records as returned due to insufficient funds in the account. **Ex. A-7; T. 55.** Twenty-seven of the “bounced” checks had been written to courts. **T. 56; Ex. A-8; Ex. C-I, p. 35-56.**² Insufficient funds checks were written out of all three trust accounts. **T. 333.** Banks sent Respondent numerous notices and assessed many charges to Respondent as a consequence of the NSF checks. **Ex. A-29.**

Respondent left his personal funds in accounts designated as trust accounts. **T. 215, 267, 335; Ex. B-VIII, p. 30-31.** Client or third party funds were also deposited and left in the trust account. **Ex. A-39; Ex. C-I, p. 31-32, 68, 71.** Respondent wrote checks out of the trust accounts for personal and business expenses. **Ex. B-IV, #10(a)(b); Ex. B-VI, #10(a)(b); Ex. C-I, p. 72, 76-78; Ex. C-II, depo. ex. 13; T. 215.**

The reason Respondent used his client trust accounts as a repository for his personal funds was to protect his money from IRS levy. **T. 217-218, 268, 270; Ex. B-VIII, p. 30; Ex. C-I, p. 90.** Respondent probably got the idea because someone told him that the IRS could not levy accounts that had other people’s money in them. **T. 335.** Sometime around 1989, the IRS assessed a 100% penalty against Respondent and his then wife as sole shareholders of a construction company that had accrued unpaid tax liability. **T. 213, 273-275.** The IRS got Respondent’s trust account number because he made a payment to it out of the account. **Ex. B-VIII, p. 55.** The IRS levied against the

² “TVB” is the Traffic Violations Bureau, Kansas City Municipal Court. **Ex. C-I, p. 38.**

trust accounts several times in 1995. **T.** 58-59; **Ex.** A-10; **Ex.** A-38; **Ex.** A-39. Respondent could not have operated his office and served his clients if he had not shielded some of his income from the threat of levy. **T.** 270-271. Respondent had entered into several payment plans with the IRS, but had not complied with them. **T.** 274. Respondent does not believe it was dishonest or a misrepresentation to use his client trust account in this manner because he was only protecting his money and was not transferring his funds into the account, but rather, was not transferring his funds out of the account after making a deposit. **T.** 336-337.

During the time frame at issue, Respondent did not keep running track of transactions in his bank accounts, at least not until after he was made aware of the disciplinary investigation. **T.** 203-204, 229-230; **Ex.** B-VIII, p. 52-53, **Ex.** C-I, p. 78-79. Respondent did not reconcile his bank accounts with monthly statements from the bank. **T.** 229-230, 359; **Ex.** B-IV, #15-17; **Ex.** B-VI, #15-17; **Ex.** C-I, p. 84. Respondent did not maintain complete records of his trust accounts. **T.** 194-195; **Ex.** A-35; **Ex.** A-36.

On July 28, 1995, Respondent settled client Alfred Thomas' personal injury case for \$32,500. Respondent deposited the settlement check in his Commerce trust account on July 31, 1995. **T.** 65, 209; **Ex.** A-40; **Ex.** B-IV, #26, 28, 32; **Ex.** B-VI, #26, 28, 32. Thomas' sixty percent share of the settlement equaled \$19,500. **Ex.** A-40; **Ex.** B-IV, #31; **Ex.** B-VI, #31.

On July 31, 1995, Respondent wrote a check to Commerce Bank out of his trust account for \$27,501.84 in order to obtain two cashier's checks: one in the amount of \$25,000 and the other in the amount of \$2,501.84. Respondent paid the \$25,000

cashier's check to Chicago Title as a deposit on an office building Respondent purchased in downtown Kansas City. **T.** 211-212, 363-365; **Ex.** A-16; **Ex.** C-I, p. 109-110. The other cashier's check was paid to Bob Sight Ford as part of a down payment on a Lincoln Continental. **T.** 212. The car was titled to Premise Corporation, a corporation in which Respondent was the sole shareholder and of which he was the sole officer. Respondent formed the corporation so he could buy a car for his personal transportation without subjecting it to IRS levy. **T.** 212-213, 361-362.

The \$27,501.84 withdrawal dropped the Commerce Bank trust account balance to \$4,958.73. **Ex.** B-IV, #34; **Ex.** B-VI, #34; **T.** 68. From August 8, 1995 to August 20, 1995, the Commerce trust account had a negative balance. **T.** 62-66; **Ex.** A-13; **Ex.** A-14; **Ex.** B-IV, #36; **Ex.** B-VI, #36.

On August 18, 1995, Respondent wrote Commerce Bank a check out of the Commerce trust account in the amount of \$19,500 to purchase a cashier's check with which to pay client Thomas his portion of the July 28, 1995, settlement. **T.** 68-69, 220; **Ex.** A-41. There were not sufficient funds in the trust account to fund the August 18 check until August 21, when a deposit was made to the account in the amount of \$31,000. The \$31,000 deposit was from the personal injury settlement of client Andrew Hallak's case. **T.** 69; **Ex.** A-18; **Ex.** B-IV, #38, 39; **Ex.** B-VI, #38, 39. Client Thomas was paid all he was due from the July 28, 1995, settlement by way of the August 18, 1995, cashier's check. **T.** 86.

Respondent took the settlement paperwork on the Thomas case and the Hallak case to the bank manager on July 31, 1995, to show he had some \$25,000 in legal fees

coming to him. **T.** 210. Respondent considered the July 31, 1995, checks that he drew on the trust account in order to make the down payments on the office building and the Lincoln Continental to be advances, or borrowing, against the legal fees he would be garnering from the Hallak and Thomas settlements. **Ex.** C-I, p. 112-113. Respondent believed that as long as he eventually had enough money in the trust account to give a client the client's share of a settlement, he was substantially complying with his ethical obligations. **T.** 370-371.

Respondent represented client Andrew Hallak in his claim for personal injuries arising from an automobile collision. The case settled for a total of \$41,000; \$10,000 of which was a medical payment recovery paid in March of 1995. **T.** 220; **Ex.** B-IV, #50-53; **Ex.** B-VI, #50-53. Respondent disbursed \$5,500 from the medical payments recovery to his client out of the client's \$6,000 share, retaining \$500 to be applied toward "unpaid legal fees and fines due on an unrelated case." **T.** 221-222; **Ex.** B-IV, #55-58; **Ex.** B-V, ex. 22-24; **Ex.** B-VI, #55-58.

On August 18, 1995, an insurance company issued a check payable to Respondent, Hallak, and St. Joseph Health Center in the amount of \$31,000, representing the rest of the Hallak settlement. **Ex.** B-IV, #60; **Ex.** B-VI, #60. Respondent deposited the check in the Commerce trust account on August 21, 1995. **Ex.** C-I, p. 118. On about August 23, 1995, Commerce Bank withheld \$7,148.89 from Respondent's trust account pursuant to IRS levy. **Ex.** A-38; **Ex.** B-IV, #21; **Ex.** B-VI, #21. All or part of the levied funds belonged to Respondent's client, Hallak. **T.** 217. The trust account was overdrawn while the Hallak and St. Joseph Health Center funds were supposed to be in it. **T.** 75.

St. Joseph Health Center had asserted a \$12,042.65 lien against the Hallak settlement. **Ex. B-IV, #63; Ex. B-VI, #63.** Respondent wrote a check out of the Commerce trust account in that amount to St. Joseph Health Center on August 18, 1995, but the check did not clear the bank. **T. 225-226; Ex. C-I, p. 123-127.** The IRS had levied the account on August 23, 1995. **Ex. B-IV, #21; Ex. B-VI, #21; Ex. A-38.** Respondent blamed the NSF check to the hospital on Blue Cross/Blue Shield's failure to pay a claim in a timely manner, as he gambled it would. **Ex. C-I, p. 126.** The hospital was eventually paid. **T. 226.**

Respondent distributed the rest of Hallak's share of the settlement monies to Hallak by way of incremental payments on August 18, 1995 (\$3,000), September 14, 1995 (\$5,000), and October 26, 1995 (\$3,374.41). **Ex. A-43.** Hallak's portion of the money was paid out over time because the client's father, a mentor and friend of Respondent, asked Respondent not to give his son all the money at once. **T. 221.** Hallak's father was fearful that Andrew would spend all the money if he got it all at once. **T. 278-281.** Andrew Hallak was not a minor at the time he contracted with Respondent for legal services. **T. 337.** Hallak did eventually get all of his share of the settlement monies. **T. 226.**

Respondent closed his Commerce Trust account on November 2, 1995 and did not open another trust account until December of 1996. Respondent practiced law throughout the time period that he had no trust account. **T. 204; Ex. B-IV, #24-25; Ex. B-VI, #24-25.**

Count VI

In September of 1992, clients Foster and Harrison paid Respondent \$2,200 to defend them in a case pending in the Jackson County Circuit Court. **Ex. B-IV, #93-94; Ex. B-VI, #93-94.** Respondent failed to file an answer or any responsive pleading to the petition, and in March of 1993, a default judgment in the amount of \$101,171 was entered in the plaintiff's favor against Respondent's clients. **Ex. B-IV, #95-96; Ex. B-VI, #95-96.** The plaintiff was unable to collect on the default. **T. 99.** A second case was filed against client Foster and another individual, alleging fraudulent real estate transfer (which precluded the plaintiff from satisfying the 1993 judgment). Respondent again agreed to represent Foster. **T. 99-100; Ex. A-26; Ex. B-IV, #97-98; Ex. B-VI, #97-98.** Respondent again filed no answer or responsive pleading and a default judgment was entered, allowing plaintiffs to execute on the real property owned by Foster and the other individual. **T. 100; Ex. A-26; Ex. B-IV, #99; Ex. B-VI, #99.**

Respondent filed a motion to set aside the second default. The circuit court set aside the default, but an appeal was taken by the plaintiffs to the Court of Appeals, Western District. **T. 100; Ex. A-26.** Respondent did not file a Respondent's brief on his client's behalf. **T. 104; Ex. A-26.** The court of appeals reversed the order setting aside the default, finding that no meritorious defense to the underlying case had been alleged in the motion to set aside the default. **T. 100; Ex. A-26.** Respondent did not file a motion for rehearing or to transfer to the Supreme Court. **T. 100-101.** Respondent moved his office location while the case was pending in the court of appeals, but did not apprise the court of his change in address. **T. 104-105.**

Count VII

Respondent failed to respond to a November 14, 1995, letter from the Chairman of the Division 3 Circuit Bar Committee requesting information about a complaint. **Ex. B-IV, #102; Ex. B-VI, #102.** Respondent failed to respond to a March 19, 1996, request for information from Special Representative Charles Gotschall. **Ex. B-IV, #104; Ex. B-VI, #104.** The letters are probably still on Respondent's desk. **T. 339.**

Respondent was served with a subpoena to produce listed materials related to Informant's investigation. **Ex. B-IV, #106; Ex. B-VI, #106.** When Respondent appeared in response to the subpoena, he did not produce all the records, **T. 190-197; Ex. C-I, p. 82,** ultimately requiring Informant to obtain the records from the banks by subpoena. **T. 197.**

Mitigating Evidence

Respondent has been engaged in the private practice of law all of the preceding twenty-seven years (as of the hearing dates in June of 2000), except when he was a juvenile commissioner. **T. 243.** His practice for the last ten or fifteen years has been primarily criminal defense and small dissolutions. **T. 253.** The only "sizeable" personal injury cases Respondent handled during his career were the Thomas and Hallak cases, as well as a third case that settled for \$8,000 at about the same time that the Thomas and Hallak cases settled in 1995. **T. 269, 372.**

The banks would not credit Respondent's accounts with checks he deposited for one or two days, causing checks he wrote out of the account to bounce. **T. 257-258.**

When checks written to Respondent bounced, it caused checks he wrote to bounce. **T.** 255. Respondent eventually made good on all the NSF checks he wrote, **T.** 261-262, and has paid his clients all they were owed. **T.** 329.

Respondent and his ex-wife separated in 1995 after the IRS levied \$19,000 out of her pension fund. **T.** 276. In late 1993, Respondent began having health problems that ultimately included: high blood pressure, prostate difficulties, diabetes, severe allergic reactions to grasses, **T.** 309-310, impotence, **T.** 310, and depression. **T.** 311. One of Respondent's sons began having drug problems in 1994, **T.** 311, and attempted suicide in 1995. **T.** 320-321. Respondent was with Judge Coburn in 1994 when he was mortally injured during a building inspection and the stress caused Respondent to be hospitalized with high blood pressure. **T.** 313.

POINT RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.15(a)(b)(d) IN THAT HE FAILED TO KEEP HIS CLIENTS' PROPERTY SEPARATE FROM HIS OWN, FAILED TO MAINTAIN COMPLETE TRUST ACCOUNT RECORDS, FAILED TO DELIVER CLIENT FUNDS TO CLIENTS PROMPTLY, AND FAILED TO ESTABLISH AND MAINTAIN AN INTEREST-BEARING INSURED DEPOSITORY ACCOUNT.

In re Witte, 615 S.W.2d 421, 422 (Mo. banc 1981), appeal dismissed, cert. denied, 454

U.S. 1025, 102 S.Ct. 559, 70 L.Ed.2d 469, quoting from *Clark v. State Bar of*

California, 39 Cal.2d 161, 168, 246 P.2d 1, 5 (1952)

In re Conrad, 105 S.W.2d 1, 13 (Mo. banc 1937)

In re Kohlmeyer, 327 S.W.2d 249 (Mo. banc 1959)

Rule 1.15

Rule 4-1.15(a)

Rule 4-1.15(b)

Rule 4-1.15(d)

POINT RELIED ON

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-8.4(c) IN THAT HE USED HIS CLIENT TRUST ACCOUNTS AS PERSONAL AND BUSINESS CHECKING ACCOUNTS TO PROTECT HIS INCOME FROM IRS LEVY, WROTE APPROXIMATELY 150 CHECKS OVER A 39-MONTH PERIOD THAT WERE RETURNED DUE TO INSUFFICIENT FUNDS, AND APPROPRIATED CLIENT FUNDS FOR HIS PERSONAL USE.

In re Disney, 922 S.W.2d 12, 15 (Mo. banc 1996)

In re Cupples, 979 S.W.2d 932 (Mo. banc 1998)

People v. Davis, 893 P.2d 775 (Colo. 1995)

People v. Larson, 828 P.2d 793 (Colo. 1992)

Rule 4-8.4(c)

§570.120 RSMo 2000

POINT RELIED ON

III.

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT
BECAUSE HE VIOLATED RULE 4-8.1 IN THAT HE FAILED
TO RESPOND TO LAWFUL REQUESTS FOR INFORMATION
FROM DISCIPLINARY AUTHORITIES.**

In re Hardge-Harris, 845 S.W.2d 557, 560 (Mo. banc 1993)

In re Staab, 719 S.W.2d 780 (Mo. banc 1986)

Rule 4-8.1

POINT RELIED ON

IV.

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT
BECAUSE HE VIOLATED RULES 4-1.1 AND 4-1.3 IN THAT
HE FAILED TO PROVIDE COMPETENT AND DILIGENT
REPRESENTATION TO CLIENTS FOSTER AND HARRISON.**

In re Lavin, 788 S.W.2d 282 (Mo. banc 1990)

In re Vails, 768 S.W.2d 78 (Mo. banc 1989)

Rule 4-1.1

Rule 4-1.3

POINT RELIED ON

V.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE HE INTENTIONALLY AND KNOWINGLY VIOLATED DUTIES OWED TO HIS CLIENTS AND THE GENERAL PUBLIC THEREBY CAUSING INJURY OR POTENTIAL INJURY IN THAT HE INTENTIONALLY AND KNOWINGLY WITHDREW OR CAUSED TO BE WITHDRAWN CLIENT AND THIRD PARTY FUNDS FROM A TRUST ACCOUNT AND CONVERTED THEM TO HIS OWN USE, COMMINGLED HIS MONEY WITH THE CLIENTS' THEREBY SUBJECTING THE TRUST ACCOUNT TO IRS LEVY, AND WROTE ABOUT 150 INSUFFICIENT FUNDS CHECKS OVER A 39-MONTH PERIOD.

The ABA's Standards for Imposing Lawyers Sanctions (1991 ed.)

In re Mentrup, 665 S.W.2d 324 (Mo. banc 1984)

In re Haggerty, 661 S.W.2d 8 (Mo. banc 1983)

In re Williams, 711 S.W.2d 518, 520 (Mo. banc 1986)

In re Witte, 615 S.W.2d 421 (Mo. banc 1981), appeal dismissed, cert. denied, 454 U.S.

1025, 102 S.Ct. 559, 70 L.Ed.2d 469, quoting from *Clark v. State Bar of*

California, 39 Cal.2d 161, 168, 246 P.2d 1, 5 (1952)

In re Schaeffer, 824 S.W.2d 1, 5 (Mo. banc 1992)

In re Thompson, 539 S.E.2d 396 (S.C. 2000)

Rule 4-1.15

Rule 4-8.4(c)

Rule 4-8.1

Rule 4-1.1

Rule 4-1.3

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.15(a)(b)(d) IN THAT HE FAILED TO KEEP HIS CLIENTS' PROPERTY SEPARATE FROM HIS OWN, FAILED TO MAINTAIN COMPLETE TRUST ACCOUNT RECORDS, FAILED TO DELIVER CLIENT FUNDS TO CLIENTS PROMPTLY, AND FAILED TO ESTABLISH AND MAINTAIN AN INTEREST-BEARING INSURED DEPOSITORY ACCOUNT.

Lawyer ethics rules inveigh against commingling client money with that of the lawyer for a straightforward reason: to guard against the probability in some cases, the possibility in many cases, and the danger in all cases that commingling will result in the loss of client money. *In re Witte*, 615 S.W.2d 421, 422 (Mo. banc 1981), appeal dismissed, cert. denied, 454 U.S. 1025, 102 S.Ct. 559, 70 L.Ed.2d 469 (1982), quoting from *Clark v. State Bar of California*, 39 Cal.2d 161, 168, 246 P.2d 1, 5 (1952). In the case at bar, Respondent's use of the trust account as a safe haven for his own income from the IRS, and his use of client funds in that account as advances on his legal fees was just that: commingling and conversion.

The undisputed, and in many cases, admitted, facts establish the following chronology of activity in the Commerce Bank trust account in the summer of 1995:

July 31, 1995: Respondent deposits \$32,500, the full amount of the Thomas settlement (Thomas' portion = \$19,500).

July 31, 1995: Respondent writes a check for \$27,501.84 out of the account to obtain two cashier's checks, which he uses as down payments on an office building and a car.

August 8 to August 20, 1995: Trust account has a negative balance.

August 18, 1995: Respondent writes a check for \$19,500 out of the trust account to purchase a cashier's check with which to make distribution to Thomas.

August 18, 1995: Respondent writes check for \$12,042.65 to St. Joseph Health Center, which is returned for insufficient funds.

August 18, 1995: Respondent writes check for \$3,000 to Hallak, as partial payment of his share of settlement.

August 21, 1995: Respondent deposits \$31,000, the remainder of the Hallak settlement, of which \$12,042.65 is subject to hospital lien and \$11,374.41 is owed to Hallak.

August 23, 1995: Commerce Bank withholds \$7,148.89 from the account pursuant to IRS levy.

While it is not disputed that Respondent's clients eventually got the full amount of their portions of the settlements, and the hospital's lien was eventually honored, Respondent's fast and loose use of the trust account to meet his personal goals of buying an office building and a luxury automobile was reprehensible attorney misconduct. By

delaying the distribution of client money to the clients, in direct violation of Rule 4-1.15(b)'s "prompt delivery" language, Respondent was able to advance his own financial purposes at the expense of his fiduciary obligations. Certainly using one client's money to pay off another client cannot be condoned, even if all are whole in the end. Further, it is well-settled in Missouri that restitution has no influence in a disciplinary case. *In re Conrad*, 105 S.W.2d 1, 13 (Mo. banc 1937); *In re Kohlmeyer*, 327 S.W.2d 249 (Mo. banc 1959).

Respondent's failure to maintain complete records of his trust account transactions, his failure to keep a personal record of each transaction, and his failure to reconcile his monthly bank statements only exacerbated the misconduct. Respondent acted as a fiduciary for large sums of client money from July through September of 1995. It was incumbent on him, if one subscribes, for the sake of argument, to Respondent's theory that he was only "borrowing" against his future fees, to comply with Rule 4-1.15(a)'s requirement of "complete" record keeping, if only to satisfy himself that his self-approved short term loans to himself could be repaid.

Finally, Respondent violated subpart (d) of Rule 4-1.15 by not converting his trust account to an interest-bearing account when the large personal injury settlements were consummated. The Client Security Fund "provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer." Comment, Rule 4-1.15.

ARGUMENT

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-8.4(c) IN THAT HE USED HIS CLIENT TRUST ACCOUNTS AS PERSONAL AND BUSINESS CHECKING ACCOUNTS TO PROTECT HIS INCOME FROM IRS LEVY, WROTE APPROXIMATELY 150 CHECKS OVER A 39-MONTH PERIOD THAT WERE RETURNED DUE TO INSUFFICIENT FUNDS, AND APPROPRIATED CLIENT FUNDS FOR HIS PERSONAL USE.

Questions of honesty go to the heart of an attorney's fitness to practice law. *In re Disney*, 922 S.W.2d 12, 15 (Mo. banc 1996); *In re Cupples*, 979 S.W.2d 932 (Mo. banc 1998). Honesty was clearly not a part of the picture when Respondent made the decision to shield his income from the IRS in his client trust account. Respondent testified that he could not have maintained his law practice if he had not been able to conduct his financial affairs out of an account free of the threat of IRS levy. Yet, Respondent also testified that he had agreed to several payment plans with the IRS, but that he had failed to comply with those agreements, resulting, ultimately, in the account levies. One has also to question Respondent's sincerity about his willingness to face up to his tax debt when, once he acquired some sizeable attorney's fees, he chose to make down payments on an office

building and an expensive automobile rather than using the money to reduce his tax liability. It was subterfuge to use the trust account for his own self-interest, and a violation of Rule 4-8.4(c). *In re Disney*, 922 S.W.2d 12, 15 (Mo. banc 1996) (attorney violated Rule 4-8.4(c) by creating a trust through which to shield assets from his ex-wife.)

Likewise, the sheer number of insufficient funds checks passed by Respondent from 1994 to 1997 evidences conduct involving dishonesty, deceit, and misrepresentation in violation of Rule 4-8.4(c). Informant does not contend that Respondent's conduct sunk to the level of criminal conduct in violation of §570.120 RSMo 2000, but Informant has shown by a preponderance of the evidence that continuing over a three-year period to write approximately 150 checks that would not be honored was dishonest and deceitful conduct and misrepresented to his payees, which often included courts, the actual state of his financial affairs. See *People v. Davis*, 893 P.2d 775 (Colo. 1995); *People v. Larson*, 828 P.2d 793 (Colo. 1992).

And finally, Respondent's use of client and third party funds from his trust account to float short-term loans to himself violated Rule 4-8.4(c). There is no evidence that the clients' approval of this use of their money was ever sought or received. Respondent was dishonest and deceitful toward his clients and St. Joseph Health Center in using their money in this manner.

ARGUMENT

III.

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT
BECAUSE HE VIOLATED RULE 4-8.1 IN THAT HE FAILED
TO RESPOND TO LAWFUL REQUESTS FOR INFORMATION
FROM DISCIPLINARY AUTHORITIES.**

One of the last things any lawyer wants to see in the incoming mail is a letter from the disciplinary office. That said, no attorney is at liberty to ignore, or bury his head in the sand and avoid, investigative requests for information. The instant case developed in large part from bank records. One of the primary reasons it took nearly five years to get the case to hearing was the difficulty Informant had in getting Respondent's bank records. Respondent assured Informant that he would produce his bank records and client files, but they were slow in coming or were not produced at all except by way of subpoena served by Informant on the banks.

Members of Missouri's Bar are required by Rule 4-8.1 to respond to investigative requests for information.

[W]e expect the members of the Bar to deal promptly and candidly with any charges that may be brought against them.

Prompt responses to a request for documents or other evidence not only expedite the process but also reflect on the willingness of the attorney to resolve any allegations of

professional wrongdoing. The individual attorney's responsibility to the profession in this respect is no less important than the attorney's ethical responsibility to a client and to the court.

In re Hardge-Harris, 845 S.W.2d 557, 560 (Mo. banc 1993). See also *In re Staab*, 719 S.W.2d 780 (Mo. banc 1986). Respondent's failure to respond at all to letters from Mr. Humphrey and Mr. Gotschall and his recalcitrance in providing records of his law business, either from his own files or by obtaining them from his banks, violated the letter and spirit of the Rule.

ARGUMENT

IV.

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT
BECAUSE HE VIOLATED RULES 4-1.1 AND 4-1.3 IN THAT
HE FAILED TO PROVIDE COMPETENT AND DILIGENT
REPRESENTATION TO CLIENTS FOSTER AND HARRISON.**

Respondent has admitted that his representation of clients Foster and Harrison lacked both competence and diligence in violation of Rules 4-1.1 and 4-1.3 by, inter alia, allowing defaults to be taken against the clients. A final judgment in the amount of \$101,171 was entered against Foster and Harrison. And a default was entered and reinstated on appeal in the case against Foster, opening the way for plaintiffs to execute on the judgment obtained earlier. The record shows the clients were harmed by Respondent's lack of competence and diligence in handling their cases. Accepting a fee from a client, then neglecting or incompetently attending to the client's matter, particularly when the misconduct results in harm to the client, is sanctionable misconduct. *In re Lavin*, 788 S.W.2d 282 (Mo. banc 1990); *In re Vails*, 768 S.W.2d 78 (Mo. banc 1989).

ARGUMENT

V.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE HE INTENTIONALLY AND KNOWINGLY VIOLATED DUTIES OWED TO HIS CLIENTS AND THE GENERAL PUBLIC THEREBY CAUSING INJURY OR POTENTIAL INJURY IN THAT HE INTENTIONALLY AND KNOWINGLY WITHDREW OR CAUSED TO BE WITHDRAWN CLIENT AND THIRD PARTY FUNDS FROM A TRUST ACCOUNT AND CONVERTED THEM TO HIS OWN USE, COMMINGLED HIS MONEY WITH THE CLIENTS' THEREBY SUBJECTING THE TRUST ACCOUNT TO IRS LEVY, AND WROTE ABOUT 150 INSUFFICIENT FUNDS CHECKS OVER A 39-MONTH PERIOD.

The ABA's Standards for Imposing Lawyers Sanctions (1991 ed.) do not, in the first analysis, account for multiple charges of misconduct, although the multiplicity of offenses can be considered as an aggravating factor. Instead, the Standards direct that the "ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct." Id. at 6.

In accordance with this analytical framework, only the sanction appropriate to the most serious misconduct will be briefed.

Disbarment is the sanction appropriate to Respondent's multiple violations of Rules 4-1.15 and 4-8.4(c), which proscribe commingling and conversion, as well as conduct involving dishonesty, fraud, deceit, and misrepresentation. Failure to pay over promptly a client's money or appropriation of a client's money is sanctionable by disbarment. *In re Mentrup*, 665 S.W.2d 324 (Mo. banc 1984); *In re Haggerty*, 661 S.W.2d 8 (Mo. banc 1983). Even were the Court to conclude that Respondent's mental state was something less than intentional, disbarment would nonetheless be the appropriate sanction due to the overwhelming evidence of the disarray with which Respondent oversaw his trust accounts. *In re Williams*, 711 S.W.2d 518, 520 (Mo. banc 1986). Similarly, intentional failure to separate the lawyer's own property from that of his clients is sanctionable by disbarment. *In re Witte*, 615 S.W.2d 421 (Mo. banc 1981), appeal dismissed, cert. denied, 454 U.S. 1025, 102 S.Ct. 559, 70 L.Ed.2d 469 (1982), quoting from *Clark v. State Bar of California*, 39 Cal.2d 161, 168, 246 P.2d 1, 5 (1952).

There could be no question but what the conduct evidenced by this record was knowing and intentional misconduct. Respondent wrote a check for his own purposes back out of his escrow account the same day he deposited the Thomas settlement draft. The account thereafter had a negative balance for 13 days in the interim before the client was disbursed his funds.

When an attorney deposits the client's funds into an account used by the attorney for his own purposes, any disbursement from the account for

purposes other than those of the client's interests has all the characteristics of misappropriation, particularly when the disbursement reduces the balance of the account less than the amount of the funds being held by the attorney for the client. Misappropriation of a client's funds, entrusted to an attorney's care, is always grounds for disbarment. *In re Mentrup*, 665 S.W.2d 324, 325 (Mo. banc 1984). Restitution of converted funds is not a defense.

In re Schaeffer, 824 S.W.2d 1, 5 (Mo. banc 1992). Additionally, Respondent very deliberately began leaving his attorney fee portion of settlement monies in the trust account because he had heard the IRS would not levy on trust accounts. Respondent's mental state is further evidenced by the fact that Respondent continued, over a three plus year period, to write insufficient funds checks even though he was getting notice from and being charged by the banks for the same.

Sanctions analysis turns next to aggravating and mitigating factors. Rule 9, ABA Standards for Imposing Lawyer Sanctions (1991 ed.). Respondent offered an array of dismaying mitigating evidence explaining his personal travails during the years at issue. While Informant in no way diminishes the seriousness of Respondent's misfortunes, it should be pointed out that the IRS could not have passed the tax liability through to Respondent and his then wife absent some legal basis for doing so. Further, Respondent offered no medical evidence of mental defect and there was no evidence that Respondent lacked the mental capacity to differentiate right from wrong. See *In re Thompson*, 539

S.E.2d 396 (S.C. 2000) (lawyer disbarred despite severe bi-polar disorder, which did not excuse long term pattern and scheme of financial misconduct).

Informant points to the equally impressive existence of aggravating factors present in this case in urging the Court to disbar Respondent. First and foremost is the presence of Respondent's dishonest and selfish motive. Respondent manipulated and misused the client trust accounts in order to avoid paying a lawful debt and in order to purchase an office building and a Lincoln Continental. The Court should consider the sheer multiplicity of misconduct – numerous violations of Rules 4-1.15 and 4-8.4(c), as well as 4-8.1, 4-1.1, and 4-1.3. Respondent was not forthcoming with the information and documents necessary to the expeditious investigation of the disciplinary case. And finally, Respondent's substantial experience in the practice of law, particularly when Respondent enjoyed the honor of serving on the Court's Advisory Committee, stands in stark contrast to his flouting of the ethical Rules.

CONCLUSION

Respondent Pendleton has committed professional misconduct by commingling his funds with those of his clients and third parties in his client trust accounts in order to avoid paying a tax debt, converting client and third-party money from the trust accounts, engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, failing to respond to lawful demands for information from disciplinary authorities, and failing to act diligently and competently in his representation of clients. Rules 4-1.1, 4-1.3, 4-1.15(a)(b)(d), 4-8.1(b), and 4-8.4(c). The record compels Respondent's disbarment owing to the seriousness of the offenses and the existence of as many aggravating factors as those in mitigation of Respondent's misconduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2001, two copies of Informant's Brief have been sent via First Class mail to:

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Sharon K. Weedin

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 6330 words, according to Microsoft Word 97, 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.

Sharon K. Weedin