IN THE SUPREME COURT
STATE OF MISSOURI

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

INFORMANT'S REPLY BRIEF

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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 his Brief, Mr. Martin alleges that at about the same time as he was contacted by Roy Williams on behalf of Rebekah and her father, Mr. Martin contacted Medicaid and the health insurance company to determine if payments had been made on any of the medical bills and whether a claim for subrogation would be made for any bills paid. *Br. p. 8.* Mr. Williams first wrote to Mr. Martin on February 8, 2005. (**Ex. 18b**). This was twelve months after Mr. Martin had deposited the Crone settlement proceeds into his trust account and at least six months after Mr. Martin learned that a health insurance company had paid a portion of the physical therapy bills. (**Tr. 161**). Mr. Martin provides no explanation regarding why he waited so long before contacting Medicaid or the insurance company. Mr. Martin's delay is especially egregious given that he knew that the physical therapists were contacting both Rebekah and her father, Harold Crone, and demanding payment.

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.

Mr. Martin asserts he should not be disbarred because he freely admitted to the OCDC that he was keeping the Crones' funds in his office safe and he did not try to conceal his bookkeeping methods from the OCDC. Mr. Martin's statement is false. In his initial written response to the OCDC, Mr. Martin never disclosed to the OCDC that he had withdrawn the Crone settlement proceeds from his trust account. (**Ex. 7**). Then, when the OCDC asked Mr. Martin to produce his monthly trust account statements, Mr. Martin failed to produce them. Consequently, OCDC was forced to issue a subpoena to Mr. Martin's bank to obtain the trust account records. In his sworn statement taken on May 9, 2006, OCDC staff showed Mr. Martin his monthly trust account records and asked him to explain why his trust account balance was less than the amount he should have been holding for the Crones. (**Ex. 12, pp. 49-52**). It was only when confronted with this evidence that Mr. Martin testified that the Crone money was actually in his office safe. (**Ex. 12, pp. 49-52**). As discussed in Point IV of Informant's Brief, the

evidence shows that instead of holding the Crone settlement money in his office safe, Mr. Martin misappropriated the funds. However, Mr. Martin refuses to admit his transgression and insists the money was in his office safe.

Mr. Martin contends that he was keeping client funds, including the Crone settlement proceeds, in his office safe because he needed to protect the funds from a possible levy by taxing authorities. Mr. Martin's argument is faulty. First, an attorney's trust account is not subject to levy by the Internal Revenue Service ("IRS") as long as the attorney does not commingle his own funds with client/third party funds.[1] Mr. Martin acknowledges that when the IRS levied on his trust account back in the 1980s or 1990s the IRS later admitted that it had made a "bureaucratic mistake." (**Tr. 181**). Second, the IRS must provide 30 days written notice of its intent to levy on a bank account unless the IRS determines that "jeopardy to collection" exists. 26 U.S.C. § 6331(d)(2). Accordingly, Mr. Martin would have notice and the opportunity to enjoin the IRS from levying upon his trust account (or at least the portion of the funds that belonged to clients and third parties). Third, the Rules of Professional Conduct require placement of client monies into a trust account. Thus, Mr. Martin has no legitimate reason for holding client/third party funds anywhere other than his trust account. Moreover, assuming for argument sake that Mr. Martin did in fact hold the Crone settlement proceeds in his office safe, Mr. Martin was not adequately protecting the funds, as the funds could have been

[1] The IRS only has authority to levy on property belonging to the taxpayer. IRC 6331(a).

stolen while Mr. Martin moved them to his office safe, stolen from Mr. Martin's home, or lost in a natural disaster such as a tornado.

Mr. Martin also asserts that several Supreme Court cases support suspending his license rather than disbarring him. The cases Mr. Martin cites are inapplicable to the instant case. *In re Barr,* 796 S.W.2d 617 (Mo. banc 1990), differs from the instant case in that the attorney in *Barr* did not misappropriate client funds like Mr. Martin did. Rather the attorney merely deposited the funds in an out-of-state, non-trust bank account. In *In re Phillips,* 767 S.W.2d 16 (Mo. banc 1989), the attorney commingled client funds with his own, failed to notify the client of the receipt of the funds and failed to provide the client with an accounting of the funds. However, this Court did not find that the attorney misappropriated client funds or that the attorney lacked the funds in his office account to pay the client. For three years, Mr. Martin's trust account fell below the amount needed to pay out the Crone settlement proceeds and the evidence shows Mr. Martin had misappropriated the client funds.

In re Waldron¸ 790 S.W.2d 456 (Mo. banc 1990), also cited by Mr. Martin, is not even a trust account case. In *Waldron,* a dispute arose between the client and the attorney over the payment of the attorney's fees. In order to obtain his fees, the attorney collected on a $5,000 medical payment policy ("med pay" policy). The insurance company made the check payable to both the client and the attorney. The client refused to endorse the "med pay" check and the attorney refused to turn over the check to the client. To settle the dispute, the attorney brought suit against the client for fees. The associate circuit court awarded the attorney $2,500 in fees. The attorney then returned the $5,000 check

to the insurance company, issued a garnishment to the insurance company and the insurance company then issued the attorney a check for $2,500. This Court found that the attorney violated Rule 4-1.15(b) when he failed to promptly pay the client the "med pay" settlement. There was no evidence that the attorney ever deposited the check into his trust account or that the attorney misappropriated the funds.

In re Tessler, 783 S.W.2d 906 (1990), cited by Mr. Martin, also presents a very different set of facts than the instant case. First, while the attorney wrote an insufficient funds check out of one of his two trust accounts, the balance in the attorney's second trust account was sufficient to cover the check. Accordingly, this Court did not find that the attorney had used client funds for his own purposes. Second, this Court mitigated the sanction imposed against the attorney to a suspension because the attorney was obtaining medical treatment for his emotional problems. Mr. Martin did not maintain a sufficient amount in his trust account to cover the Crone settlement proceeds. Moreover, unlike *Tessler*, there are not any mitigating factors which would justify this Court dispensing a lesser sanction than disbarment to Mr. Martin.

Because Mr. Martin misappropriated client funds, and there are several aggravating factors, this Court should disbar Mr. Martin.

CONCLUSION

For the reasons set forth in Informant's Brief and this Reply Brief , 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,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2008, two copies of Informant's Reply Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

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_____
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 1,769 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