

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

KENNETH A. LEEDS,

Respondent.

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)

Supreme Court #SC93930

INFORMANT'S BRIEF

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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, R.S.Mo. (2000).

STATEMENT OF FACTS

PROCEDURAL HISTORY & KEY DATES

April 12, 2000	Admonition – Competence, Scope of Representation, Diligence, and Communication
May 23, 2005	Admonition – Fees, Competence, Candor towards Tribunal, and Impartiality and Decorum of the Tribunal
March 8, 2012	Sworn Statement of Respondent before Region X Disciplinary Committee
June 15, 2012	Information
July 10, 2012	Respondent’s Reply to Information
July 26, 2012	Appointment of Disciplinary Hearing Panel
September 25, 2012	Scheduling Order (Hearing Date: October 18, 2012)
October 23, 2012	Entry of Appearance for Attorneys for Respondent
October 23, 2012	Respondent’s Motion for Continuance and Request to Amend Answer
February 6, 2013	Amended Scheduling Order (Hearing Date: February 28, 2013)
February 7, 2013	Respondent’s Motion for Continuance
February 11, 2013	Respondent’s Consent Motion for Extension of Time to File Amended Answer
February 12, 2013	Order: Respondent’s Motion for Continuance denied; Respondent’s Consent Motion for Extension of Time to File

	Amended answer granted (Hearing Date remains February 28, 2013)
February 19, 2013	Respondent's Amended Answer to Information
February 27, 2013	Respondent's Motion for Continuance
February 28, 2013	E-mail from Presiding Office granting Respondent's Motion for Continuance
March 18, 2013	Respondent's Motion for Protective Order
April 29, 2013	Protective Order granted
April 29, 2013	Second Amended Scheduling Order (Hearing Date: May 9, 2013)
May 8, 2013	Order: Joint Request for Continuance granted (Hearing Date: May 21, 2013)
May 21, 2013	Joint Stipulation of Facts, Joint Proposed Conclusions of Law and Joint Recommendation for Discipline filed
December 16, 2013	DHP Hearing
December 16, 2013	DHP Decision adopting Joint Stipulation of Facts, Joint Proposed Conclusions of Law and Joint Recommendation for Discipline
December 20, 2013	Acceptance of DHP decision by Informant
January 15, 2014	Acceptance of DHP decision by Respondent
January 22, 2014	Statement of Acceptance of DHP Decision
March 27, 2014	Record submitted

BACKGROUND

Respondent, Kenneth A. Leeds, is the principal of the Law Office of Kenneth A. Leeds, P.C. and has been licensed to practice law in the State of Missouri since 1980. **App. 555.** Respondent graduated from John Marshall Law School in 1979. **App. 490.** Upon graduation, Respondent took the Missouri and Illinois bar exams, passed both, and started his own law firm. **App. 490.** Respondent has been a solo practitioner from the time he was licensed to present.

Respondent and his wife met in 1995 and were married in 2007. **App. 492; 518.** Both had children by previous marriage. **App. 492.** Respondent's wife's daughter ("Daughter") had her first child in November 2004 ("J"). **App. 492.** Because of Daughter's substance abuse issues, she was unable to take care of J and Respondent's wife was appointed his legal guardian. **App. 492; 519.** In January 2006, Daughter had a second child ("S"). **App. 492.** Once again, Respondent's wife was appointed as the legal guardian. **App. 492.** Then, in February 2007, Respondent's wife's guardianship over J and S was terminated by mutual consent (and custody returned to Daughter). **App. 493.**

In December 2007 Daughter had her third child. **App. 493.** The child was adopted at birth. **App. 493.**

Between February 2007 and June 2009, although Respondent and his wife no longer had physical custody of J or S, they were still, as a result of Daughter's substance abuse issues, very much involved in their care. **App. 493; 519.** Daughter's substance abuse

continued and she had repeated run-ins with the Madison County Sheriff's Office and Granite City Police. **App. 493.**

In June 2009, Daughter had her fourth child ("A"). **App. 493.** Daughters continued substance abuse led to her imprisonment in July 2009. **App. 494.** On June 6, 2009, Respondent and his wife took custody of J, S, and A. **App. 494; 523.** Daughter was released from prison sometime between July 2009 and February 2011.

Then, on February 6, 2011, J and S were caught in a house fire while visiting Daughter. **App. 496.** Both children died (Mother survived). **App. 496; 524.** Respondent and his wife legally adopted A on April 5, 2011. **App. 496; 525.**

On or about February 1, 2013, Respondent was evaluated by a licensed medical professional. **App. 562.** Respondent was diagnosed as suffering from Major Depressive Disorder (sparked by the profound traumas of February 6th).¹ Respondent continues to receive regular treatment from the medical professional. **App. 531, 562.**

DISCIPLINARY HISTORY

Respondent has a history of discipline. On April 13, 2000, Informant issued Respondent a Letter of Admonition for violation of Rule 4-1.1 (competence), Rule 4-1.2 (scope of representation), Rule 4-1.3 (diligence), and Rule 4-1.4 (communication). **App. 556.** Respondent was admonished again on May 23, 2005 for violation of Rule 4-1.1 (fees), Rule 4-3.3 (candor towards the tribunal), and Rule 4-3.5 (impartiality and decorum of the tribunal). **App. 556.**

¹ See medical records filed under seal with the Supreme Court on March 27, 2014.

RESPONDENT'S TRUST ACCOUNT

At all times relevant herein, Respondent maintained and used an attorney trust account with Bank of America, Account No. ...0782, in the name of Kenneth A. Leeds, P.C. ("Trust Account"). **App. 377; 556.**

On January 9, 2012, Respondent self-reported an overdraft on his Trust Account caused by a \$7,964.89 settlement check Respondent issued to E.W. on July 6, 2010. **App. 5-6; 95-97; 377; 513; 556;.** E.W. had not presented her check for payment since receiving it some 18 months prior, and when presented for payment on January 9, 2012, the funds were no longer available. **App. 377; 513; 556-557.** Respondent provided the Office of Chief Disciplinary Counsel ("OCDC") with a copy of the overdraft report from Bank of America, which included a copy of the settlement check that caused the overdraft. **App. 557.**

On January 10, 2012, the OCDC received the overdraft report for Respondent's Trust Account directly from Bank of America. **App. 377; 557.** The report was sent in compliance with the regulatory requirements set forth in amended Missouri Supreme Court Rule 4-1.15 and the related Advisory Committee Regulations effective January 1, 2010. The overdraft report indicated that Respondent's Trust Account had been overdrawn on December 29, 2011 in the amount of \$3,484.04. **App. 377; 557.** On January 10, 2012, a letter was issued by the OCDC to Respondent requesting records from his Trust Account; specifically, copies of all Trust Account statements from June 1, 2010 through the current date, copies of all items presented against the Trust Account and appearing on those

statements, and copies of all items deposited to the Trust Account, including deposit slips appearing on those statements. **App. 377-378; 557.**

On January 23, 2012, Respondent provided the OCDC with copies of his Trust Account statements from June 1, 2010 through December 31, 2011. **App. 378; 557.** The OCDC's investigator then prepared a trust account audit spreadsheet ("Trust Account Audit") with the bank records provided by Respondent. **App. 378; 558.** The Trust Account Audit listed checks and deposits from June 1, 2010 through December 30, 2011. **App. 300-310; 378; 558.**

On February 24, 2012, the OCDC requested that Respondent produce all settlement sheets and/or client billing records for deposits made to his Trust Account after June 1, 2011. **App. 378; 558.** On March 2, 2012, Respondent provided the OCDC with several, but not all, of the settlement sheets requested. **App. 378; 558.** On March 7, 2012, Respondent provided the OCDC with additional settlement sheets. **App. 378; 558.** In addition, he explained why any outstanding settlement sheets had yet to be, or could not be, provided. **App. 378; 558.**

On March 8, 2012, Respondent's sworn statement was taken on behalf of the Chief Disciplinary Counsel at the offices of Keefe & Brodie, 222 S. Central Ave., Ste. 708, Clayton, Missouri, 63105. **App. 379; 558.** Respondent testified to the following regarding his Trust Account:

1. On or about October 14, 2010, Respondent deposited a settlement check from MU payable to OTC in the amount of \$2,900.00. **App. 35; 320; 380; 558.** On or about

November 15, 2010, Respondent then issued a check payable to OTC in the amount of \$1,733.34, which represented their portion of the settlement funds. **App. 35; 321; 380; 558.** On October 29, 2010, Respondent's Trust Account balance fell to \$435.70, an amount insufficient to hold OTC's settlement funds (\$1,733.34) in trust. **App. 35-36; 300-310 (p. 210); 380; 558;**

2. On or about November 26, 2010, Respondent issued a check to W.M. in the amount of \$2,000.00. **App. 36; 322; 380; 559.** The check was an advance to W.M. to be repaid when W.M.'s settlement funds were received/deposited. **App. 36; 322; 380; 559;**
3. On or about November 10, 2010, Respondent deposited a settlement check from LM payable to S.S. in the amount of \$30,124.00. **App. 38; 323; 380; 559.** On or about January 11, 2011 Respondent deposited a second settlement check from LM payable to S.S. in the amount of \$4,207.57. **App. 39; 324; 380; 559.** On or about August 19, 2011 Respondent then issued a check to S.S. in the amount of \$21,194.43, which represented her portion of the settlement proceeds. **App. 39; 324; 381; 559.** On January 14, 2011, Respondent's Trust Account balance fell to \$17,085.00, an amount insufficient to hold S.S.'s settlement funds (\$21,194.43) in trust. **App. 41-42; 300-310 (p. 211); 381; 559;**
4. On or about December 28, 2010, a check was issued to M.B. in the amount of \$1,000.00. **App. 42; 328; 381; 559;.** The check was an advance to M.B. to be repaid when M.B.'s settlement funds were received/deposited. **App. 328; 342; 381; 559;**

5. On or about March 25, 2011, Respondent deposited a settlement check from AF payable to A.T. in the amount of \$4,000.00. **App. 44; 330; 381; 559.** On or about June 27, 2011 Respondent then issued a check to A.T. in the amount of \$2,621.00, which represented his portion of the settlement funds. **App. 44; 331; 381; 559.** On April 4, 2011, Respondent's Trust Account balance fell to \$939.65, an amount insufficient to hold A.T.'s settlement funds (\$2,621.00) in trust. **App. 44-45; 300-310 (p. 212); 381; 559;**
6. On or about April 25, 2011, Respondent deposited three "med pay" settlement checks from AI payable to S.E. totaling \$5,000.00. **App. 46; 333-335; 381; 559.** On or about October 19, 2011, Respondent deposited a fourth settlement check from GC payable to S.E. in the amount of \$36,666.67. **App. 46-47; 336; 381; 559-560.** On or about October 24, 2011, Respondent then issued a check to S.E. in the amount of \$27,661.49, which represented S.E.'s portion of the settlement proceeds, but failed to take into consideration the three prior "med pay" payments from AI (in the amount of \$5,000.00). **App. 47; 337; 381; 560.** On June 1, 2011, Respondent's Trust Account balance fell below \$5,000.00, an amount insufficient to hold S.E.'s remaining settlement funds in trust. **App. 48-49; 300-310 (p. 213); 381-382; 560;**
7. On or about November, 2011, Respondent advanced H.S. \$2,000.00 from his Trust Account to be repaid when H. S.'s settlement funds were received/deposited. **App. 60; 351; 383; 560;**
8. On or about December 19, 2011, Respondent deposited a settlement check from SI payable to A.S. in the amount of \$5,000.00. **App. 61-62; 355; 383; 560.** On

December 29, 2011, Respondent's Trust Account was overdrawn in the amount of \$3,484.04, and fell below \$5,000.00, an amount insufficient to hold A. S.'s settlement funds in trust. **App. 62; 300-310 (p. 218); 383; 560;**

9. On or about April 5, 2011, Respondent deposited personal funds in the amount of \$9,000.00. **App. 63-64; 360; 384; 560;**

10. On or about October 5, 2011, Respondent deposited a "med pay" settlement check from LM payable to L.S. in the amount of \$5,000.00. **App. 359, 384; 560.** On December 29, 2011, Respondent's Trust Account was overdrawn in the amount of \$3,484.04 and fell below \$5,000.00, an amount insufficient to hold L.S.'s settlement funds in trust. **App. 300-310 (p. 218); 384; 560;**

11. On or about June 15, 2010, Respondent issued a check from his Trust Account payable to J.O. in the amount of \$1,000.00. **App. 65; 363; 384; 560.** The check was an advance to be repaid when J.O.'s settlement funds were received/deposited. **App. 65-66; 384; 560;**

12. On or about June 20, 2011, Respondent deposited a settlement check from AFI on behalf of E.B. in the amount of \$18,200.00. **App. 66; 366; 384; 561.** On or about June 27, 2011, Respondent then issued a check to E.B. in the amount of \$15,931.28, which represented E.B.'s portion of the settlement proceeds. **App. 66-67; 367; 384; 561.** On June 24, 2011, Respondent's Trust Account balance fell to \$14,209.13, an amount insufficient to hold E.B.'s settlement funds (\$15,931.28) in trust. **App. 67; 300-310 (p. 213); 384; 561;**

13. On or about June 1, 2010, Respondent received settlement funds in the amount of \$9,631.28 payable to J.T. **App. 369.** On or about September 9, 2011 (approximately 15 months after receiving J.T.'s settlement funds), Respondent issued a check to KS on behalf of J.T. in the amount of \$3,489.39. **App. 66; 370; 384-385; 561.** On June 18, 2010, and on many subsequent dates, Respondent's Trust Account balance fell below an amount sufficient to hold J.T.'s settlement funds in trust. **App. 68-69; 300-310 (p. 208); 384; 561;**

14. On or about May 16, 2010, Respondent disbursed from a payment from his Trust Account to "Crd 4104," which Respondent testified is a personal credit card of his Wife. **App. 69; 371; 385; 561;**

15. On or about August 25, 2010, a check was presented for payment from Respondent's Trust Account by the State of Missouri, Department of the Treasury in the amount of \$1,500.46 which Respondent testified was his "quarterly [tax] payment"². **App. 70; 373; 385; 561;** and

16. On or about July 2, 2010, Respondent deposited personal funds in the amount of \$7,000.00 into his Trust Account. **App. 70-71; 374; 385; 561;**

As of March 8, 2012, Respondent had retained the bonded accounting firm of Brown, Smith & Wallace, LLC to manage and monitor his client trust account. **App. 13; 515-516; 562;.**

² Respondent testified that this was an inadvertent mistake and that the payments should have instead been made from his "operating account."

Throughout the OCDC's investigation, Respondent has acted in a timely and good faith manner in cooperating with the OCDC. **App. 514-515; 562.** Furthermore, none of Respondent's clients are owed any money as of the date of signing of the Joint Stipulation. **App. 562.**

THE DISCIPLINARY HEARING PANEL DECISION

On December 16, 2013, the Disciplinary Hearing Panel accepted the Joint Stipulation of Facts, Joint Proposed Conclusions of Law and Joint Recommendation for Discipline submitted to it by the parties, which found that:

- Respondent violated Rule 4-1.8 (e) by advancing settlement funds to clients (*see* ¶¶ 2, 4, 7, and 11 above). **App. 563;**
- Respondent violated Rule 4-1.15 (c)³ by commingling personal and client funds in his Trust Account and by failing to appropriately safeguard his client's property (*see* ¶¶ 1, 3, 5 – 6, 8 – 10, and 12 – 16 above). **App. 565;** and
- Respondent violated Rule 4-1.15(d)⁴ by failing to maintain and preserve complete records of client trust accounts that expressly reflect the date, amount, source and explanation of all receipts, withdrawals and disbursements of funds or other property of clients or other parties by being unable to fully comply with the

³ Rule 4-1.15 (c)(2012)(amended effective July 1, 2013). All references to Rule 4-1.15 (c) from here on out shall be in reference to this version of said rule.

⁴ Rule 4-1.15 (d)(2012)(amended effective July 1, 2013). All references to Rule 4-1.15 (d) from here on out shall be in reference to this version of said rule.

OCDC's request to produce all settlement sheets and/or billing records for deposits made into Trust Account after June 1, 2011. **App. 565.**

Following an analysis of relevant decisions from this Court and the *ABA's Standards for Imposing Lawyer Sanctions*, the Panel recommended that this Court issue a one year actual stayed suspension and two years of probation. **App. 565.** Respondent accepted the Panel's recommendation on January 15, 2014. **App. 612-613.** Informant accepted the Panel's recommendation on December 20, 2013. **App. 611.**

POINT RELIED ON

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

(A) PROVIDING FINANCIAL ASSISTANCE TO CLIENTS IN CONNECTION WITH PENDING LITIGATION IN VIOLATION OF RULE 4-1.8 (e);

(B) FAILING TO HOLD PROPERTY OF CLIENTS IN A LAWYER'S POSSESSION IN CONNECTION WITH A REPRESENTATION SEPARATE FROM THE LAWYER'S OWN PROPERTY IN A CLIENT TRUST ACCOUNT AND FAILING TO APPROPRIATELY SAFEGUARD OTHER PROPERTY, BOTH IN VIOLATION OF RULE 4-1.15 (c); AND

(C) FAILING TO MAINTAIN AND PRESERVE COMPLETE RECORDS OF CLIENT TRUST ACCOUNTS FOR A PERIOD OF AT LEAST FIVE YEARS IN VIOLATION OF RULE 4-1.15

(d).

Rule 4-1.8, Rules of Professional Conduct

Rule 4-1.15, Rules of Professional Conduct

POINT RELIED ON

II.

PREVIOUS MISSOURI SUPREME COURT DECISIONS AND THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST PROBATION IS THE APPROPRIATE SANCTION IN THIS CASE WHERE RESPONDENT ENGAGED IN A SERIES OF ETHICAL VIOLATIONS INVOLVING ADVANCING SETTLEMENT FUNDS TO CLIENTS, COMMINGLING PERSONAL AND CLIENT FUNDS IN HIS TRUST ACCOUNT, FAILING TO APPROPRIATELY SAFEGUARD HIS CLIENTS' PROPERTY, AND FAILING TO MAINTAIN AND PRESERVE COMPLETE RECORDS OF CLIENT TRUST ACCOUNTS.

In re Wiles, 107 S.W.3d 228 (Mo. banc 2003)

In re Coleman, 295 S.W.3d 857 (Mo. banc 2009)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

(A) PROVIDING FINANCIAL ASSISTANCE TO CLIENTS IN CONNECTION WITH PENDING LITIGATION IN VIOLATION OF RULE 4-1.8 (e);

(B) FAILING TO HOLD PROPERTY OF CLIENTS IN A LAWYER'S POSSESSION IN CONNECTION WITH A REPRESENTATION SEPARATE FROM THE LAWYER'S OWN PROPERTY IN A CLIENT TRUST ACCOUNT AND FAILING TO APPROPRIATELY SAFEGUARD OTHER PROPERTY, BOTH IN VIOLATION OF RULE 4-1.15 (c); AND

(C) FAILING TO MAINTAIN AND PRESERVE COMPLETE RECORDS OF CLIENT TRUST ACCOUNTS FOR A PERIOD OF AT LEAST FIVE YEARS IN VIOLATION OF RULE 4-1.15

(d).

Violation of Rule 4-1.8 (e). Respondent admits he advanced settlement funds to clients before said funds were actually on deposit between June 2010 and November 2011. **App. 36; 42; 60; 65; 66; 380-81; 383-384; 559-560;.** By that conduct, Respondent violated Rule 4-1.8 (conflict of interest: prohibited transactions).

Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. Comment [10] to Rule 4-1.8. Rule 4-1.8 (e) provides, in pertinent part, that:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation. Rule 4-1.8 (e).

Once the attorney and client relationship begins, the attorney sustains a trust relationship to the client similar to that between a guardian and ward or a principal and agent (*i.e.* a fiduciary relationship). *Morton v. Forsee*, 155 S.W. 765, 775[3] (Mo. banc 1913); *see also In re Oliver*, 285 S.W.2d 648, 655 (Mo. banc 1956)(noting the relationship between attorney and client is highly fiduciary and very delicate, exacting and confidential in character, requiring a very high degree of fidelity and good faith on the attorney's part). The stringency of the standard that an attorney may not obtain a self-advantage from subject-matter committed to him by the client serves to ensure the integrity of that relationship. *Jo B. Gardner, Inc. v. Beanland*, 611 S.W.2d 317, 320[3-5] (Mo. Ct. App. W.D. 1980).

Here, Respondent failed to ensure the integrity of the attorney-client relationship when he advanced settlement funds to clients.

Violation of Rules 4-1.15 (c) & (d). Respondent admits to commingling personal and client trust funds in his Trust Account between May 2010 and August 2010, and to failing to appropriately safeguard his client's property between June 2010 and January

2012. **App. 35-36; 41-42;44-45; 48-49; 62; 63-64; 67; 68-69; 70-71; 300-310 (p. 218); 380-385; 558-561;**. Respondent also admits to failing to maintain and preserve complete records of client trust accounts between June 2010 and January 2012.. **App. 565.** By that conduct, Respondent violated Rule 4-1.15 (safekeeping property).

A lawyer should hold property of others with the care required of a professional fiduciary. Comment [1] to Rule 4-1.15(2012)(amended effective July 1, 2013). Rule 4-1.15 itself provides, in pertinent part, that:

(c) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Client or third party funds shall be kept in a separate account designated as a "Client Trust Account"...Other property shall be identified as such and appropriate safeguarded. Rule 4-1.15 (c).

All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Comment [1] to Rule 4-1.15 (2012)(amended effective July 1, 2013).

Rule 4-1.15 also provides, in pertinent part, that:

(d) Complete records of client trust accounts shall be maintained and preserved for a period of at least five years (1) after termination of the representation or (2) after the date of the last disbursement of funds, whichever is later. Rule 4-1.15 (d).

A lawyer should maintain, on a current basis, books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules

established by law or court order. Comment [1] to Rule 4-1.15(2012)(amended effective July 1, 2013).

Here, Respondent failed to hold property of others with the care required of a professional fiduciary when he commingled personal and client trust funds in his Trust Account and repeatedly let his Trust Account fall below the balance necessary to hold client settlement funds in trust. Respondent was also unable to fully comply with the OCDC's request to produce all settlement sheets and/or client billing records for deposits made into his Trust Account after June 1, 2011, and thus, failed to maintain and preserve complete records of client trust accounts.

ARGUMENT

II.

PREVIOUS MISSOURI SUPREME COURT DECISIONS AND THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST PROBATION IS THE APPROPRIATE SANCTION IN THIS CASE WHERE RESPONDENT ENGAGED IN A SERIES OF ETHICAL VIOLATIONS INVOLVING ADVANCING SETTLEMENT FUNDS TO CLIENTS, COMMINGLING PERSONAL AND CLIENT FUNDS IN HIS TRUST ACCOUNT, FAILING TO APPROPRIATELY SAFEGUARD HIS CLIENTS' PROPERTY, AND FAILING TO MAINTAIN AND PRESERVE COMPLETE RECORDS OF CLIENT TRUST ACCOUNTS.

The purpose of discipline is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession. *In re Kazanas*, 96 S.W.3d 803, 807-08 (Mo. banc 2003). Those twin purposes may be achieved both directly, by removing a person from the practice of law, and indirectly, by imposing a sanction which serves to deter other members of the bar from engaging in similar conduct. *Id.* (citing *In re Littleton*, 719 S.W.2d 772, 777 (Mo. banc 1986)).

This Court often refers to the American Bar Association's *Standards for Imposing Lawyer Sanctions* (hereinafter referred to as the "ABA Standards") in determining appropriate (*i.e.* direct or indirect) discipline. The ABA *Standards* recommend baseline

discipline for specific acts of misconduct taking into consideration the duty violated, the lawyer's mental state, 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* (p.6). The *ABA Standards* "assume that the most important ethical duties are those obligations which a lawyer owes to clients" and provides that the ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct among a number of violations. *ABA Standards* (p.5 – 6).

Here, Respondent's most serious violation was breaching the duty of loyalty to his clients by failing to preserve the property of those clients. Failure to preserve a client's property is addressed in ABA Standard 4.1, and having considered the case at bar, Informant believes that Standard 4.12 is applicable: **Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.** ABA Standard 4.12. Informant and Respondent agreed to jointly recommend stayed suspension with probation because Respondent's misconduct appeared to originate from lack of appreciation for his ethical obligations regarding client money, and, in large part, from personal/emotional/mental problems of the Respondent, but not from an intentional or knowing violation of the rules with a profit motive.

There are two reported decisions where this Court has ordered probation in addressing professional conduct. In the first case, this Court ordered probation for Missouri Attorney Stanley Wiles. *In re Wiles*, 107 S.W.3d 228 (Mo. banc 2003). Attorney Wiles

had been previously admonished for four diligence violations, five communication violations, one safeguarding client property violation, and one violation for engaging in conduct prejudicial to the administration of justice. *Id.* at 229. And, he had received two more admonitions from Kansas disciplinary authorities. *Id.* The opinion did not describe the new conduct that led to discipline, other than noting that Mr. Wiles had been censured in Kansas. *Id.* at 228.

The more recent decision involving probation provides additional guidance. In that opinion, this Court granted probation to Missouri attorney Larry Coleman. *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009). Attorney Coleman had been admonished in 1990 for violations involving communication and unreasonable fees. *Id.* at 859. Later, in 1999, he was admonished again for diligence and communication violations. *Id.* Finally, in 2008, the Court publically reprimanded him for “violations regarding diligence, unreasonable fees and conduct prejudicial to the administration of justice.” *Id.* In the *Coleman*, this Court found that attorney Coleman violated several rules, including Rule 4-1.15 (c) by commingling his own funds with client funds in his trust account and by failing to keep adequate accounting records. *Id.* at 866.

Most trust account violations result in disbarment, suspension, or stayed suspension with a period of probation intended to improve the attorney’s practice methods. The *Coleman* and *Wiles* decisions support the use of probation for Respondent in this case with regard to his violation of the safekeeping property rule. Informant also firmly supports the concept of retraining lawyers while on probation and believes that probationary conditions are, in many cases, more likely to improve lawyer’s practices (and thereby protect the

public).⁵ Although Respondent put clients' funds at clear risk over a period of several months, and his records and accounting methods were in shambles, his clients have never complained.

The failure of an injured client to complain is considered neither aggravating nor mitigating, per ABA Standard 9.4 (f). But, in a 2008 majority opinion, this Court considered the fact that "the client from whose account the funds were taken not only did not complain, but [have] chosen to remain Mr. Belz's client ever after learning of his misconduct." *In re Belz*, 258 S.W.3d 38 (Mo. banc 2008). During the period covered by the Information, not a single client has filed a bar complaint against Respondent; in fact, many of them are still Respondent's clients today. **App. 498.**

Informant believes that a stayed suspension with probation is an adequate and appropriate sanction for Respondent. First, no evidence of intent to either steal or borrow from Respondent's Trust Account has been discovered. *See* ABA Sanction Standard 9.32

⁵ Should this Court decide to place Respondent on probation, then Informant believes that the following probationary terms would be appropriate: probation monitor (OCDC); quarterly reporting responsibility; compliance with the Rules of Professional Conduct; attendance at Ethics School; obtaining legal malpractice insurance; obtaining a mental health evaluation and treatment (including quarterly monitoring by the OCDC); client trust account monitor (Brown, Smith & Wallace, LLC); compliance and quarterly reporting regarding the proper handling of client and third party funds; client trust account audits by the OCDC; costs of probation to be paid by Respondent. **App. 569-577.**

(a). Informant discovered no evidence that Respondent attempted to deceive his clients or the OCDC. Second, and perhaps most importantly, during the period covered by the Information, Respondent experienced several profound traumas sparking a major depression, which was, ultimately, the single largest contributor to his professional misconduct.⁶ The combination of traumatic events, major depression, and lack of appropriate treatment at the time caused Respondent to be incapable of appropriately handling his business affairs.⁷ Third, Respondent has admitted to his misconduct with regard to the improper mishandling of his Trust Account and has, upon repeated request, provided Informant with the information needed to investigate this case. *See* ABA Sanction Standard 9.32 (e). Fourth, Respondent has already taken steps to correct his practices, including hiring Brown, Smith & Wallace, LLC to manage and monitor his client trust account, and seeing a licensed medical professional for his Major Depressive Disorder, which, if continues, should not cause any additional problems for Respondent from a professional standpoint.⁸ And finally, although not a mitigating factor, Informant submits that it is significant that no discernible harm was brought upon Respondent's clients by virtue of his conduct.

On the basis of its analysis of this Court's decisions and the guidance provided by the *ABA Standards*, the Panel recommended that this Court issue a one year stayed

⁶ *See* medical records filed under seal with the Supreme Court on March 27, 2014

⁷*Id.*

⁸*Id.*

suspension and two years of probation. Informant concurs in the Panel's well-reasoned recommendation and believes that such is adequate to protect the public and maintain the integrity of the legal profession.

CONCLUSION

Respondent committed professional misconduct by advancing settlement funds to clients in violation of Rule 1.8 (e). Respondent also commingled personal and client trust funds in his Trust Account and failed to appropriately safeguard his client's property, both in violation of Rule 4-1.15 (c), and failed to maintain and preserve complete records of client trust accounts in violation of Rule 4-1.15 (d).

Trust accounting rule violations are inherently serious. Here, the conduct may be remedial through education and the public protected through close monitoring, both of which can be accomplished through a one year actual stayed suspension and two years of probation. The parties jointly recommend that the Court indefinitely suspend Respondent's license with no leave for reinstatement for one year, and order Respondent placed on an twenty-four month term of probation.

Finally, Information asks the Court to tax all costs in this matter to Respondent, including fees pursuant to Rule 5.19(h) in the amount of \$1,500 payable to the Clerk of this Court to the credit of the Advisory Committee Fund.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2014, the Informant's Brief was sent through the Missouri Supreme Court e-filing system to:

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CERTIFICATION: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 5493 words, according to Microsoft Word, which is the word

processing system used to prepare this brief.



Maia Brodie