IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
FREDERICK W. MARTIN, III	)	**Supreme Court #SC89009**
	)	
Respondent.	)	

INFORMANT'S BRIEF

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL

NANCY L. RIPPERGER #40627
STAFF COUNSEL
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400
(573) 635-2240 fax
Nancy.Ripperger@courts.mo.gov

ATTORNEYS FOR INFORMANT

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STATEMENT OF JURISDICTION

This action is one in which Informant, the Office of Chief Disciplinary Counsel, is seeking to discipline an attorney licensed by the Missouri Bar for violations of the Missouri Rules of Professional Conduct. 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

GENERAL INFORMATION REGARDING RESPONDENT

This Court issued a law license to Respondent Frederick William Martin, III, on September 3, 1977. (**Ex. 1, para. 3; Ex. 2, para. 3**). Mr. Martin's license is in good standing. (**Ex. 1, para. 4; Ex. 2, para. 4**). Mr. Martin has no prior disciplinary history.

After graduating from law school in 1977, Mr. Martin moved to Warrensburg, Missouri and worked for Legal Aid of Western Missouri until late 1981. (**Tr. 212**). In early 1982, Mr. Martin moved to West Plains, Missouri and became a solo practitioner. (**Tr. 213**). Initially, Mr. Martin primarily handled matters on a contract basis for Legal Aid of Southwest Missouri and for the Office of State Public Defender. (**Tr. 215-16**). Mr. Martin has not contracted with Legal Aid or the State Public Defender since the mid-1990s. (**Tr. 216**). Mr. Martin currently handles a variety of matters for clients and has a high volume practice. (**Tr. 213-14, 216**). Mr. Martin does not have secretarial support and since 1989 has worked out of his home. (**Tr. 213-14**).

Mr. Martin is delinquent in the payment of both state and federal taxes from the mid 1990s forward. Mr. Martin estimates that he owes over $100,000 to the federal government in back taxes and between $15,000 and $20,000 to the State in back taxes. **(Ex. 25, pp. 11-12).**

CRONE/OWENS COMPLAINT

Ms. Robin Crass was involved in an automobile accident in August 1999. (**Tr. 35-36; Ex. 28, p. 53**). Rebekah Crone[1] was a passenger in Ms. Crass' automobile and sustained various injuries as a result of the accident, including injuries to both her knees. (**Tr. 35-36**). The driver of the other car was Angela Brown. (**Ex. 28, p. 63**).

On November 29, 1999, Rebekah and her mother, Kamala Crone,[2] brought suit against Angela Brown for Rebekah's pain and suffering and for the bills Kamala incurred for Rebekah's medical treatment. (**Ex. 28; Ex. 29, pp. 63-65**). The Court appointed Kamala as Next Friend for Rebekah, as Rebekah was only fourteen when the Crones filed suit. (**Tr. 36; Ex. 29, pp. 56-57**). Mr. H. Lynn Henry and Mr. Ray Williams originally represented the Crones. (**Tr. 219; Ex. 29, pp. 63-65**). While representing the Crones, Mr. Henry and Mr. Williams provided interrogatory answers to defendant in which they alleged Rebekah's medical bills totaled $8,384.28, including a physical therapy bill of $5,010.98. (**Ex. 13; Ex. 30, pp. 11-12**).

On January 15, 2002, the Court allowed Mr. Henry and Mr. Williams to withdraw from representing the Crones due to a conflict of interest.[3] (**Ex. 28; Ex. 29, pp. 24-27**).

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[1] Ms. Crone is now married and is presently known as Rebekah Owens. (**Tr. 35-36**).

[2] To distinguish Kamala Crone from Rebekah Crone, Informant will refer to these individuals by their first names in the Brief.

[3] Mr. Henry and Mr. Williams also represented Robin Crass in a separate lawsuit brought against Ms. Brown for injuries Ms. Crass suffered as a result of the same car

The Crones then hired Mr. Martin to represent them on or before May 2002. (**Tr. 39; Ex. 29, pp. 22-23**).

The Court scheduled a pretrial conference for November 3, 2003. (**Ex. 28**). At the pretrial conference, the Judge acted as a mediator. (**Tr. 224**). Mr. Martin participated in the mediation along with two attorneys representing Ms. Brown and Ms. Crass' insurance companies. (**Tr. 223-24**). Initially, Kamala wanted $26,000 to settle the matter but the insurance companies were only willing to pay $23,000. (**Tr. 224; Ex. 30, pp. 13-14**). During the meditation, Mr. Martin advised Kamala that he might be able to get the medical providers to reduce their bills so that the Crones could keep some of the $8,383.28 the insurance companies were offering to pay to cover Rebekah's medical bills. (**Tr. 41, 224; Ex. 30, pp. 13-14**). Kamala ultimately agreed to settle for the $23,000 offered. (**Tr. 40-41, 224; Ex. 30, p. 14**).

In November and December 2003, prior to receiving court approval of the settlement and prior to receiving any settlement checks, Mr. Martin wrote three checks out of his trust account payable to "cash" totaling $5,600. (**Ex. 1, para. 19; Ex. 2, para.**

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accident. In Ms. Crass' lawsuit, the Court found Ms. Crass partially at fault. (**Ex. 29, pp. 25-26**). Upon motion by Ms. Brown, the Court added Ms. Crass as a third party defendant in the Crone lawsuit. (**Ex. 29, pp. 30-31**).

19). Each check contained the notation "Crone Fee Disbursement" and was endorsed by Mr. Martin.[4] (**Ex. 1, para. 19; Ex. 2, para. 19**).

The parties filed a petition for Approval of the Settlement on or about December 18, 2003. (**Ex. 29. p. 9**). The proposed settlement included:

(a) a cash payment to Kamala, Next Friend of Rebekah, in the amount of $8,596.78 for Rebekah's pain and suffering;

(b) a cash payment to Kamala and Harold Crone,[5] in their capacity as parents and natural guardians of Rebekah, in the amount of $8,384.28 for medical expenses incurred; and

(c) a cash payment for Mr. Martin in the amount of $6,018.94 for attorney's fees and expenses.

(**Ex. 29, pp. 9-11**).

On December 24, 2003, the Court approved the settlement. (**Ex. 29, pp. 4-5**). On December 30, 2003, and January 5, 2004, respectively, the attorneys for the insurance companies forwarded four settlement checks totaling $23,000 to Mr. Martin. (**Ex. 15; Ex. 16**).

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[4] Check number 3133 had an additional endorsement on it to "Mary Seldeel." (**Ex. 34, p. 245**).

[5] Kamala and Harold were divorced. The insurance companies insisted on putting Harold's name on the settlement check, even though he was not a party to the lawsuit, because he was legally responsible for Rebekah's medical bills. (**Tr. 21; Ex. 12, p. 17**).

Shortly after the pretrial conference, Kamala was arrested. (**Ex. 30, p. 17**). Upon arrest, Kamala was housed in a jail in Osceola, Missouri for approximately one year.[6] (**Ex. 30, p. 18**). On or about January 22, 2004, Mr. Martin traveled to Osceola, Missouri to obtain Kamala's endorsement on the settlement checks. (**Ex. 29, p. 2; Ex. 30, pp. 18-19, 25**). While Mr. Martin was at the jail, Kamala informed him that she wanted Rebekah's settlement money ($8,596.78) put into a trust or restricted account whereby Rebekah could not touch the money until she was twenty-one. (**Ex. 30, p. 19**).

At about the same time he met with Kamala, Mr. Martin met with Rebekah and her father and had them endorse the settlement checks. (**Tr. 82-83**). When Rebekah and her father met with Mr. Martin, Mr. Martin told them he would:

(a) deposit the settlement checks into his trust account;

(b) write Rebekah and her mother a check for $8,596.78;

(c) withdraw his attorney's fees from his trust account;

(d) pay any outstanding medical bills; and

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[6] Kamala later pled guilty in federal court to the crime of a felon in the possession of a firearm. (**Ex. 30, p. 7**). After pleading guilty Kamala was transferred to a federal facility in Springfield, Missouri for a short period of time. (**Ex. 30, p. 18**). Finally, in late 2004 Kamala was transferred to a federal prison in Tallahassee, Florida where she remains today. (**Ex. 30, p. 18**).

(e) pay Rebekah and her mother any remaining settlement funds after all medical bills had been paid.

(**Tr. 50**).

On January 30, 2004, Mr. Martin deposited the settlement checks into his trust account. (**Ex. 1, para. 18; Ex. 2, para. 18**). The checks totaled $23,000, but the deposit was only $22,000 as Mr. Martin withdrew $1,000 in cash when making the deposit. (**Ex. 1, para. 18; Ex. 2, para. 18**). After making the $22,000 deposit, Mr. Martin's trust account had a balance of $23,991.13. (**Ex. 1 para. 18; Ex. 2, para. 18**). On January 30, 2004, Mr. Martin was holding $16,981.06 in his trust account for Rebekah and for the payment of Rebekah's medical bills. (**Ex. 1, para. 20; Ex. 2, para. 20**).

On February 5, 2004, Kamala wrote to Mr. Martin. (**Ex. 17a**). In her letter, Kamala again advised Mr. Martin that she wanted Mr. Martin to put Rebekah's money into some type of restricted account or trust and requested that Mr. Martin draw up the necessary paperwork for the trust or restricted account. (**Ex. 17a**). Kamala also advised Mr. Martin that he should give any money remaining after the payment of the medical bills to Rebekah. (**Ex. 17a**). Mr. Martin received the letter but did not respond to Kamala. (**Tr. 227; Ex. 30, p. 24**). Mr. Martin has not communicated with Kamala since she signed the settlement checks on January 22, 2004. (**Ex. 30, p. 30**).

After depositing the checks into his trust account, Mr. Martin did not pay Rebekah. (**Tr. 51-52**). Rebekah began calling Mr. Martin and complaining that she wanted her money. (**Tr. 51-52**). Mr. Martin advised Rebekah of her mother's instructions that the money be placed in a restricted account whereby Rebekah would not

have access to the money until she was twenty-one. (**Tr. 228**). Rebekah was not pleased with her mother's instructions to Mr. Martin. (**Tr. 51-52**). Mr. Martin advised Rebekah that if she waited until she was eighteen Mr. Martin could pay Rebekah the money and Kamala could not stop the payment. (**Tr. 84**). Mr. Martin never advised Kamala of what he had told Rebekah. (**Tr. 229**).

Rebekah turned eighteen on May 13, 2004. (**Tr. 52**). On May 17, 2004, Mr. Martin issued a check to Rebekah for $8,596.78 from his trust account. (**Ex. 1, para. 25; Ex. 2, para. 25**). The check cleared the bank on May 27, 2004. (**Ex. 1, para. 25; Ex. 2, para. 25**). On May 16, 2004, Mr. Martin's trust account had a balance of $5,155.38. (**Ex. 34, p. 307**). On May 17, 2004, Mr. Martin made a $10,791.14 deposit into his trust account. The deposit consisted of $625 in cash and checks totaling $10,166, including a $9,785 check from another client, Kailash Tarneja. (**Ex. 34, pp. 317-320**).

Between January 30, 2004, and May 27, 2004, Mr. Martin should have been holding $16,981.06 in his trust account for the Crones.[7] Mr. Martin's trust account balance was below $16,981.06 from March 2, 2004, until May 27, 2004. (**Ex. 1, para. 23; Ex. 2, para. 23**). During this period of time, Mr. Martin's trust account had a high balance of $15,946.52 on May 17, 2004, and a low balance of $5,155.38 between May 13, 2004, and May 16, 2004. (**Ex. 1, para. 23; Ex. 2, para. 23**). Between March 2, 2004, and May 27, 2004, Mr. Martin wrote ten checks out of his trust account made

[7] The $16,981.06 was comprised of the $8,596.78 award for Rebekah's pain and suffering and the $8,384.28 award for Rebekah's medical bills.

payable to “cash” totaling $13,285.14 (**Ex. 1, para. 23; Ex. 2, para. 23; Ex. 34, p. 28**). All of the checks were endorsed by Mr. Martin. (**Ex. 34, pp. 289, 291, 293, 299, 301, 304, 305, 313, 322, 323**).

Some time after June 2004, Rebekah began receiving phone calls from the physical therapists advising her that her bill had not been paid and they were going to initiate a collection action if she did not make payment arrangements with them. (**Tr. 55**). By this time, Rebekah had moved out-of-state, was recently married, working full-time and attending college full-time. (**Tr. 56**). The calls were very distressing to Rebekah as she did not have the time to deal with the matter nor the money to pay the physical therapy bill. (**Tr. 56**).

Rebekah called Mr. Martin about the matter and he advised her that he needed an itemized bill from the physical therapists before he could pay the bill. (**Tr. 86-88**). Mr. Martin also informed Rebekah that he could not pay the medical providers until Kamala advised him whether any family members needed to be reimbursed for paying any of Rebekah's medical bills. (**Ex. 12, pp. 69-70**). Mr. Martin did not call or write to Kamala about the matter or ask Rebekah or other family members how to contact Kamala. (**Tr. 229; Ex. 12, pp. 35-38, 70**). Rebekah provided Mr. Martin with the itemized bill. (**Tr. 87-88**). The bill showed that health insurance had paid $2,704.20 of the physical therapist’s bill and the remaining bill was only $2,306.78 instead of the $5,010.98 set forth in the interrogatory answers. (**Ex. 7**).

After Rebekah provided Mr. Martin with the itemized bill she called him at least twice a month from June 2004 until September 2005. (**Tr. 57; Ex. 4**). Mr. Martin did

not return any of her calls. (**Tr. 57**). Rebekah talked with her mother and other family members about Mr. Martin's failure to pay the medical bills and asked them for assistance in contacting Mr. Martin. (**Tr. 57**). The physical therapists also called Mr. Martin repeatedly about his failure to pay them. (**Tr. 234**).

After paying Rebekah's award to her on May 27, 2004, Mr. Martin should have had at least $8,384.28 in his trust account to pay Rebekah's medical providers. (**Ex. 1, para. 26; Ex. 2, para. 26**). Mr. Martin's trust account balance was below $8,384.28 between May 27, 2004, and June 28, 2004. (**Ex. 1, para. 27; Ex. 2, para. 27**). During this period of time, Mr. Martin's trust account had a high balance of $5,559.18 on June 24, 2004, and a low balance of $509.18 on June 9, 2004. (**Ex. 1, para. 27; Ex. 2, para. 27**).

In December 2004, Kamala sent Mr. Martin a letter stating that Rebekah had repeatedly tried to get Mr. Martin to pay her the settlement funds that were not needed to pay the medical providers and that Mr. Martin was ignoring Rebekah's request. (**Ex. 30, pp. 26-27**). The letter instructed Mr. Martin to pay the physical therapy bill, pay Kamala's mother $250 for the medical bills she had paid on Rebekah's behalf and to send the remainder of the money to Rebekah. (**Ex. 30, pp. 26-27**). The letter also advised that if Mr. Martin did not "take care of the matter" within ten days Kamala would contact the judge. (**Ex. 30, pp. 26-27**). Kamala advised Rebekah of her actions by a letter dated December 6, 2004. (**Ex. 18**).

On or about January 27, 2005, Rebekah sent a letter to Mr. Martin stating that she expected the physical therapy clinic to receive payment within ten business days and she

also expected to receive a check for the remaining funds within ten business days or she would report Mr. Martin to the judge who had approved the settlement. (**Ex. 18**). She provided Mr. Martin with her address in California. (**Ex. 18**). Rebekah attached Kamala's December 6, 2004, letter to her to the letter she sent to Mr. Martin. (**Ex. 18**).

In late January 2005, Rebekah's father, Harold Crone, contacted attorney Roy Williams about Mr. Martin's failure to use the settlement funds to pay the medical providers. (**Tr. 201; Ex. 18a**). Mr. Williams wrote to Mr. Martin advising him that Rebekah's health care providers were contacting Harold and were wanting payment from him. (**Ex. 18a**). Mr. Martin informed Mr. Williams that the distribution of the settlement proceeds was delayed because he was having trouble communicating with Kamala because she was incarcerated and that he was waiting instructions from Kamala about the payment of the medical providers. (**Tr. 206, 208-09; Ex. 12, p. 77**). Mr. Williams wrote to Mr. Martin again on March 22, 2005, requesting a written accounting of the settlement funds. (**Ex. 18b**). Mr. Martin provided an accounting. (**Tr. 203**). When Mr. Martin provided Mr. Williams with the accounting, he failed to disclose that he no longer had the settlement proceeds in his trust account. (**Tr. 209-10**). On July 12, 2005, Mr. Williams wrote to Mr. Martin again and advised Mr. Martin that he should get the medical providers paid as soon as possible and requested a breakdown of the medical expenses Mr. Martin believed due and owing. (**Ex. 18c**).

On or about September 30, 2005, Rebekah made a complaint about Mr. Martin to Informant. (**Ex. 4**). In his response to the complaint, Mr. Martin advised that:

(a) he knew that the physical therapy bill of $5,010.98 had been paid down to $2,306.78 by insurance;

(b) he was concerned that the health insurance company that had paid a portion of the physical therapy bills might have a subrogation claim against part of the settlement proceeds; and

(c) he had not heard from Kamala but he was more than "ready to pay the bills if someone could give him authority to do so."

(**Ex. 7**).

As part of their investigation, Informant's staff requested that Mr. Martin provide them with his trust records by December 23, 2005. (**Tr. 109-11**). On December 20, 2005, Mr. Martin requested an extension of time until January 10, 2006, to produce the records. (**Ex. 9**). On January 17, 2006, Mr. Martin wrote to Informant's staff apologizing for not producing the trust records stating that he had lost some records and had other bank records stored in St. Louis and he was in the process of gathering the necessary records. (**Ex. 9**). Mr. Martin also stated, "After reviewing this matter, I have decided to pay all of the medical bills presently known to me, with the exception of the subrogation bill to the health insurance company." (**Ex. 9**). Mr. Martin did not produce the requested trust documents. (**Tr. 112**). Accordingly, Informant's staff subpoenaed Mr. Martin to appear for a sworn statement on May 9, 2006, and for him to produce his trust records. (**Ex. 12, p. 5**).

On or about May 5, 2006, Mr. Martin sent: (a) West Plains Imaging a check in the amount of $21.60; (b) Physical Therapy Specialists a check in the amount of $2,306.78;

and (c) Southern Missouri Orthopedic Clinic a check in the amount of $471.10. (**Ex. 34, pp. 592, 594, 597**). These checks totaled $2,799.48 and on May 5, 2006, Mr. Martin's trust account had a balance of $1,387.08. (**Ex. 34, p. 583**). Mr. Martin deposited $3,740.28 into his trust account on May 8, 2006, before the payments to the medical providers had cleared the bank. (**Ex. 34, p. 583**). The deposit consisted of $340 in cash and $3,200 transferred from Mr. Martin's law office account to his trust account. (**Ex. 34, p. 589**).

Between May 27, 2004, when Mr. Martin paid Rebekah's award to her, and before May 5, 2006, when Mr. Martin began paying Rebekah's medical providers, his trust account should have had a balance of at least $8,384.28. (**Ex. 29, pp. 9-11**). Mr. Martin's trust account balance was below $8,384.28 between July 16, 2004, and May 5, 2006. (**Ex. 1, para. 28; Ex. 2, para. 28**). During this period of time, Mr. Martin's trust account had a high balance of $5,184.00 on August 23, 2004, and a low balance of negative $41.45 on December 1, 2005. (**Ex. 1, para. 28; Ex. 2, para. 28**). Mr. Martin wrote eleven checks from his trust account to "cash" totaling $8,000 between July 16, 2004 and May 5, 2006. (**Ex. 1, para. 28; Ex. 2, para. 28; Ex. 34, p. 419**).[8] All of the checks were endorsed by Mr. Martin. (**Ex. 34, pp. 357, 358, 371, 372, 419, 515, 522, 527, 533, 536, 542**). During this same period of time, Mr. Martin also wrote two checks

[8] In the Information, Informant had failed to identify one check written to "cash." (**Ex. 34, p. 515**).

totaling $1,300 out of his trust account to his mother, Lucia Bere. (**Ex. 1, p. 28; Ex. 2, p. 28; Ex. 34, pp. 401, 524**).

On May 9, 2006, Informant's staff took Mr. Martin's sworn statement. (**Ex. 12**). In connection with the taking of Mr. Martin's sworn statement, Informant's staff subpoenaed Mr. Martin's trust account records. (**Ex. 12, p. 5**). Mr. Martin failed to produce the requested trust account records. (**Ex. 12, p. 5**). At the sworn statement, Mr. Martin testified:

(a) he did not keep cancelled checks for this trust account;

(b) he did not maintain client ledgers for this trust account but relied upon notes in the client's file and his memory to determine what funds he was holding for clients;

(c) he avoided keeping amounts in his trust account over $1,000 if he was going to have to hold the money for more than a few days because the IRS had levied on his trust account in the late 1980s or early 1990s;

(d) if he was expecting to hold client funds over a $1,000 for more than a few days he would withdraw the funds from his trust account in small increments of $500, $1,000 or $2,000 cash and placed the cash in his office safe;

(e) when he needed to pay out client funds held in his office safe he would redeposit the funds back into his trust account and write a check out of his trust account;

(f) he had approximately $5,000 of the Crone settlement funds in his office safe; and

(g) he had also recently held money for clients Debra James and Jon Herndon in his office safe.

(**Ex. 12, pp. 5-10, 50-64**).

Mr. Martin denied ever using client funds for personal purposes. (**Ex. 12, p. 60**). After Staff Counsel for Informant finished taking Mr. Martin's sworn statement, she advised him that he violated the Rules of Professional Conduct by:

(a) holding client funds in his office safe;

(b) commingling client funds with his own funds; and

(c) failing to maintain adequate trust account records.

(**Tr. 123**).

On July 28, 2006, Mr. Martin received notification from the health insurance company that it would not be seeking subrogation for the portion of the physical therapy bills it had paid on Rebekah's behalf. (**Ex. 20**).

After an inquiry from Informant's staff in January 2007 regarding whether Mr. Martin had ever disbursed all of the settlement proceeds, Mr. Martin notified Informant that he was holding $5,584.80 in settlement funds and that he could now release the remaining funds to Kamala as he had cleared up the issue of subrogation and insurance liens, but he needed instructions from Kamala about making payment to her. (**Ex. 20**).

Informant's staff contacted Kamala about how she wanted the remaining funds distributed. (**Ex. 21**). On March 3, 2007, Informant's staff forwarded a letter from

Kamala to Mr. Martin in which Kamala advised that Mr. Martin should pay Jean Simmons, Kamala's mother, $500 and the remaining funds should be sent to Rebekah. (**Ex. 21; Ex. 22**).

On or about March 16, 2007, Informant subpoenaed Mr. Martin to appear at Informant's office on April 12, 2007. (**Ex. 26**). On or about March 28, 2007, Mr. Martin issued a check in the amount of $500.00 from his trust account to Kamala's mother. (**Ex. 25**). The check cleared Mr. Martin's trust account on April 11, 2007. (**Ex. 34, p. 651**). On or about March 28, 2007, Mr. Martin issued a check in the amount of $4,892.90 from his trust account to Rebekah.[9] (**Ex. 25**). This check cleared Mr. Martin's trust account on April 27, 2007. (**Ex. 34, p. 651**). In order to have enough money in his trust account for these checks to clear, Mr. Martin deposited $2,578 in cash and deposited a check in the amount of $1,180 from Prima's Canteen & Grill into his trust account on April 4 and 6, 2007. (**Ex. 34, pp. 651-54**).

By agreement of the parties, Mr. Martin's sworn statement was postponed until April 16, 2007. (**Ex. 27**). In his sworn statement, Mr. Martin testified that he had not made any real significant changes to his handling of client trust funds from when Staff Counsel took his statement on May 9, 2006, except that he had not had any large amounts come into his trust account recently. (**Ex. 27, p. 13**). When asked about specific trust

[9] Rebekah received a substantial amount because the health insurance company had paid a portion of the physical therapy bill and the Crones had previously used a $2,000 "med pay" award to pay some of Rebekah's medical bills.

account transactions, Mr. Martin could not identify who the funds belonged to or why the transaction was being made. (**Ex. 26, pp. 73-86**).

INFORMANT'S AUDIT OF RESPONDENT'S TRUST ACCOUNT

Informant's staff obtained bank statements, cancelled checks and select deposit slips from Mr. Martin's trust account for the time periods July 2002 through May 2007 and reviewed these items. (**Ex. 34**). Informant's staff also questioned Mr. Martin about his trust transactions during his April 17, 2007, sworn statement and the disciplinary hearing. The audit revealed, in addition to the information set forth above:

(a) Mr. Martin's trust account had a negative balance from October 22, 2002 through October 23, 2002; from December 24, 2002, through January 9, 2003; and from November 30, 2005 through December 2, 2005;

(b) Mr. Martin wrote six checks on his trust account payable to his mother, Lucia Bere, totaling $4,500;

(c) Mr. Martin deposited a $5,000 check into his trust account from his mother on one occasion[10] and another $200 check from her on another occasion; and

(d) From January 30, 2003, until April 11, 2003, Mr. Martin's trust account had a high balance of $51,849.13 and a low balance of $26,012.07.

(**Ex. 32; Ex. 34, pp. 37, 64, 79, 219, 284, 329, 393, 524, 528, 545, 616**).

[10] When depositing the check, Mr. Martin took $1,000 in cash. (**Ex. 34, p. 393**).

Mr. Martin testified that the checks that he wrote to his mother "were mainly from fees that were earned which were in the trust account. And that was just a method of taking that out of the trust account for my income." (**Tr. 173**). He went on to explain that the checks were made payable to his mother because he was visiting his mother in St. Louis at the time and he probably needed cash to purchase a high dollar item like a suit while in St. Louis. (**Tr. 193**).

Mr. Martin initially testified that he did not believe he had ever deposited checks from his mother into his trust account. (**Tr. 178**). Then, when shown the checks, Mr. Martin testified that the $200 check he deposited into his trust account was "probably a birthday gift" and that he "needed to deposit some money into the trust account to cover expenses on the account." (**Tr. 187**). Regarding the $5,000 check from his mother, Mr. Martin testified, "I imagine what that is, I did some legal work for her. And that was probably not a flat fee, so I didn't actually just cash that through my business account. It was put into the trust account . . . to see what eventually I was going to charge her for that. That's probably what that was." (**Tr. 187-88**).

PROCEDURAL HISTORY

On June 25, 2007, Informant filed an Information charging Mr. Martin with violating (a) Rule 4-1.3 (lack of diligence); (b) Rule 4-1.4 (lack of adequate communication); (c) Rule 4-1.15(a) (failing to maintain adequate trust account records); (d) Rule 4-1.15(b) (improper handling of trust account funds); and (e) Rule 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation). On or

about July 25, 2007, Mr. Martin filed his Answer to the Information. The Advisory Committee appointed a Disciplinary Hearing Panel to hear the matter.

The Disciplinary Hearing Panel conducted a hearing on October 8, 2007. Nancy Ripperger represented Informant. Mr. Martin appeared pro se. The following exhibits were admitted into evidence at the request of Informant: Exhibits 1-14, 16-16a, 17a, 18-30, 32-34 and 37. Mr. Martin offered no exhibits into evidence. Informant put on live testimony from Rebekah Crone Owens, Holly Crass and Fred Martin. Informant also presented Kamala Crone's testimony via deposition. Mr. Martin called Roy Williams to testify and then testified on his own behalf.

The Panel issued its decision on October 24, 2007, whereby it found Mr. Martin violated:

(a) Rule 4-1.3 by failing to act with reasonable diligence and promptness in paying Rebekah's medical expenses;

(b) Rule 4-1.4 by failing to communicate with Rebekah and her parents that he had failed to promptly pay the medical expenses described in the Settlement Statement;

(c) Rule 4-1.15(a) by

a. failing to hold client funds in a separate account,

b. failing to identify and safeguard client funds appropriately,

c. failing to maintain complete records of client funds, and

d. failing to preserve records of client funds for five years after terminating legal representation;

(d) Rule 4-1.15(b) by failing to promptly deliver client funds as promised; and

(e) Rule 4-8.4(c) by using client funds for personal purposes.

The Panel recommended that Mr. Martin be disbarred with leave to apply for reinstatement in one year.

POINT RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE MR. MARTIN'S LICENSE BECAUSE MR. MARTIN FAILED TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS IN VIOLATION OF RULE 4-1.3 IN THAT HE FAILED TO PAY REBEKAH CRONE'S MEDICAL EXPENSES FOR SEVERAL YEARS AFTER RECEIVING THE SETTLEMENT PROCEEDS.

In re Shelhorse, 147 S.W.3d 79, 80 (Mo. banc 2004)

Committee on Professional Ethics and Conduct v. Freed, 341 N.W.2d 757, 759 (Iowa 1983)

In re Hailey,792 N.E.2d 851, 862-63 (Ind. 2003)

Lawyer Disciplinary Board v. Hardison, 518 S.E.2d 101, 103 (W.Va. 1999)

Rule 4-1.3

ABA/BNA Lawyer's Manual on Professional Conduct, *Diligence* § 31:402 (2007)

Michael L. Barkett, *Settle Medical Negligence Cases Efficiently and Successfully*, 34206 NBI-CLE 71 (2006)

POINT RELIED ON

II.

THE SUPREME COURT SHOULD DISCIPLINE MR. MARTIN'S LICENSE BECAUSE HE FAILED TO ADEQUATELY COMMUNICATE WITH THE CRONES IN VIOLATION OF RULE 4-1.4(a) IN THAT HE REFUSED TO RETURN CALLS FROM REBEKAH REGARDING THE PAYMENT OF MEDICAL PROVIDERS AND HE FAILED TO CONTACT KAMALA AFTER SHE ENDORSED THE SETTLEMENT CHECKS.

In re Daw, 910 P.2d 752 (Idaho 1996)

Rule 4-1.4

Rule 4-1.4(a)

POINT RELIED ON

III.

THE SUPREME COURT SHOULD DISCIPLINE MR. MARTIN'S LICENSE BECAUSE MR. MARTIN FAILED TO ADEQUATELY HANDLE CLIENT AND THIRD PARTY FUNDS IN VIOLATION OF RULE 4-1.15 IN THAT HE:

1. **COMMINGLED THE CRONES' SETTLEMENT PROCEEDS WITH HIS OWN FUNDS;**
2. **FAILED TO MAINTAIN COMPLETE TRUST ACCOUNT RECORDS;**
3. **FAILED TO PRESERVE TRUST ACCOUNT RECORDS FOR THE APPROPRIATE TIME PERIOD;**
4. **FAILED TO IDENTIFY CLIENT FUNDS APPROPRIATELY; AND**
5. **FAILED TO PAY REBEKAH CRONE AND HER MEDICAL PROVIDERS FOR SEVERAL YEARS AFTER RECEIVING THE SETTLEMENT PROCEEDS.**

Committee On Professional Ethics and Conduct v. Gross, 326. N.W.2d 272 (Iowa 1982)

Rule 4-1.15

Rule 4-1.15(a)

Rule 4-1.15(b)

ABA/BNA Lawyer's Manual on Professional Conduct, *Misappropriation* § 45:503 (2007)

ABA/BNA Lawyer's Manual on Professional Conduct, *Misappropriation* § 45:1005 (2007)

POINT RELIED ON

IV.

THIS COURT SHOULD DISCIPLINE MR. MARTIN BECAUSE MR. MARTIN ENGAGED IN CONDUCT INVOLVING DISHONESTY IN VIOLATION OF RULE 4-8.4(c) IN THAT HE USED THE CRONE SETTLEMENT PROCEEDS FOR HIS OWN PERSONAL PURPOSES.

Committee on Professional Ethics and Conduct v. Brodsky, 318 N.W.2d 180, 183 (Iowa 1982)

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

Rule 4-8.4(c)

POINT RELIED ON

V.

THIS COURT SHOULD DISBAR MR. MARTIN BECAUSE DISBARMENT IS GENERALLY APPROPRIATE WHEN A LAWYER CONVERTS CLIENT PROPERTY AND BECAUSE THERE ARE AGGRAVATING FACTORS WHICH SUGGEST THAT MR. MARTIN SHOULD RECEIVE THE MOST SEVERE DISCIPLINE.

In re Mentrup, 665 S.W.2d 324, 325 (Mo. banc 1984)

In re Mendell, 693 S.W.2d 76, 78 (Mo. banc 1985)

In re Staab, 785 S.W.2d 551, 554-55 (Mo. banc 1990)

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

Rule 5.28(d)

ABA Standards for Imposing Lawyer Sanctions (1991)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE MR. MARTIN'S LICENSE BECAUSE MR. MARTIN FAILED TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS IN VIOLATION OF RULE 4-1.3 IN THAT HE FAILED TO PAY REBEKAH CRONE'S MEDICAL EXPENSES FOR SEVERAL YEARS AFTER RECEIVING THE SETTLEMENT PROCEEDS.

In matters of attorney discipline, the Disciplinary Hearing Panel's decision is only advisory. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004). This Court reviews the evidence de novo and reaches its own conclusions of law.[11] *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). Professional misconduct is established by a preponderance of the evidence. *Id.*

As a condition of retaining his license an attorney must comply with the Rules of Professional Conduct as set forth in Supreme Court Rule 4. *In re Shelhorse*, 147 S.W.3d at 80. Violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *Id.*

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[11] The standard of review is the same for all of the Points Relied On in this Brief. Consequently, Informant has only set forth the standard for review under Point I of this Brief and incorporates the standard of review into the other Points.

Rule 4-1.3 provides that a lawyer shall act with reasonable diligence and promptness in representing a client. At the core of the duty of diligence is a lawyer's obligation to perform the work for which he was hired in a timely manner. ABA/BNA Lawyer's Manual on Professional Conduct, *Diligence* § 31:402 (2007). The failure to attend to a client's case is a very serious ethical violation. *Committee on Professional Ethics and Conduct v. Freed*, 341 N.W.2d 757, 759 (Iowa 1983). The comments to Rule 4-1.3 provide that unless the relationship is terminated a lawyer shall carry through to the conclusion all matters undertaken for the client. Rule 4-1.3 cmt.

While this Court has not specifically addressed the issue of what constitutes unreasonable delay in the distribution of settlement proceeds, case law from other jurisdictions provides guidance in this area. In *In re Hailey*¸792 N.E.2d 851, 862-63 (Ind. 2003), the Indiana Supreme Court found that an attorney violated Rule 1.3 of the Rules of Professional Conduct when the attorney waited ten months after receiving settlement proceeds from a personal injury action before paying any of the medical providers. Similarly, in *Lawyer Disciplinary Board v. Hardison*, 518 S.E.2d 101, 103 (W.Va. 1999), the West Virginia Supreme Court concluded that a delay of more than two years in disbursing the settlements proceeds to the client and medical providers violated Rule 1.3.[12]

In the instant case, Mr. Martin's duties included disbursing the settlement proceeds. Mr. Martin exceeded the times required in both *Hailey* and *Hardison* to pay

[12] Indiana and West Virginia's Rule 1.3 are the same as Missouri's Rule 4-1.3.

the medical providers. Mr. Martin deposited the settlement checks into his trust account on January 30, 2004. (**Ex. 1, para. 18; Ex. 2, para. 18**). Yet, Mr. Martin did not pay any of the medical providers until May 5, 2006. (**Ex. 34, pp. 592, 594, 597**). This was twenty-seven months after he deposited the settlement checks into his trust account. He did not distribute the final settlement funds until March 28, 2007. (**Ex. 25**). This was thirty-eight months after he deposited the settlement proceeds into his trust account.

At the hearing, Mr. Martin asserted that his delay in the distribution of the funds was justified because of two factors. First, he claimed he was awaiting instructions from Kamala regarding whether any family members were entitled to reimbursement for paying medical bills other than those listed in the interrogatory answers. (**Tr. 231**). Second, he claimed he could not distribute the proceeds until he determined whether there was a subrogation claim by the insurance company that had paid a portion of the physical therapist's bill. (**Tr. 235**).

Mr. Martin's argument is not well-founded. First, Mr. Martin took no action to contact Kamala to see if there were medical bills other than those listed on the interrogatory answers. (**Tr. 229; Ex. 30, p. 30**). He merely waited for Kamala to contact him. As discussed more thoroughly in Point II of this Brief, an attorney has the obligation to contact the client rather than the duty falling on the client. If Mr. Martin needed instructions from Kamala he should have tried to contact her himself. Moreover, when Mr. Martin did receive instructions from Kamala about paying the medical providers, he did not take any action. Kamala sent Mr. Martin a letter in December 2004 stating he should pay the physical therapy bill, pay Kamala's mother $250 for the

medical bills she had paid on Rebekah's behalf and that Kamala wanted any remaining money paid to Rebekah. (**Ex. 30, pp. 26-27**). Kamala wrote to Rebekah and informed Rebekah of what she had instructed Mr. Martin to do. Rebekah forwarded Kamala's letter on to Mr. Martin. (**Ex. 18**). Mr. Martin ignored Kamala's instructions in both letters.

While Mr. Martin is correct that in a personal injury action an attorney has an obligation to inquire about the existence of all liens and subrogation interests which may attach to settlement proceeds, a thorough lawyer will obtain information about the existence and amount of any such interests early in the case so that the client can make an informed decision as to whether or not to accept a settlement offer. *See* Michael L. Barkett, *Settle Medical Negligence Cases Efficiently and Successfully*, 34206 NBI-CLE 71 (2006). Mr. Martin had been representing the Crones from at least May 2002. (**Ex. 29, pp. 23-23**). The mediation did not occur until November 2003. (**Ex. 29**). Mr. Martin had sixteen months to ascertain the exact amount of the medical bills, whether payment had been made to any of the providers by insurance and, if so, whether any right of subrogation existed. Apparently, Mr. Martin did not do this before settling the matter but waited until after he had received the settlement proceeds.

However, by August 2004 Mr. Martin knew that insurance had paid a portion of the physical therapy bill. (**Tr. 161**). Mr. Martin has never provided an explanation as to why it took from August 2004 until July 2006, for him to ascertain whether a subrogation claim existed. Furthermore, while Mr. Martin was in the process of determining whether the insurance company had any subrogation claim to the settlement proceeds he could

have paid the therapists the portion of the bill that the insurance company did not cover. He did not do that. He waited until May 5, 2006, to pay the physical therapists. Mr. Martin has not provided a satisfactory explanation for his delay in paying the medical providers and the Court should find that he violated Rule 4-1.3

ARGUMENT

II.

THE SUPREME COURT SHOULD DISCIPLINE MR. MARTIN'S LICENSE BECAUSE HE FAILED TO ADEQUATELY COMMUNICATE WITH THE CRONES IN VIOLATION OF RULE 4-1.4(a) IN THAT HE REFUSED TO RETURN CALLS FROM REBEKAH REGARDING THE PAYMENT OF MEDICAL PROVIDERS AND HE FAILED TO CONTACT KAMALA AFTER SHE ENDORSED THE SETTLEMENT CHECKS.

Rule 4-1.4(a) provides that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. A lawyer's duty to communicate with the client is one of the most fundamental of the attorney's obligations to the client. The guiding principle under this rule is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest. Rule 4-1.4 cmt.

From June 2004 until September 2005, Rebekah called Mr. Martin at least twice a month to inquire why he was not paying the medical providers. (**Tr. 57; Ex. 4**). None of her calls were returned. (**Tr. 57; Ex. 4**). During this time Rebekah was continually receiving calls from the physical therapist threatening to start collection actions. (**Tr. 55**). Mr. Martin was holding the money to pay the physical therapists. It was very reasonable for Rebekah to expect that her calls be returned and for Mr. Martin to explain why the physical therapists had not been paid and when he expected to pay the physical

therapists. However, Mr. Martin returned none of Rebekah's calls and Rebekah was left to wonder whether Mr. Martin would ever disburse the money. Obviously, Mr. Martin's lack of communication with Rebekah violated Rule 4-1.3.

With Kamala, Mr. Martin never contacted her after he obtained her endorsements on the settlement checks. (**Ex. 30, p. 30**). Throughout Informant's investigation, Mr. Martin kept stating that he could not disburse settlement proceeds because he was awaiting instructions from Kamala and she had not contacted him. (**Tr. 25, 238; Ex. 7**). Under cross-examination Mr. Martin admitted that he took no action to contact Kamala except to ask the Federal Marshalls at the Springfield courthouse if they knew where Kamala was housed. (**Tr. 162**).

The Idaho Supreme Court addressed a similar argument to Mr. Martin's. In *In re Daw*, 910 P.2d 752 (Idaho 1996), an attorney had failed to communicate with his client while the client was incarcerated. The attorney argued that the client had the obligation to contact him if he wanted the attorney to have a default judgment in a forfeiture action set aside. The Court disagreed and held:

> "An attorney violates I.R.P.C. 1.4 by failing to keep his client informed about the status of a matter. <u>This obligation is placed on the attorney, not the client.</u> Baxter's failure to contact Daw during the time he was in prison in no way serves to relieve Daw of his obligation to communicate with his client."

Id. at 756 (underlining added).

The duty was on Mr. Martin to contact Kamala. Rebekah knew how to contact her mother and Mr. Martin never asked her for contact information nor did he contact the Federal Bureau of Prisons to locate Kamala. (**Tr. 47, 124, 229**). Rather, he just waited. As the Idaho Supreme Court sated in *Daw* the obligation was upon Mr. Martin to contact Kamala and he failed to do so. Therefore, this Court should find that Mr. Martin violated Rule 4-1.4(a).

ARGUMENT

III.

THE SUPREME COURT SHOULD DISCIPLINE MR. MARTIN'S LICENSE BECAUSE MR. MARTIN FAILED TO ADEQUATELY HANDLE CLIENT AND THIRD PARTY FUNDS IN VIOLATION OF RULE 4-1.15 IN THAT HE:

1. **COMMINGLED THE CRONES' SETTLEMENT PROCEEDS WITH HIS OWN FUNDS;**
2. **FAILED TO MAINTAIN COMPLETE TRUST ACCOUNT RECORDS;**
3. **FAILED TO PRESERVE TRUST ACCOUNT RECORDS FOR THE APPROPRIATE TIME PERIOD;**
4. **FAILED TO IDENTIFY CLIENT FUNDS APPROPRIATELY; AND**
5. **FAILED TO PAY REBEKAH CRONE AND HER MEDICAL PROVIDERS FOR SEVERAL YEARS AFTER RECEIVING THE SETTLEMENT PROCEEDS.**

Rule 4-1.15(a) provides, in part, that a lawyer shall hold property belonging to clients or third persons separate from the lawyer's own property. This rule recognizes that when a client or a third party's money is mixed with money belonging to the lawyer, it is in danger of being used for the lawyer's own expenses, as well as vulnerable to

claims by the lawyer's creditors. ABA/BNA Lawyer's Manual on Professional Conduct, *Misappropriation* § 45:503 (2007).

Mr. Martin has commingled client/third party funds with his own funds in violation of Rule 4-1.15(a). When Mr. Martin paid the physical therapists and orthopedic clinic on May 5, 2006, he transferred $3,200 from his law office account in order to have enough funds in his trust account for the checks to clear. **(Ex. 34, p. 589).** Thus, Mr. Martin commingled client funds with his own funds.

Furthermore, Mr. Martin testified at his April 16, 2007, sworn statement that he did not routinely take client fees out of his trust account when he earned them but instead left the money in the trust account after earning it until he needed it. **(Ex. 27, pp. 29-30, 43).** Failure to withdraw fees from the trust account as they are earned involves commingling. ABA/BNA Lawyer's Manual on Professional Conduct, *Misappropriation* § 45:503 (2007).

Mr. Martin also deposited checks from his mother into his trust account on at least two occasions and wrote six checks on his trust account payable to his mother. (**Ex. 34, pp. 37, 64, 79, 219, 284, 329, 393, 524, 528, 545, 616**). Given that Mr. Martin has significant tax delinquencies. it appears he may have been using his trust account to shield his own funds from attachment by the Internal Revenue Service or the Missouri Department of Revenue in violation of Rule 4-1.15(a). *See Committee On Professional Ethics and Conduct v. Gross*, 326. N.W.2d 272 (Iowa 1982). (Deposit of personal funds into trust account to avoid attachment by wife for back child support violates DR 9-102(a)).

Rule 4-1.15(a) further requires that the attorney keep complete records of all client/third party funds and preserve the records for five years after the termination of the representation. In order for an attorney to have the "complete trust records" required by Rule 4-1.15(a) the attorney should maintain:

1. receipt and disbursement journals recording all deposits and withdrawals from the trust account;
2. a ledger book showing for each trust client the source of funds, name of all persons for whom the funds are held, the amount of the funds and the names of all persons to whom money is disbursed:
3. monthly balance sheets of individual trust ledgers;
4. copies of written retainer and compensation agreements with clients;
5. copies of statements to clients or third persons showing the disbursement of funds to them or on their behalf;
6. copies of bills delivered to clients;
7. copies of records showing payments to lawyers, investigators, or other persons not in the lawyer's regular employ;
8. checkbook and check stubs, bank statements, pre-numbered cancelled checks, and duplicate deposit checks for the trust account;
9. copies of records showing that the trust account books have been balanced every quarter; and
10. copies of documents reasonably necessary for a complete understanding of the financial transactions affecting the trust account.

ABA/BNA Lawyer's Manual on Professional Conduct, *Misappropriation* § 45:1005 (2007). Maintenance of these records serves to ensure that a lawyer has complied with his fiduciary obligations to the client and also aids Informant in its investigation of alleged misconduct. *Id.* Inadequate recordkeeping makes it difficult for clients, this Court and Informant to determine whether an attorney has complied with his professional fiduciary obligations. *Id.*

Mr. Martin did not have receipt and disbursement journals, client trust account ledgers, or any type of reconciliation of his trust account. (**Ex. 12, pp. 5-10, 50-60**). He did not retain monthly bank statements, cancelled checks, or copies of deposit tickets. (**Ex. 12, pp. 5-10, 50-60**). Rather, he relied upon memory and notes in individual client files to determine what money he was holding for clients. (**Ex. 12, pp. 5-10, 50-60**). Because Mr. Martin did not have or retain any type of trust account records, it was virtually impossible for Informant to audit Mr. Martin's trust account or trace client funds. When Mr. Martin was questioned about certain transactions he could not provide explanations about why the money was deposited or withdrawn or which client's money it was. For example, Mr. Martin could not provide definitive explanations for:

1. why he was depositing checks from his mother into his trust account;
2. why he was writing checks on his trust account payable to his mother; or
3. why he withdrew his fees in the Crone matter from his trust account before he had ever received the settlement checks.

(**Tr. 173, 178, 187-88, 193; Ex. 1, para. 19; Ex. 9, para. 19**).

Subsection (b) of Rule 4-1.15 requires an attorney to promptly deliver to the client or third person any funds that the client or third person is entitled to receive. In the Crone matter, Mr. Martin deposited the settlement checks into his trust account on January 30, 2004. (**Ex. 1, para. 18; Ex. 2, para. 18**). Mr. Martin did not disburse the last of the Crone settlement until March 28, 2007, more than three years after he received the funds. (**Ex. 25**). At the hearing, Mr. Martin attributes the delay upon Kamala's failure to instruct him on what to do and the fact that he had to research whether an insurance company had a subrogation right to part of the proceeds.

Mr. Martin's argument is not well-supported. As discussed more fully in Points I and II of this Brief, Mr. Martin took no action to contact Kamala regarding her wishes even though the burden rested upon Mr. Martin to communicate with Kamala. Secondly, the fact that Mr. Martin needed to research the issue of subrogation did not prevent him from paying any of the medical providers other than the health insurance company. In fact, Mr. Martin advised Informant's staff on January 17, 2006, that he had decided to pay all of the medical bills presently known to him except for the subrogation bill to the health insurance company. **(Ex. 9).** Yet, even after making this representation to Informant he waited until May 5, 2006, to pay any of the medical providers. This was over three months later and only four days before he was scheduled to appear at Informant's office for his sworn statement. **(Ex. 32, pp. 592, 594, 597).** Mr. Martin failed to promptly deliver funds to the medical providers in violation of Rule 4-1.15(b).

ARGUMENT

IV.

THIS COURT SHOULD DISCIPLINE MR. MARTIN BECAUSE MR. MARTIN ENGAGED IN CONDUCT INVOLVING DISHONESTY IN VIOLATION OF RULE 4-8.4(c) IN THAT HE USED THE CRONE SETTLEMENT PROCEEDS FOR HIS OWN PERSONAL PURPOSES.

Rule 4-8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Misuse of client or third party funds is dishonest conduct which violates Rule 4-8.4(c). *Committee on Professional Ethics and Conduct v. Brodsky*, 318 N.W.2d 180, 183 (Iowa 1982). Misappropriation has been defined by courts as "any unauthorized use of client's funds entrusted to the lawyer, including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain therefrom." *See In re Anderson*, 778 A.2d 330, 335 (D.C. 2001); *See also In re Schaeffer*, 824 S.W.2d 1 (Mo. banc 1992).

Mr. Martin denies ever using client funds for his personal use. (**Ex. 12, p. 60**). However, a review of the facts shows differently. Almost the entire time from January 22, 2004, until March 28, 2007, Mr. Martin’s trust account was below the amount he should have been holding on the Crones' behalf. Mr. Martin's explanation for this is that he withdrew the Crone money from his trust account and placed it in his office safe to prevent the IRS from levying on it, as was his standard practice whenever he received

deposits of more than $1,000. He then went on to testify that when he needed to pay Rebekah or the medical providers he redeposited the cash back into his trust account. (**Ex. 12, pp. 5-10, 50-60**).

Mr. Martin's allegations are not supported by the evidence. When Mr. Martin paid Rebekah on May 17, 2004, he did not have enough in his trust account to cover the check and needed to deposit $3,441.40 to keep his trust account from being overdrawn. Only $625 of Mr. Martin's deposit was cash. The rest of the deposit consisted of checks from other clients. When Mr. Martin paid the physical therapists, the radiologist and the orthopedic clinic he also had to make a deposit into his trust account to cover these checks. He deposited $340 in cash and transferred $3,200 from his law office account to cover the checks. (**Ex. 34, p. 589**). Contrary to Mr. Martin's testimony he was not depositing only cash into his trust account when he needed to make payments out of his trust account.

A review of Mr. Martin's trust account balance prior to the Crone matter also shows that he did not routinely avoid keeping large amounts in his trust account. From January 30, 2003, until April 11, 2003, Mr. Martin's trust account had a high balance of $51,849.13 and a low balance of $26,012.07. (**Ex. 32**). If Mr. Martin was concerned about the IRS levying on his trust account, why would he have left these large amounts in his trust account?

Mr. Martin's delay in paying the medical providers also points to him using the funds for his personal use. Rebekah, Rebekah's father, attorney Roy Williams and Kamala were all urging Mr. Martin to pay the medical providers and Mr. Martin was not

taking any action on the matter. He claims he could not pay the medical providers because he was unsure of whether there were unpaid medical bills other than those listed in the interrogatory answers and he was afraid there would be a subrogation claim. As discussed in Points I, II, and III of this Brief, Mr. Martin's reasons were note valid. When you look at Mr. Martin's actions with a critical eye it is evident that he was merely making excuses and "buying time" to come up with the funds to pay the medical providers.

Mr. Martin's actions regarding Informant's investigation of the matter also point to the fact that he used the funds for personal purposes. As part of the investigation, Informant's staff requested that Mr. Martin provide them with his trust records by December 23, 2005. (**Tr. 109-11**). Mr. Martin asked for an extension until January 10, 2006, to produce the records. (**Ex. 9**). However, he did not produce the documents by the extension date. Rather, on January 17, 2006, he wrote to Informant's staff stating he had decided to pay all of the medicals bills except for the subrogation bill to the health insurance company. (**Ex. 9**). Informant's staff then subpoenaed Mr. Martin to appear at Informant's office on May 9, 2006. On May 5, 2006, four days before he was scheduled to appear at Informant's office and almost four months after he advised Informant's staff he had decided to pay the medical providers, Mr. Martin paid the physical therapists, the orthopedic clinic and the radiologist. (**Ex. 32, pp. 589, 592, 594, 597, 583**). In order to pay these medical providers Mr. Martin deposited money from his law office account into his trust account.

Finally, at his May 9, 2006, sworn statement Mr. Martin was advised by Informant's staff that he should not be holding client funds in his office safe. Despite this warning, Mr. Martin did not immediately deposit funds into his trust account to cover the funds he should have been holding for the Crones. Rather, his trust account remained below the required balance until April 6, 2007, when he deposited funds into his account to cover his final payment to Rebekah. Thus, when all of the facts of this case are examined it is evident that Mr. Martin knowingly misappropriated client/third party funds and as a result he violated Rule 4-8.4(c).

ARGUMENT

V.

THIS COURT SHOULD DISBAR MR. MARTIN BECAUSE DISBARMENT IS GENERALLY APPROPRIATE WHEN A LAWYER CONVERTS CLIENT PROPERTY AND BECAUSE THERE ARE AGGRAVATING FACTORS WHICH SUGGEST THAT MR. MARTIN SHOULD RECEIVE THE MOST SEVERE DISCIPLINE.

When determining an appropriate penalty for the violations of the Rules of Professional Conduct, this Court assesses the gravity of the misconduct, as well as mitigating or aggravating factors that tend to shed light on Respondent's moral and intellectual fitness as an attorney. *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). Since its decision in *In re Storment*, 873 S.W.2d 227 (Mo. banc 1994), this Court has consistently turned to the ABA Standards for Imposing Lawyer Sanctions (1991) ("ABA Standards") for guidance in deciding what discipline to impose. The notes to the ABA Standards provide that when an attorney violates multiple Rules of Professional Conduct the ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct and often should be greater than the sanction for the most serious misconduct. *See* Section II-Theoretical Framework of ABA Standards.

The Panel recommended that this Court disbar Mr. Martin with leave to reapply for reinstatement in one year. Informant believes Mr. Martin should be disbarred. Informant, however, does not support the Panel's recommendation that Mr. Martin be

granted leave to apply for reinstatement in one year, as this recommendation directly contradicts the requirements of Rule 5.28(d). Rule 5.28(d) specifically provides that when an attorney is disbarred this Court will not accept an application for reinstatement until after five years have passed since the date the discipline was imposed. Per Rule 5.28(d), Informant asserts Mr. Martin should not be allowed to apply for reinstatement until five years have passed after this Court issues its disbarment order.

In this case, the most serious violation is Mr. Martin's use of the Crones' property for his own purposes, a dishonest act upon the part of Mr. Martin. Questions of honesty go to the heart of an attorney's fitness to practice law. *See In re Disney*, 922 S.W.2d 12 (Mo. banc 1966). ABA Rule 4.11 provides that absent aggravating or mitigating circumstances, disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client. As discussed in Point IV of this Brief, the facts show that Mr. Martin did use the Crone funds for his own use and Rebekah suffered injury as a result of Mr. Martin's actions. More specifically, Rebekah did not receive her final payment of the settlement proceeds until March 28, 2007, more than three years after Mr. Martin received them. This was money Rebekah needed to help her with college tuition and living expenses. During these three years, Rebekah had to endure repeated phone calls from the physical therapists threatening to start collection actions against her which was extraordinarily stressful for Rebekah. Accordingly, Rebekah was injured by Mr. Martin's actions.

Missouri case law also strongly supports disbarment. This Court has repeatedly held that the appropriate discipline for misappropriation of client funds is disbarment.

See In re Mentrup, 665 S.W.2d 324, 325 (Mo. banc 1984); *In re Mendell*, 693 S.W.2d 76, 78 (Mo. banc 1985); *In re Staab*, 785 S.W.2d 551, 554-55 (Mo. banc 1990). This Court has also held when an attorney fails to act in an honest manner, the conduct warrants severe discipline. *In re Carey*, 89 S.W.3d 477, 498 (Mo. banc 2002).

The case at bar is similar to *In re Schaeffer*, 824 S.W.2d 1 (Mo. banc 1992). In *Schaeffer*, the attorney had deposited a $4,500 personal injury settlement into his business account and he then let his business account drop below the amount of the settlement check on nineteen occasions between February and July, 1989. After the client made a complaint to Informant, the attorney paid the client. The attorney attributed the delay in paying the client because he was very busy with his practice. *Id.* at 4-5. This Court found:

> "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. *Id*. Respondent's failure to preserve the client's funds undiminished in an escrow account constitutes a most serious violation of the disciplinary rules in an area where those rules properly demand procedures that not only guarantee that the client's funds will not be misappropriated but also enable the attorney readily to demonstrate that no misappropriation has occurred.
>
> * * *

> Disbarment is the ultimate sanction and should be reserved for a clear case. *In re Fenlon*, 775 S.W.2d at 142. The case is clear and no sanction less then disbarment is warranted."

Id. at 5-6. While Mr. Martin did deposit the Crone money into his trust account, he did not leave it in there. Like the *Schaeffer* case, Mr. Martin's trust account fell below the amount he should be holding for the Crones many times. Also like in the *Schaeffer* matter, the Crones ultimately received their money. However, restitution of the funds does not excuse Mr. Martin's conduct or lessen the level of discipline this Court should impose. Both ABA Standards and case law dictate that disbarment is the appropriate discipline for Mr. Martin.

In determining the level of discipline to be imposed, this Court also considers aggravating and mitigating circumstances. *In re Kazanas*, 96 S.W.3d 803, 808 (Mo. banc 2003). In this case there are several aggravating factors which support Mr. Martin's disbarment. As discussed under Point IV of this Brief, Mr. Martin's conduct involves dishonesty, one of the most serious violations. ABA Standard 9.22(b). Mr. Martin violated multiple Rules of Professional Conduct. ABA Standard 9.22(d). Mr. Martin has refused to acknowledge his wrongful conduct in that he denies using the Crone money for his personal purposes. ABA Standard 9.22(g). Instead, Mr. Martin continues to insist that he was holding the Crone money in his office safe and redepositing the cash into his trust account when writing checks out of his trust account, even though the evidence shows otherwise. The Crones were very vulnerable. ABA Standard 9.22(h). Kamala is in a federal prison in Florida and Mr. Martin basically refused to communicate with her

after she signed the settlement checks. Consequently, she had no effective way to ensure that the medical providers were paid or that Rebekah received the remaining funds. Rebekah was very young, living out of state and very inexperienced in dealing with legal and money matters. She did not have money to pay the physical therapists who were threatening her with a collection action and she needed any of the remaining settlement proceeds to pay college tuition and living expenses. Mr. Martin has substantial experience in the practice of the law as he has practiced since 1977 and had been in private practice since 1982. ABA Standard 9.22(i). Thus, Mr. Martin has had adequate time to learn about appropriate trust account procedures.

Consequently, the following aggravating factors are present in this case: (1) dishonest or selfish motive; (2) multiple offenses; (3) refusal to acknowledge wrongful nature of conduct; (4) vulnerability of victims; and (5) substantial experience in the practice of the law. The only mitigating factor presented is Mr. Martin's absence of a prior disciplinary record. ABA Standard 9.32(a). Given the seriousness of Mr. Martin's conduct, the numerous aggravating factors, the lack of a prior disciplinary history does not negate that both ABA Standards and Missouri case law dictate that Mr. Martin should be disbarred.

CONCLUSION

For the reasons set forth above, this Court should:

(a) find that Mr. Martin violated Rules 4-1.3, 4-1.4, 4-1.15(a) (b), and 4-8.4(c);

(b) disbar Mr. Martin; and

(c) tax all costs in this matter against Respondent, including this Court's recently imposed fee for disbarment of $2,000 pursuant to Rule 5.19(h).

Respectfully submitted,

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel

By: _____
Nancy L. Ripperger #40627
Staff Counsel
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400
(573) 635-2240 fax
Nancy.Ripperger@courts.mo.gov

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2008, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

Frederick W. Martin, III
P. O. Box 587
West Plains, MO 65775-0587

_____
Nancy L. Ripperger

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 10,990 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

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

_____
Nancy L. Ripperger

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