

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:)
)
RENAE LYNN EHLER,) **Supreme Court #SC90652**
)
Respondent.)

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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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

Background and Disciplinary History

Respondent Renae Lynn Ehler was licensed to practice law in Missouri in October of 1997. **App. 31, 48.**

Ms. Ehler has a prior disciplinary history with this Court. Specifically, in Case No. SC87152, Respondent received a stayed six month suspension with two years of probation on October 21, 2005 for violating the following Rules of Professional Conduct:

- Rule 4-1.3 on diligence for failing to take action on behalf of clients and failing to return money to them within a reasonable time after being requested to do so by the clients;
- Rule 4-1.4 on communication by failing to reasonably communicate with clients regarding the status of their cases;
- Rule 4-1.15(a) [now Rule 4-1.15(c)] on safekeeping property by failing to maintain clients' fees and expenses in Respondent's trust account until earned;
- Rule 4-1.15(b) [now Rule 4-1.15(f)] on safekeeping property by failing to deliver money when due;
- Rule 4-1.16(d) on withdrawal by failing to refund unearned fees and unused costs to former clients in a timely manner; and
- Rule 4-8.1(b) [now Rule 4-8.1(c)] by failing to respond to reasonable requests for information from the Office of Chief Disciplinary Counsel.

App. 117-142.

Among the probation requirements imposed were that Respondent utilize a law practice management consultant to assist her in organizing her office practices, and also utilize an attorney mentor to serve as a guide for her on the appropriate manner to practice law. Because of trust account violations as set forth above, a point of emphasis in Respondent's probation was the appropriate way to manage a trust account. **App. 119-142.**

Respondent consulted with attorney Sarah Read as a law office practice management consultant and attorney Cynthia Suter as a mentor attorney. Respondent received an order of successful completion of her probation on January 28, 2008. **App. 32, 48.**

Roberta Ann Miller (Kimmel) Representation

In 2007, Roberta Ann Miller hired Respondent to represent her in a dissolution case against Harold Bing Miller. Respondent filed the dissolution action in Chariton County, being Case No. 07CH-DR00031. **App. 11 (T. 27), 32, 48.**¹ In addition to the

¹ The facts contained herein are drawn from the testimony elicited and the exhibits admitted into evidence at the trial in this matter conducted on August 26, 2009. Citations to the trial testimony before the Disciplinary Hearing Panel are denoted by the appropriate Appendix page reference followed by the specific transcript page reference in parentheses, for example "**App. ____ (Tr. ____)**". Citations to the Information, Respondent's Answer to the Information and the trial exhibits are denoted by the appropriate Appendix page reference.

dissolution, Ms. Miller directed Respondent to obtain an order of protection and to recover personal property then in possession of Mr. Miller. **App. 11-12 (T. 27-28)**. Mr. Miller was represented by attorney James Cooksey. **App. 17 (T. 49)**.

On January 16, 2008, the parties appeared in court for a hearing and a judgment was entered by the court. Part of the resolution of the dissolution case was that the Millers' real estate and personal property would be sold at auction and the net proceeds would be equally divided between them after payment of outstanding debts. In addition, Ms. Miller's maiden name of Roberta Ann Kimmel was restored to her. **App. 33, 48.**²

During the ensuing months, Respondent received and deposited the following amounts into her trust account, representing the marital property belonging to the Ms. Kimmel and Mr. Miller:

- On February 19, 2008, Respondent received and deposited into her trust account two federal income tax refund checks issued to the Ms. Kimmel and Mr. Miller to hold until the distribution of the other marital assets. One check was for the sum of \$846.50 and the other was for the sum of \$379.13. The sum of the two checks was \$1,225.63. **App. 8 (T. 14), 33, 48.**
- On June 6, 2008, Respondent received and deposited into her trust account a check in the amount of \$52,481.22 from Chariton Abstract Escrow representing the net proceeds from the sale of the marital real estate. **App. 8 (T. 14), 33, 48.**

² For the remainder of Informant's brief, Roberta Ann Miller will be referred to by her maiden name, Roberta Ann Kimmel.

- On July 7, 2008, Respondent received and deposited into her trust account a check in the amount of \$13,832.66 from Inman Enterprises, representing the net proceeds from the sale of marital personal property. **App. 8 (T. 14-15), 33, 48.**

The net proceeds deposited into Respondent's trust account as set forth above was \$67,539.51.

On June 25, 2008, Respondent sent opposing counsel Cooksey a letter outlining her plans for distribution of the marital assets of Ms. Kimmel and Mr. Miller. **App. 33, 49, 112-113.** In that letter, Respondent listed payments to be made to Lutheran CU of America, Boone Hospital Center, Moberly Regional Medical Center, Francis Rychnovski (DDS), Bank of America, Stefanie Neidholdt, Jerry Neidholdt, and Renae Ehler (for attorney's fees). The sum of those payments totaled \$18,380.41, although Respondent's letter erroneously listed the sum as \$18,636.64. **App. 33, 49, 112-113.**

In July 2008, Respondent made the payments to those creditors listed in her June 25, 2008 letter, which should have left a remaining balance in Respondent's trust account of \$49,159.10 for equal distribution to Ms. Kimmel and Mr. Miller. Half to each would have totaled \$24,579.55. **App. 33, 49.**

In addition, Ms. Kimmel and Mr. Miller, during the course of the dissolution, had individually paid some additional bills for which adjustments were to be made. Thus, Ms. Kimmel had made payments to creditors totaling \$3,780.95. Mr. Miller made payments to creditors totaling \$3,375.40. To adjust for that difference in payment, an additional \$202.76 should have gone to Ms. Kimmel and \$202.76 subtracted from the amount due to Mr. Miller. Accordingly, the distribution of net proceeds from

Respondent to her client Roberta Ann Kimmel should have been \$24,782.31 and to Harold Miller should have been \$24,376.79. **App. 34, 49.**

In September 2008, Respondent sent a check to Roberta Ann Kimmel in the amount of \$20,460.44. **App. 13 (T. 32-33), 34, 49, 54-58.** Respondent made no other payment to Roberta Ann Kimmel until January 29, 2009 and, as of that date, still owed Ms. Kimmel the sum of \$4,321.87 (i.e., the difference between \$24,782.31 and \$20,460.44). **App. 34, 49.** As of January 29, 2009, Harold Miller had not received any of the \$24,376.79 owed to him by Respondent. **App. 18 (T. 53), 34, 49.** Thus, as of January 29, 2009, the total amount owing from Respondent to Roberta Kimmel and Harold Miller was \$28,698.66 (i.e., the sum of \$4,321.87 and \$24,376.79). **App. 35, 49, 54-58.**

Ms. Kimmel knew from her own calculations that the amount sent to her by Respondent was incorrect and insufficient. **App. 13 (T. 33).** Ms. Kimmel contacted Respondent to request an accounting of the funds that Respondent had collected and distributed from the marital estate. **App. 13 (T. 33).** Respondent never provided the accounting to Ms. Kimmel. **App. 13 (T. 33).**

Ms. Kimmel filed a complaint with the Office of Chief Disciplinary Counsel against Respondent on October 31, 2008. Following an investigation of the complaint, including an audit of Respondent's trust account, Informant's staff counsel Carl Schaeperkoetter and paralegal Kelly Dillon met with Respondent at her office in Keytesville on January 29, 2009. **App. 9-10 (T. 18-20), 35, 49.** Informant reviewed the results of its investigation with Respondent and directed Respondent to pay Ms. Kimmel

and Mr. Miller the remaining balance of money owed to them from her trust account. **App. 9-10 (T. 18-20), 54-58.** Respondent immediately paid Ms. Kimmel a cashier's check in the amount of \$3,066.70 and paid Mr. Miller a cashier's check in the amount of \$23,527.14. **App. 35, 49.**

Despite the aforementioned payments on January 29, 2009, Respondent still owed an additional \$2,104.82 to Ms. Kimmel and Mr. Miller. Despite a promise to do so on January 29, 2009, Respondent failed to pay any additional monies to either Ms. Kimmel or Mr. Miller. **App. 35, 49.**

In addition to the above, Respondent paid personal and office expenses out of her trust account. Thus, from January 1, 2007 through December 31, 2008, Respondent made twelve (12) payments by electronic transfer through the Automated Clearing House (ACH) to Kansas City Power and Light, Century Tel, and U.S. Cellular. The sum of those payments was \$3,474.48. **App. 36, 50, 54-58.**

Craig and Vicki Gorham Representation

In or about September 2007, Craig and Vicki Gorham hired Respondent to represent them in defense of a lawsuit then pending in the 9th Judicial Circuit captioned, *Public Water Supply District #3 v. Gorham*, Case No. 07LI-AC00204. **App. 37, 50.** Respondent agreed to represent the Gorhams in the case involving a dispute over unpaid water bills.

The basis for the defense of the Gorhams was to be that they had not lived in the subject property where the water bills had been generated during the relevant time period. Specifically, the Gorhams had moved to the state of Iowa for several years and had then

moved back to Missouri to the subject property where they had previously lived several years before. **App. 19 (T. 59).** The Gorhams provided Respondent with bank statements, tax papers and school records evidencing that they had lived in Iowa during the relevant time period during which the water bills were generated at the subject property in Missouri. **App. 20, (T. 60).**

Respondent did not utilize the information and documentation provided by the Gorhams in defense of the pending lawsuit. Instead, Respondent appeared in court on July 28, 2008, in response to a motion for sanctions filed by the plaintiff and stated that the Gorhams had not provided the information to her. **App. 146.** The court entered a judgment by default against the Gorhams in the amount of \$1,900 as a sanction under Rule 61.01(b)(1) for failure to comply with plaintiff's discovery requests. **App. 20 (T. 61), 146.** The Gorhams did not appear in Court on July 28 because Respondent told them that they did not need to appear. **App. 20 (T. 61).** In addition, Respondent failed to notify her clients that the Court had entered a default judgment against them. **App. 20 (T. 61).** The Gorhams only learned of the default judgment entered against them by checking the status of the case on Case.net. **App. 20 (T. 61-62).**

As a result of the default judgment entered against them, Mr. Gorham's wages were garnished and his credit was damaged. **App. 20 (T. 61-62).**

Disciplinary Case

Informant filed the Information in this case on April 15, 2009. Respondent timely filed her Answer to the Information on or about May 18, 2009. **App. 48.** The Chair of the Missouri Supreme Court Advisory Committee appointed a Disciplinary Hearing

Panel on July 6, 2009. **App. 3-4.** The Panel held its hearing in this matter on August 26, 2009. **App. 5.**

On November 12, 2009, the Panel issued its Findings of Fact, Conclusions of Law and Decision. **App. 147.** With regard to the Kimmel complaint, the Panel found that Respondent violated the following Missouri Rules of Professional Conduct:

- Rule 4-1.1 on competence in that Respondent failed to correctly calculate the money owed to Ms. Kimmel and Mr. Miller and failed to deliver the correct amount to them;
- Rule 4-1.3 on diligence by failing to deliver the money owed to Ms. Kimmel and Mr. Miller in a timely fashion;
- Rule 4-1.4 on communication by failing to communicate with her client about the money owed and failing to communicate with Mr. Miller and his counsel about the money owed to Mr. Miller;
- Rule 4-1.15 by failing to safekeep money owed to Ms. Kimmel and Mr. Miller, instead utilizing a portion of the money for other improper purposes; and
- Rule 4-8.4(c) by engaging in conduct involving deceit and misrepresentation.

With regard to the Gorham complaint, the Panel found that Respondent violated the following Missouri Rules of Professional Conduct:

- Rule 4-1.1 on competence by failing to provide opposing counsel with the information requested in discovery so as to avoid entry of a judgment against her clients; and

- Rule 4-1.3 on diligence by failing to provide opposing counsel with the information requested in discovery so as to avoid entry of a judgment against her clients.

App. 152-154.

In determining the appropriate level of discipline, the Panel found the presence of both aggravating and mitigating circumstances. In aggravation, the Panel found the following: prior disciplinary offenses; a dishonest or selfish motive; a pattern of misconduct; multiple offenses and indifference to making restitution to the injured parties. In mitigation, the Panel found the following: personal or emotional problems and a cooperative attitude toward the disciplinary proceedings and disclosure to the disciplinary body. **App. 152, 154.**

The Panel recommended that Respondent be disbarred. **App. 155.**

The Informant filed its notice of acceptance of the Panel's decision on November 20, 2009. **App. 157.** The Respondent filed her notice of rejection of the Panel's decision on December 30, 2009. **App. 160.** Informant filed the record in this case on February 1, 2010.

POINT RELIED ON

I.

RESPONDENT IS SUBJECT TO DISCIPLINE BY THE SUPREME COURT BECAUSE:

A. SHE VIOLATED THE RULES OF PROFESSIONAL CONDUCT INVOLVING COMPETENCE, DILIGENCE, COMMUNICATION, SAFEKEEPING PROPERTY, DECEIT AND MISREPRESENTATION IN HER HANDLING OF CLIENT AND THIRD PARTY FUNDS IN THE KIMMEL/MILLER DIVORCE PROCEEDING; AND

B. SHE VIOLATED THE RULES OF PROFESSIONAL CONDUCT INVOLVING COMPETENCE AND DILIGENCE IN HER REPRESENTATION OF THE GORHAMS IN LITIGATION OVER A DISPUTED WATER BILL.

Rule 4-1.1, Rules of Professional Conduct

Rule 4-1.3, Rules of Professional Conduct

Rule 4-1.4, Rules of Professional Conduct

Rule 4-1.15, Rules of Professional Conduct

Rule 4-8.4(c), Rules of Professional Conduct

POINT RELIED ON

II.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE:

A. SHE ENGAGED IN PROFESSIONAL MISCONDUCT INVOLVING DECEIT AND MISREPRESENTATION; SHE FAILED TO SAFEKEEP BOTH HER CLIENT'S AND A THIRD PARTY'S PROPERTY; SHE FAILED TO COMPETENTLY AND DILIGENTLY REPRESENT HER CLIENTS; AND SHE FAILED TO REASONABLY COMMUNICATE WITH HER CLIENTS;

B. RESPONDENT HAS PREVIOUSLY BEEN DISCIPLINED BY THIS COURT FOR SIMILAR CONDUCT INVOLVING A FAILURE TO SAFEKEEP HER CLIENT'S PROPERTY; A FAILURE TO DELIVER MONEY TO HER CLIENT WHEN DUE; A FAILURE TO COMPETENTLY AND DILIGENTLY REPRESENT HER CLIENT; AND A FAILURE TO REASONABLY COMMUNICATE WITH HER CLIENT.

C. THE ABA SANCTION STANDARDS AND THE PRESENCE OF SIGNIFICANT AGGRAVATING CIRCUMSTANCES SUPPORT DISBARMENT; AND

D. THE DISCIPLINARY HEARING PANEL RECOMMENDED DISBARMENT.

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

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

In re Belz, 258 S.W.3d 38 (Mo. banc 2008)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

RESPONDENT IS SUBJECT TO DISCIPLINE BY THE SUPREME COURT BECAUSE:

A. SHE VIOLATED THE RULES OF PROFESSIONAL CONDUCT INVOLVING COMPETENCE, DILIGENCE, COMMUNICATION, SAFEKEEPING PROPERTY, DECEIT AND MISREPRESENTATION IN HER HANDLING OF CLIENT AND THIRD PARTY FUNDS IN THE KIMMEL/MILLER DIVORCE PROCEEDING; AND

B. SHE VIOLATED THE RULES OF PROFESSIONAL CONDUCT INVOLVING COMPETENCE AND DILIGENCE IN HER REPRESENTATION OF THE GORHAMS IN LITIGATION OVER A DISPUTED WATER BILL.

A lawyer owes her client the utmost in good-faith and the highest loyalty and devotion to her client's interests. "The relation between attorney and client is highly fiduciary and of a very delicate, exacting and confidential character, requiring a very high degree of fidelity and good faith" on the part of the attorney. *In re Oliver*, 285 S.W.2d 648, 655 (Mo. banc 1956). The public expects the lawyer to be honest and to abide by the law; public confidence in the integrity of officers of the court is undermined when a lawyer engages in deceitful conduct that reflects adversely on the lawyer's honesty,

trustworthiness or fitness as a lawyer. See Introduction, Rule 5.0, ABA Standards for Imposing Lawyer Sanctions (1991 ed.).

The record evidence in this case is virtually undisputed by Respondent and overwhelmingly supports a finding that she repeatedly breached her duty of good faith and fidelity to her clients.

The Rule 4-1.15 Violation. Respondent failed to deliver to her client Ms. Kimmel and to a third party, Mr. Miller, their respective portions of the marital estate that Respondent was charged with liquidating and distributing in accordance with the Court's order of dissolution. Thus, as of July 7, 2008, Respondent had liquidated and deposited net proceeds of \$67,539.51 into her trust account that were the product of the marital estate. After paying rightful third party claims in the total sum of \$18,380.41, there should have been a remaining balance of \$49,159.10 in Respondent's trust account for distribution to Ms. Kimmel and Mr. Miller. However, as of October 31, 2008, the date that Ms. Kimmel filed her complaint with the Office of Chief Disciplinary Counsel, Respondent had only paid her client the sum of \$20,460.44 and had paid none of the net proceeds of the marital estate to Mr. Miller. Accordingly, Respondent still owed Roberta Kimmel and Harold Miller the sum of \$28,698.66.

Ms. Kimmel knew from her own calculations that the amount sent to her by Respondent was incorrect and insufficient. Ms. Kimmel contacted Respondent to request an accounting of the funds that Respondent had collected and distributed from the marital estate. Respondent never provided the accounting to Ms. Kimmel.

Following its investigation of Ms. Kimmel's complaint, including an audit of Respondent's trust account, Informant met with Respondent on January 29, 2009. Informant reviewed the results of its investigation with Respondent and directed Respondent to pay Ms. Kimmel and Mr. Miller the remaining balance of money owed to them from her trust account. Respondent gave Ms. Kimmel a cashier's check in the amount of \$3,066.70 and gave Mr. Miller a cashier's check in the amount of \$23,527.14. Despite the aforementioned payments, Respondent owed an additional \$2,104.82 to Ms. Kimmel and Mr. Miller. Despite a promise to do so on January 29, 2009, Respondent failed to pay any additional monies to either Ms. Kimmel or Mr. Miller.

The Disciplinary Hearing Panel properly found that Respondent's conduct violated Rule 4-1.15 requiring that she safekeep third party property in her possession.

The Rule 4-8.4(c) Violation. Despite the fact that she had in excess of \$20,000 of liquidated marital assets in her trust account, Respondent failed to pay Mr. Miller any money for several months. In addition, Respondent failed to maintain sufficient funds in her trust account to pay the appropriate amounts owed to Ms. Kimmel and Mr. Miller. Finally, Respondent used the funds in her trust account to pay her personal and law office bills to the utility and telephone companies. Respondent's conduct involved deceit and misrepresentation in violation of Rule 4-8.4(c).

The Rule 4-1.1 Violation. The Rules of Professional Conduct require that an attorney provide competent representation to her clients and that she possess the necessary legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Rule 4-1.1. Respondent violated Rule 4-1.1 in her representation of

Ms. Kimmel by failing to correctly and accurately calculate the amount of money owed to her client and to Mr. Miller as a result of liquidating the marital estate and delivering the correct amount of money to Ms. Kimmel and to Mr. Miller. With regard to the Gorham representation, Respondent violated Rule 4-1.1 by failing to provide opposing counsel with the information requested in discovery so as to avoid the entry of a default judgment against her clients.

The Rule 4-1.3 Violation. Respondent failed to provide diligent and prompt representation to her clients as required by Rule 4-1.3. With regard to the Kimmel representation, Respondent failed to deliver the money owed to her client and to Mr. Miller in a timely fashion. Similarly, in the Gorham representation, Respondent failed to promptly provide opposing counsel with requested discovery resulting in the entry of a default judgment against her clients. Respondent's acts and omissions violated Rule 4-1.3 of the Rules of Professional Conduct.

The Rule 4-1.4 Violation. Compounding the serious acts of professional misconduct described above, Respondent violated Rule 4-1.4 on communication by failing to communicate with her client about the marital assets owed and failed to respond to reasonable requests for information from her client. Thus, Ms. Kimmel requested that Respondent provide her with an accounting of funds collected and owed, however, Respondent failed and refused to provide the accounting. In addition, Respondent failed to communicate with Mr. Miller and his counsel about the substantial monies owed to him.

In the Gorham representation, Respondent failed to notify her clients that the trial court had entered a default judgment against them. Instead, the Gorhams only learned of the default judgment when Ms. Gorham checked the status of the litigation on Case.net.

ARGUMENT

II.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE:

A. SHE ENGAGED IN PROFESSIONAL MISCONDUCT INVOLVING DECEIT AND MISREPRESENTATION; SHE FAILED TO SAFEKEEP BOTH HER CLIENT'S AND A THIRD PARTY'S PROPERTY; SHE FAILED TO COMPETENTLY AND DILIGENTLY REPRESENT HER CLIENTS; AND SHE FAILED TO REASONABLY COMMUNICATE WITH HER CLIENTS;

B. RESPONDENT HAS PREVIOUSLY BEEN DISCIPLINED BY THIS COURT FOR SIMILAR CONDUCT INVOLVING A FAILURE TO SAFEKEEP HER CLIENT'S PROPERTY; A FAILURE TO DELIVER MONEY TO HER CLIENT WHEN DUE; A FAILURE TO COMPETENTLY AND DILIGENTLY REPRESENT HER CLIENT; AND A FAILURE TO REASONABLY COMMUNICATE WITH HER CLIENT.

C. THE ABA SANCTION STANDARDS AND THE PRESENCE OF SIGNIFICANT AGGRAVATING CIRCUMSTANCES SUPPORT DISBARMENT; AND

D. THE DISCIPLINARY HEARING PANEL RECOMMENDED DISBARMENT.

In determining the appropriate sanction for attorney misconduct, this Court historically relies on several sources. First and foremost, the Court applies its own standards to maintain consistency, fairness and ultimately, to accomplish the overriding goal of protecting the public and maintaining the integrity of the legal profession. Those standards are written into law when the Court issues opinions in attorney discipline cases. *In re Kazanas*, 96 S.W.3d 803, 806 (Mo. banc 2003).

The Court also relies on the ABA's Standards for Imposing Lawyer Sanctions (1991 ed.). Those guidelines recommend baseline discipline for specific acts of misconduct, taking into consideration the duty violated, the lawyer's mental state (level of intent), and the extent of injury or potential injury. *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994). Once the baseline discipline is known, the ABA Standards allow consideration of aggravating and mitigating circumstances. ABA Standards for Imposing Lawyer Sanctions (1991 ed.). Of particular significance in this case, the Court considers and takes into account the Respondent's prior history of discipline.

The Court also considers as advisory the recommendation of the Disciplinary Hearing Panel who heard the case. In this instance, the Panel recommended disbarment. **App. 155.**

The prior opinions of this Court in attorney discipline cases support disbarment in this case. Absent significant mitigating circumstances that are not present in this case, the Court has generally disbarred attorneys who misappropriated client or third party funds. Thus, in 1985, the Court disbarred an attorney for taking \$500 off the top of an \$8,000 settlement he had reached for a client. *In re Mendell*, 693 S.W.2d 76 (Mo. banc

1985). See also: *In re Mentrup*, 665 S.W.2d 324 (Mo. banc 1984); *In re Maier*, 664 S.W.2d 1 (Mo. banc 1984); *In re Witte*, 615 S.W.2d 421 (Mo. banc 1981).

More recently, the Court disbarred an attorney who stole, not from his clients but from his law partners. Noting that mitigating factors were present, the Court found that “certain acts by attorneys so impugn the integrity of the legal system that disbarment is the only appropriate means to restore public confidence in it. Some acts ... may indicate such a lack of respect for the law ... that disbarment may be warranted.” *In re Kazanas*, 96 S.W.3d 803, 809 (Mo. banc 2003), citing *In re Frick*, 694 S.W.2d 473, 480 (Mo. banc 1985).

Most recently, the Court extensively addressed the issue of misappropriation and conversion of client funds by a lawyer in the case of *In re Belz*, 258 S.W.3d 38 (Mo. banc 2008). In that case, Belz committed professional misconduct when he borrowed client funds from their trust accounts. While the Court noted that disbarment is the usual result in misappropriation cases because of the egregious nature of the misconduct, it also held that mitigating and aggravating factors are always considered in determining the correct sanction. *Id.* at 39. The Court found the presence of compelling mitigating circumstances, including the fact that (a) Belz suffered from bipolar disorder that was causally connected to the misappropriations, (b) he self-reported his professional misconduct, (c) he made timely and voluntary restitution, and (d) he had no prior disciplinary history. Based on this “unusual array of mitigating circumstances”, the Court suspended Belz for three years. *Id.* at 47.

The case at bar is factually distinguishable from *Belz*. Respondent did not suffer from any mental disability that caused her to delay the payment of client funds from the marital estate to Ms. Kimmel and Mr. Miller or caused her to convert and misappropriate client funds in order to pay her personal utility bills. In addition, Respondent did not self-report her conduct. To the contrary, she failed to communicate with both her own client and with Mr. Miller and his counsel regarding the status of her efforts to liquidate the marital estate and refused to provide her client with the requested accounting of those marital assets. Moreover, Respondent has failed to make restitution to her client and has failed to pay her client and Mr. Miller the balance of the funds owed from the marital estate. Finally, as discussed *infra*, this Court has previously disciplined Respondent for professional misconduct involving the mishandling of client funds. Thus, none of the unique mitigating circumstances existing in the *Belz* case is present in this case.

Under this Court's prior opinions, disbarment is the appropriate discipline for Respondent's professional misconduct.

Respondent has been previously disciplined by this Court for similar professional misconduct. On October 21, 2005, in Case No. SC87152, Respondent received a stayed six month suspension with two years of probation. The Rules violated were 4-1.3 on diligence by failing to take action on behalf of clients and failing to return money to them in a reasonable time after being requested; Rule 4-1.4 on communication by failing to communicate with clients about their cases; Rule 4-1.15(a) [now Rule 4-1.15(c)] on safekeeping property by failing to maintain clients' fees and expenses in Respondent's trust account until earned; Rule 4-1.15(b) [now Rule 4-1.15(f)] on safekeeping property

by failing to deliver money when due; Rule 4-1.16(d) on withdrawal by failing to refund unearned fees and unused costs to former clients in a timely manner; and Rule 4-8.1(b) [now Rule 4-8.1(c)] by failing to respond to requests for information from the ODCD. **App. 117-142.**

Respondent received an order of successful completion of her probation from this Court on January 28, 2008. **App. 32, 48.** Within months thereafter, from February through July 2008, Respondent deposited \$67,539.51 of Kimmel/Miller marital assets into her trust account. She thereafter failed to communicate with her client and with Mr. Miller about the status of her efforts to liquidate the marital estate, failed to properly account for and distribute the assets, and converted and misappropriated some of the assets to her personal use. During the same time frame, Respondent failed to competently and diligently represent the Gorhams, resulting in a default judgment being entered against them.

Respondent's prior disciplinary history is particularly significant as an aggravating circumstance because it occurred in close temporal proximity to the current professional misconduct. In addition, the prior disciplinary history involved the same or similar misconduct involving violations of many of the same rules involved in this case. In accordance with the Court's well-established system of graduated, progressive discipline, Respondent should be disbarred.

The ABA Guidelines support disbarment in this case. This Court has often relied on sanction guidelines developed by the ABA's Center for Professional Responsibility. *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994). The guidelines, known as the ABA

Standards for Imposing Lawyer Sanctions (1991 ed), consider the following primary questions:

- (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)
- (2) What was the lawyer’s mental state? (Did the lawyer act intentionally, knowingly, or negligently?)
- (3) What was the extent of the actual or potential injury caused by the lawyer’s misconduct? (Was there a serious or potentially serious injury?) and
- (4) Are there any aggravating or mitigating circumstances?

ABA Standards: Theoretical Framework, p. 5.

The ABA Standards “assume that the most important ethical duties are those obligations which a lawyer owes to clients.” Application of the ABA Standards requires the user to initially analyze the first three questions and then, only after a baseline sanction is apparent, to consider aggravating and mitigating circumstances. ABA Standards, Preface: Methodology, p. 3. The drafters intentionally rejected an approach, however, that focused only on a lawyer’s intent. Instead, they recognized that sanctioning courts must consider not only the attorney’s intent and damage to her clients, but also the damage to the “public, the legal system and the profession.” ABA Standards, Preface: Methodology, p. 3.

Having considered this background, the application of these ABA Standards to the case at bar must start with Standard 4.11: **Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a**

client. ABA Standard 4.11. That standard must be the starting point because mitigating and aggravating circumstances are only considered after a baseline standard is determined. And, that standard must be the baseline because the admitted and uncontroverted evidence is that Respondent made conscious choices and took specific action to convert and misappropriate the marital assets of her client and Mr. Miller to her own use. Respondent failed to deliver all of the marital assets to her client and Mr. Miller and has, even to this day, failed to do so. Respondent's acts and omissions caused actual injury to her client and to a third party within the meaning of ABA Standard 4.11.

Suspension, which is discussed as a baseline sanction in ABA Standard 4.12, is not applicable in this case because Respondent did not merely commingle her own money with client and third party funds; instead, she intentionally took and spent her client's money out of her trust account and used it to pay her personal and office utility and phone bills.

Under the ABA Standards, once a baseline is established, aggravating and mitigating circumstances should be considered. The aggravating circumstances evident in the instant case and found to be present by the Disciplinary Hearing Panel include:

9.22(a) Prior Disciplinary Offenses

As discussed *supra*, Respondent has previously been disciplined and placed on probation by this Court for professional misconduct very similar in nature to the conduct at issue in this case.

9.22(b) Dishonest or Selfish Motive

Respondent admitted that she wrote checks from her trust account to pay personal and office expenses, including utility and telephone bills.

9.22(c) Pattern of Misconduct

Respondent wrote several checks from her trust account over a period of weeks and used the proceeds for her own use.

9.22(d) Multiple Offenses

The Disciplinary Hearing Panel found and the record evidence supports a finding that Respondent violated various rules in her representation of Ms. Kimmel and the Gorhams, including Rule 4-1.1 (competence); Rule 4-1.3 (diligence); Rule 4-1.4 (communication); Rule 4-1.15 (safekeeping property); and Rule 4-8.4(c) (conduct involving deceit and misrepresentation).

9.22(j) Indifference to Making Restitution

Respondent has failed, to this day, to make full restitution of the marital assets to her client Ms. Kimmel and to Mr. Miller

The Disciplinary Hearing Panel also found the presence of the following mitigating circumstances:

9.32(c) Personal and Emotional Problems

Respondent testified that she is going through a divorce and is a single parent caring for her child. **App. 27-28 (T. 91, 94).**

9.32(e) Disclosure to the Disciplinary Board and Cooperative Attitude toward the Disciplinary Proceedings.

Respondent has generally cooperated with the OCDC and the Disciplinary Hearing Panel.

The Disciplinary Hearing Panel recommended that Respondent be disbarred. In an attorney discipline case, the disciplinary hearing panel's findings of fact, conclusions of law and recommendation are advisory in nature. This Court reviews the evidence *de novo*, independently determines the credibility, weight, and value of the testimony of the witnesses and draws its own conclusions of law. *In re Snyder*, 35 S.W.3d 380 (Mo. banc 2000); *In re Oberhellman*, 873 S.W.2d 851, 852 (Mo. banc 1994). Nevertheless, the Panel's decision in this case recommending that Respondent be disbarred is consistent with the preponderance of the record evidence and the controlling case law.

With regard to the Kimmel complaint, the Panel properly found that Respondent violated the following Missouri Rules of Professional Conduct:

- Rule 4-1.1 on competence in that Respondent failed to correctly calculate the money owed to Ms. Kimmel and Mr. Miller and failed to deliver the correct amount to them;
- Rule 4-1.3 on diligence by failing to deliver the money owed to Ms. Kimmel and Mr. Miller in a timely fashion;
- Rule 4-1.4 on communication by failing to communicate with her client about the money owed and failing to communicate with Mr. Miller and his counsel about the money owed to Mr. Miller;

- Rule 4-1.15 by failing to safekeep money owed to Ms. Kimmel and Mr. Miller, instead utilizing a portion of the money for other improper purposes; and
- Rule 4-8.4(c) by engaging in conduct involving deceit and misrepresentation.

With regard to the Gorham complaint, the Panel properly found that Respondent violated the following Missouri Rules of Professional Conduct:

- Rule 4-1.1 on competence by failing to provide opposing counsel with the information requested in discovery so as to avoid entry of a judgment against her clients; and
- Rule 4-1.3 on diligence by failing to provide opposing counsel with the information requested in discovery so as to avoid entry of a judgment against her clients.

App. 152-154.

In determining the appropriate level of discipline, the Panel found the presence of both aggravating and mitigating circumstances. In aggravation, the Panel found the following: prior disciplinary offenses; a dishonest or selfish motive; a pattern of misconduct; multiple offenses and indifference to making restitution to the injured parties. In mitigation, the Panel found the following: personal or emotional problems and a cooperative attitude toward the disciplinary proceedings and disclosure to the disciplinary body. **App. 152-154.** The Panel recommended that Respondent be disbarred. **App. 155.**

CONCLUSION

Respondent engaged in professional misconduct involving competence, diligence, communication, safekeeping property, deceit and misrepresentation in her handling of client and third party funds in the Kimmel/Miller divorce proceedings. Respondent also engaged in professional misconduct involving competence and diligence in her representation of the Gorhams in litigation that resulted in the entry of a default judgment against her clients. The presence of aggravating factors, including (i) a prior history of discipline involving similar misconduct, (ii) a pattern of misconduct, (iii) a selfish and deceitful motivation driving her actions, and (iv) an indifference to making full restitution to those injured by her actions, require disbarment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2010, two copies of Informant's Brief and a disk containing the Brief in Word format have been sent via First Class United States Mail, postage prepaid, to:

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Alan D. Pratzel

CERTIFICATION: RULE 84.06(c)

I hereby 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 6,226 words, according to Microsoft Word, which is the word processing system used to prepare this Brief; and
4. That Trend Micro Anti-Virus software was used to scan the disk for viruses and that it is virus-free.

Alan D. Pratzel