

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

MICHAEL KOENIG,

Respondent.

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Supreme Court #SC91685

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

This action is one in which Informant, the Chief Disciplinary Counsel, is seeking to discipline an attorney licensed in the State of Missouri for violations of the Missouri Rules of Professional Conduct. Jurisdiction over attorney discipline matters is established by this Court's inherent authority to regulate the practice of law, Supreme Court Rule 5, this Court's common law and Section 484.040, RSMo 2000.

STATEMENT OF FACTS

GENERAL INFORMATION

Mr. Koenig has been a licensed Missouri attorney since April 16, 2003. **App. 93.** From April 2003 until May 2009, Mr. Koenig maintained a small private practice in Chillicothe, Missouri. **App. 93-94.** In 2006, Mr. Koenig ran for and was elected the Livingston County Prosecutor. Mr. Koenig served one term as the Livingston County Prosecutor. **App. 94.** His term ran from January 1, 2007, until December 31, 2010. **App. 94.** Mr. Koenig did not seek reelection. **App. 52; 94.**

Prior to becoming the Livingston County Prosecutor, Mr. Koenig had not received any disciplinary complaints and had no discipline issued against his license. **App. 67.**

In early 2011, Mr. Koenig reopened his private practice in Chillicothe, Missouri. **App. 142-145.**¹

PROBLEMS EXPERIENCED BY MR. KOENIG WHILE PROSECUTOR

The Livingston County Prosecutor's position is only a part-time position even though the caseload is very heavy. **App. 61-62.** The County does not allow the elected prosecutor to employ any assistant prosecutors to aid him. **App. 61-62; 95.** In order to

¹ To assist this Court in assessing Mr. Koenig's recovery, Mr. Koenig's counsel will be moving to supplement the record with an Affidavit from Mr. Koenig describing Mr. Koenig's current condition and his actions since the disciplinary hearing. Informant has no objection to Mr. Koenig supplementing the record and has cited to the Affidavit in this Brief.

manage the workload, the prior prosecutor had refused to file many of the cases presented to him by law enforcement and/or had allowed a backlog of cases to develop. **App. 61-62.** When Mr. Koenig took office, there were 130 felony cases which needed to be reviewed and filed. **App. 61-62.** Mr. Koenig believed it was his duty as an elected official to reduce the backlog of cases quickly and he let his private practice slide. **App. 61-62.**

Soon after taking office as prosecutor, Mr. Koenig filed an action to have a guardian and conservator appointed for his elderly father due to his father's failing health and fears that another family member was taking financial advantage of Mr. Koenig's father. **App. 142-145.** Mr. Koenig's father became very angry with Mr. Koenig and cut off contact with Mr. Koenig. It was very upsetting for Mr. Koenig to be estranged from his father. **App. 142-145.**

Also, soon after being elected prosecutor, Mr. Koenig's twenty-year marriage began to deteriorate. **App. 57; 84; 94.** In April 2007, Mr. Koenig filed for divorce from his wife. **App. 84; 94.** After a few months, Mr. Koenig and his wife reconciled. **App. 84; 94.** After reconciling, Mr. Koenig's wife suggested that she quit her job as a nurse and become his secretary. **App. 84; 94.** In an effort to save the marriage, Mr. Koenig agreed to Ms. Koenig's proposal. **App. 84; 94.** Ms. Koenig did not have any training in the legal field or office management and was not well-equipped to assist Mr. Koenig. **App. 84; 94.** While Mr. Koenig was the only one who had signatory authority over his client trust account, he turned over the preparation of trust account checks and all other

trust account bookkeeping functions to Ms. Koenig. **App. 84.** Mr. Koenig failed to monitor the account after turning over the bookkeeping to Ms. Koenig. **App. 84.**

In December 2007, a horse threw Mr. Koenig and then drug him along the ground. **App. 95.** Respondent suffered extensive injuries to his back and ribs because of the accident. **App. 95.** He went to numerous neurologists seeking treatment for the pain he was suffering. **App. 71.** Mr. Koenig was hospitalized several times during the spring of 2009 for the pain. **App. 95.** After he did not improve with treatment, Mr. Koenig's local physicians referred him to the Mayo Clinic in Rochester, Minnesota. **App. 95.** Mr. Koenig obtained treatment at the Mayo Clinic on May 1, June 10 through 12, June 19 and June 25, 2009. **App. 95.** Mr. Koenig returned to the Mayo Clinic in August 2009 and was hospitalized from August 22 through 28 for treatment of his physical ailments and his increasing depression. **App. 95.** Mr. Koenig's insurance company denied coverage for his treatment at the Mayo Clinic so he was responsible for over \$40,000 in medical bills, which added to Mr. Koenig's stress level. **App. 71.**

While Mr. Koenig was receiving treatment at the Mayo Clinic, Mr. Koenig's wife closed his private law office. **App. 95.** Mr. Koenig's wife sent a number of the files to Mr. Koenig's brother, Rick Koenig.² **App. 95.** Rick Koenig completed the litigation for some of Mr. Koenig's clients and found local attorneys to handle matters which were outside his practice areas. **App. 95.**

² Rick Koenig is a well-respected attorney with a successful workers' compensation and personal injury practice in Sedalia, Missouri.

During much of 2009, Mr. Koenig was unable to fulfill his duties as prosecutor due to his poor health. **App. 95-96.** After Mr. Koenig was released from the Mayo Clinic in August 2009, he resumed acting as the Livingston County prosecutor. **App. 95-96.** Mr. Koenig, however, continued to suffer from depression and for a period suffered from short-term memory loss because of the treatments he received while at the Mayo Clinic. **App. 95-96.**

In November 2009, Mr. Koenig's wife advised him she wanted a divorce. **App. 96.** Mr. Koenig's depression increased due to the stresses of his job, his health issues, his impending divorce and disciplinary complaints that had been lodged against him in 2009. **App. 96.** On December 16, 2009, Mr. Koenig attempted suicide via a drug overdose of Tylenol and other prescribed medications. **App. 96.**

TREATMENT AFTER SUICIDE ATTEMPT

After the suicide attempt, Mr. Koenig was treated at the University of Missouri-Columbia and then transferred to Heartland Regional Medical Center ("Heartland") in St. Joseph, Missouri. **App. 96.** Mr. Koenig spent a few weeks receiving inpatient treatment at Heartland. **App. 57.** Mr. Koenig was diagnosed with recurrent, severe, major depressive disorder. **App. 96.** Mr. Koenig has suffered with depression periodically for at least 15 years. **App. 96.** His prior episodes of depression were not nearly as severe and he improved after obtaining antidepressants from his family doctor. **App. 77-78.**

While at Heartland, his treating psychiatrist prescribed Abilify with two other antidepressants. **App. 58.** He also started counseling sessions with a psychologist. **App. 58.** After release from Heartland, Mr. Koenig continued with monthly appointments with

both his psychiatrist and psychologist. **App. 58.** Mr. Koenig's condition continued to improve with treatment.

A few months after being released from Heartland Mr. Koenig resumed his duties as prosecutor. **App. 63.** He successfully tried numerous jury trials after resuming his duties. **App. 63.** Informant's staff polled a local judge who advised that after his hospitalization Mr. Koenig handled the prosecutor's job in a satisfactory and competent manner. **App. 96.**

Mr. Koenig's divorce was completed in April 2010, which lessened the stress level in his personal life. Because of the counseling he received, his anger towards his ex-wife decreased. **App. 64-66.** In the divorce he obtained custody of his 17-year-old son which he viewed as a positive outcome. **App. 64-66.**

Per directions from his psychiatrist and psychologist, Mr. Koenig stopped taking antidepressants in September 2010. **App. 58.** Mr. Koenig's mood, work ethic and demeanor continued to increase after he stopped taking the medication. **App. 58; 142-145.**

DISCIPLINARY COMPLAINTS LODGED AGAINST MR. KOENIG

During 2008 and 2009, Informant opened a total of six disciplinary investigations against Mr. Koenig for conduct occurring in 2008 and 2009. Informant determined that there was probable cause in four of the matters to believe that Mr. Koenig violated the Rules of Professional Conduct. While the investigations were ongoing, Informant's staff had been communicating with Rick Koenig, Mr. Koenig's brother, and was aware of Mr. Koenig's severe depression, his suicide attempt and his improvement after receiving

treatment. Informant's staff met with Mr. Koenig and his attorney and the parties agreed to resolve the disciplinary cases via a stipulation. The stipulated facts and rule violations for the four counts are set forth below.

STIPULATED FACTS AND CONCLUSIONS OF LAW

Count I of Information (Janice Hoag Complaint) (File No. 09-2221)

In October 2008, Mr. Koenig agreed to represent James Hoag in an action to challenge paternity. **App. 97.** Mr. Hoag resided in Kansas. **App. 97.** Mr. Hoag's mother, Janice Hoag, paid Mr. Koenig \$1,730 on October 8, 2008. **App. 97.** This amount included Mr. Koenig's attorney fees, the DNA testing fees, filing fees and service fees. **App. 97.** Mr. Koenig did not place any of the fees into his trust account. **App. 97.**

Mr. Koenig had advised the Hoags that he would file the paternity challenge within a few weeks of October 8, 2008. **App. 97.** Beginning in November 2008, the Hoags called Mr. Koenig's office many times to see if Mr. Koenig had prepared the petition yet. **App. 97-98.** Mr. Koenig's wife returned some of the calls and explained that Mr. Koenig had not been able to prepare the petition due to his poor health. **App. 97-98.** Other times, Mr. Koenig's wife advised the Hoags that Mr. Koenig would have the petition prepared and filed within a few days. **App. 97-98.** Mr. Koenig did in fact prepare a petition but, because of his severe depression, failed to file it. **App. 98.**

In October 2009, one year after the Hoags hired Mr. Koenig, the Hoags contacted a Kansas attorney about Mr. Koenig's lack of action. **App. 98.** The attorney wrote to

Mr. Koenig on three different occasions asking for a status update on the matter. Mr. Koenig did not respond to the letters. **App. 98.**

In December 2009, Ms. Hoag made a complaint to Informant. **App. 98.** Informant sent the complaint to Mr. Koenig's brother/attorney.³ When Mr. Koenig's brother received the complaint, Mr. Koenig was undergoing inpatient hospitalization and was not able to address Ms. Hoag's complaint. **App. 98.**

Mr. Koenig's brother contacted the Hoags and their Kansas attorney and advised them of Mr. Koenig's illness and hospitalization. **App. 98.** Mr. Koenig's brother then retrieved the file from Mr. Koenig's wife. **App. 98.** The file contained the petition that Mr. Koenig had prepared. **App. 98.**

Upon learning that Mr. Koenig had prepared the petition, the Hoags asked if Mr. Koenig would continue with the representation. **App. 98.** On January 11, 2010, Mr. Koenig advised the Hoags that he would not be able to continue with the representation. **App. 98.** On January 12, 2010, Mr. Koenig's brother refunded \$1,730 to Ms. Hoag and assisted the Hoags in finding new counsel. **App. 99.** Mr. Koenig used proceeds from his share of a personal injury settlement to reimburse his brother for the \$1,730 refund his brother made to the Hoags. **App. 99.**

Informant and Mr. Koenig agree that Mr. Koenig violated:

³ Initially, Mr. Koenig's brother, Rick Koenig, represented him. Later Mr. Koenig engaged the Honorable Robert Russell to represent him.

1. Rule 4-1.3 (diligence) by failing to file the petition he prepared on the Hoags' behalf within a reasonable amount of time after he was hired by the Hoags;

2. Rule 4-1.4 (communication) when he failed to return the Hoags' calls and failed to respond to their written requests for a status report on his actions; and

3. Rule 4-1.15(c) (hold client money separate) when he failed to deposit the funds he received from Ms. Hoag into his trust account. **App. 104-105.**

Count II of the Information
(Charles Fields Complaint)
(Complaint No. 09-1233)

Mr. Charles Fields hired Mr. Koenig to file a dissolution action on his behalf. **App. 99.** Mr. Fields paid Mr. Koenig \$950 on April 7, 2009. **App. 99.** The \$950 fee included Mr. Koenig's attorney fees, filing fees and service fees. **App. 99.** Mr. Koenig did not put the \$950 into his trust account. **App. 99.** In late April 2009, Mr. Koenig presented Mr. Fields with a petition for his review and signature. **App. 99.** Mr. Fields reviewed the petition and signed it. **App. 99.** Mr. Fields believed that Mr. Koenig would file the petition shortly thereafter. **App. 99.**

In June 2009, Mr. Fields learned that his wife had filed her own petition for dissolution. **App. 99.** Mr. Fields tried to call Mr. Koenig but could not do so because his office number had been disconnected. **App. 99.** Mr. Fields later called the circuit clerk's office and learned that Mr. Koenig had not filed his dissolution petition. **App. 99.**

Mr. Fields then obtained other counsel to represent him in the dissolution action. **App. 99.**

On September 2, 2009, Mr. Koenig refunded \$950 to Mr. Fields. **App. 99.** Informant and Mr. Koenig agree that Mr. Koenig violated:

1. Rule 4-1.3 (diligence) by failing to file the petition for dissolution he had prepared for Mr. Fields *after* Mr. Fields had approved and signed the petition;
2. Rule 4-1.4 (communication) when he failed to provide Mr. Fields with a working phone number that he could use to contact him; and
3. Rule 4-1.15(c) (hold client money separate) when he failed to deposit the funds he received from Mr. Fields into his trust account.

Count III of Information
(Cindy Stafford Complaint)
(File No. 09-1901)

In April 2008, Mr. Koenig agreed to represent Greg and Cindy Stafford after they were sued by a contractor for failing to make payment to the contractor. **App. 100.** The contractor was seeking payment of \$16,900 plus interest. **App. 100.** While the Staffords knew that they owed the contractor something for his work they believed his demand for \$16,900 was too high. **App. 100.**

Greg and Cindy Stafford were good friends of Mr. Koenig and his wife. **App. 100.** Mr. Koenig agreed to represent the Staffords with the belief that the Staffords were amenable to mediating the matter as the cost of litigating would exceed the amount at issue. **App. 100.** Unfortunately the parties were not able to reach a settlement prior to trial. **App. 100.**

The matter went to trial in December 2008. **App. 100.** The judge who presided over the case opined that Mr. Koenig was adequately prepared for trial and that Mr. Koenig acted in a competent manner in representing the Staffords. **App. 100.**

On December 22, 2008, the court entered a judgment in favor of the contractor in the amount of \$15,408 plus interest in the amount of \$995. **App. 100.**

After the Court entered its judgment against the Staffords, the Staffords advised Mr. Koenig that they wanted to appeal the matter. **App. 100.** Mr. Koenig explained to the Staffords that it would not be economically feasible to appeal the matter but did agree to file a Motion for New Trial and, if necessary, Notice of Appeal with the thought that he might be able to negotiate a more favorable settlement with the contractor prior to briefing the matter. **App. 100.**

On January 7, 2009, the Staffords gave Mr. Koenig a check for \$4,000. **App. 101.** A dispute exists between the Staffords and Mr. Koenig as to whether the \$4,000 was earned fees owed to Mr. Koenig for his work through trial or whether the \$4,000 was advanced fees for the Motion for New Trial and other appellate work. **App. 101.** The parties did not have a written fee agreement. **App. 101.**

Mr. Koenig filed a motion for new trial on January 22, 2009. **App. 101.** The motion was deemed overruled on April 22, 2009, pursuant to Rule 78.06.⁴ Mr. Koenig failed to file the Notice of Appeal by May 4, 2009, as required by Rule 78.06.

⁴ Rule 78.06 provides that any motion for new trial is overruled if the trial court does not rule on it within ninety days after the date the motion is filed.

On June 4, 2009, the contractor's attorney filed a notice of levy on the Staffords' real estate, a writ of execution and a notice of sheriff's sale scheduled for July 20, 2009. **App. 101.** On June 5, 2009, Mr. Koenig filed a motion to file his notice of appeal out of time. **App. 101.** In his motion, Mr. Koenig attributed his failure to file the notice of appeal to the health problems and hospitalizations he had suffered in April and May 2009. **App. 101.**

On June 15, 2009, the Court granted Mr. Koenig's motion to file the notice of appeal out of time. **App. 101.** On July 2, 2009, the Staffords posted a supersedes bond and the writ of execution was released. **App. 101.** The Court of Appeals then scheduled a settlement conference in September 2009. **App. 101.**

A few days before the settlement conference, Mr. Koenig and the Staffords came to an impasse as the Staffords did not want to compromise and reach a settlement. **App. 102.** The Staffords insisted that Mr. Koenig move forward with the appeal. **App. 102.** Mr. Koenig suggested to the Staffords that they find new counsel to handle the appeal and on September 8, 2009, Mr. Koenig texted Cindy Stafford stating "he was done." **App. 102.**

On September 17, 2009, Mr. Koenig requested leave from the court to withdraw as the Staffords' attorney and the Court granted him leave to withdraw on October 1, 2009. **App. 102.** On or about October 12, 2009, the Staffords obtained new counsel to represent them in their appeal. **App. 102.** On October 19, 2009, the Staffords entered into a settlement agreement with the contractor whereby the Staffords agreed to pay the contractor \$16,500. **App 102.**

The Staffords made a demand that Mr. Koenig return the \$4,000 they paid him. **App 102.** They contend that Mr. Koenig agreed to handle the trial for free and that the \$4,000 they paid him was for the appeal only. **App 102.** Mr. Koenig disputes their claim and asserts that the \$4,000 was his fee to handle the matter through completion of the trial. **App 102.**

Informant and Mr. Koenig agreed that Mr. Koenig violated Rule 4-1.3 (diligence) when he failed to file the Staffords' notice of appeal in a timely manner.

Count IV of the Information
(Trust Account Overdraft & Audit)
(File No. 09-2054-OD)

On or about October 23, 2009, Informant received notice from the Interest on Lawyer Trust Account ("IOLTA") office that Mr. Koenig's trust account had a negative balance. **App 102.** Based upon the IOLTA report, Informant subpoenaed Mr. Koenig's trust account records for the period January 1, 2009, through September 30, 2009. **App 103.**

An audit of Mr. Koenig's trust account revealed the following:

- a. On January 1, 2009, Mr. Koenig received a \$25,000 settlement on behalf of Lora Kelly. Mr. Koenig paid Ms. Kelly and an attorney who assisted Mr. Koenig in the matter their share of the proceeds immediately. Hedrick Medical Center had a lien against the settlement proceeds in the amount of \$5,448.93. Mr. Koenig did not satisfy the lien until March 29, 2010. Mr. Koenig's trust account fell below the lien amount many times between January 9, 2009 and

- March 29, 2010. Mr. Koenig sold personal assets in order to pay Hedrick Medical Center.
- b. Mr. Koenig's trust account had a negative balance from May 12, 2009, until July 20, 2009, when he received a \$25,000 settlement.
 - c. On July 16, 2009, Mr. Koenig's wife wrote a \$2,000 check to herself out of his trust account when the account was overdrawn. Mr. Koenig's wife signed Mr. Koenig's name to the check without his knowledge or permission. The check was returned by the bank.
 - d. On July 20, 2009, Mr. Koenig received a \$25,000 settlement on behalf of client Sherry Ripley. Ms. Ripley's share of the proceeds was \$16,613. Ms. Ripley did not receive her share of the proceeds until September 20, 2009. Between July 20, 2009, and September 20, 2009, Mr. Koenig's trust account balance dropped to \$11,976.90.
 - e. On September 16, 2009, Mr. Koenig deposited \$4,630.90 of his personal funds into his trust account, bringing the balance up to \$16,607.
 - f. On September 17, 2009, Mr. Koenig wrote a check for \$16,607.80 to his brother so his brother could assist him with disbursing funds to Ms. Ripley. Mr. Koenig's brother deposited the funds into his trust account and then paid Ms. Ripley.
 - g. While Mr. Koenig was receiving treatment at the Mayo Clinic, Mr. Koenig's wife signed Mr. Koenig's name to two other checks without his knowledge or permission totaling \$3,300. **App 103-104.**

Informant and Mr. Koenig agreed that Mr. Koenig violated Rule 4-8.4(c) (dishonesty, fraud & misrepresentation) when he or his wife used client or third party funds for personal purposes.

Stipulation As To Aggravating and Mitigating Factors

The parties also agreed and stipulated that the following were aggravating and mitigating factors in deciding the level of discipline to impose:

Aggravating Factors

1. Mr. Koenig acted in a selfish manner when he used client funds for his own purposes. ABA Standard § 9.22(b).
2. There was a pattern of misconduct. ABA Standard § 9.22(c).
3. There were multiple offenses. ABA Standard § 9.22(d).

App 106.

Mitigating Factors

1. Mr. Koenig does not have a prior disciplinary history. ABA Standard § 9.32(a).
2. Mr. Koenig was having severe marital problems at the time the misconduct occurred. ABA Standard § 9.32(c).

3. Mr. Koenig has made restitution to all of his clients except the Staffords and did so without being directed to do so by Informant.⁵ ABA Standard § 9.32(d).
4. When Mr. Koenig appeared before Informant's staff he freely admitted his wrongdoing. ABA Standards § 9.32(e).
5. Mr. Koenig has somewhat limited experience in the law, as he has been licensed only 7 years. ABA Standard § 9.32(f).
6. At the time of the misconduct, Mr. Koenig was suffering from recurrent, severe, major depressive disorder, which appeared to be a significant contributing cause of the misconduct. ABA Standard § 9.32(i).
7. Mr. Koenig is very remorseful for his actions. ABA Standard § 9.32(l).

App. 106-107.

Stipulated Terms of Discipline

The parties also stipulated to terms of discipline, contingent upon this Court's approval. The stipulated terms involve a two year stayed suspension with three years' probation, the costs of the discipline proceeding assessed against Mr. Koenig and the assessment of the \$1,000 fee for for suspensions prescribed in Rule 5.19(h). **App. 93-127.**

⁵ Mr. Koenig has agreed to participate in the Missouri Bar's Fee Dispute Arbitration program regarding his fee dispute with the Staffords.

The terms of probation include the standard provisions. In addition, the probation terms require, but are not limited to, Mr. Koenig:

1. attending Informant's Ethics School;
2. maintaining malpractice insurance of not less than \$100,000 per occurrence and an aggregate amount of not less than \$300,000;
3. taking and passing the MultiState Professional Responsibility Examination;
4. obtaining a mental health evaluation;
5. following the mental health professionals' recommendation for therapy or treatment including attendance at alcoholics anonymous if recommended by the mental health professional;
6. providing the names of two individuals who will serve as personal observers of Mr. Koenig's behavior and report to Informant any problems observed;
7. obtaining a substance abuse evaluation;
8. following the recommended treatment plan of any substance abuse professional;
9. submitting to random drug testing;
10. obtaining a mentor;
11. submitting to client trust account audits; and
12. participating in and abiding by any decision of the Missouri Bar Fee Dispute Committee concerning the \$4,000 paid to him by Greg and Cindy Stafford.

App. 128-141.

THE DISCIPLINARY PANEL'S HANDLING OF THE MATTER

Informant and Mr. Koenig submitted the Stipulation to the appointed Disciplinary Hearing Panel. The Panel held a hearing on February 8, 2011. At the hearing, Mr. Koenig testified and the parties submitted the Stipulation and Probation Agreement into evidence as Exhibits 1 and 2, respectively. **App 93-141.**

Mr. Koenig's Testimony at the Hearing

At the DHP hearing, Mr. Koenig discussed how he had let his private practice clients suffer because of his depression and his heavy caseload at the prosecutor's office. He also advised that he was very committed to preventing future client harm. **App. 61-64.** He reported that he was intent upon doing "what my clients expect me to do and what I'm obligated to do for them." **App. 67.** He also noted that the stressors and factors that led to his depression and client complaints were now gone and he now knew how to identify and better handle further stressors that might occur. He stated he was intent on giving his clients his full attention, following through with all of his treatment plans, and following all the terms of the probation. **App. 67.**

The Panel asked Mr. Koenig what had occurred regarding his trust account. He stated that his ex-wife had written the checks out of the trust account, or had had him sign checks from the account whereby funds were misappropriated, that he did not know what the funds were used for, but that **he was fully responsible for her actions for failing to monitor the account and ignoring the situation.** **App. 83-84.**

Mr. Koenig discussed his future plans. He stated that he intended to open a small solo practice in Chillicothe and practice there until at least May 2012, when his youngest son graduated from high school. **App. 52-53.** He had rented office space but had not opened the practice at the time of the hearing. **App. 53.** He intended to focus his practice on criminal law cases. Mr. Koenig's goal was to merely earn enough money to pay his living expenses. **App. 54.** After his son finishes high school, he planned upon reevaluating whether he should seek employment with a firm in the Kansas City area or should go practice with his brother in Sedalia, Missouri. **App. 74.**

Mr. Koenig also discussed the stipulated probation terms and his preparatory actions for implementing the probation. Mr. Koenig stated that he looked forward to participating in the probation and that he welcomed the very structured and strict probation plan developed by Informant. **App. 80.** Mr. Koenig had spoken with Dana Macoubrie about being a mentor for him and Mr. Macoubrie had agreed to mentor him.⁶ **App. 55.** Mr. Koenig stated he was very willing to submit to a psychiatric examination, obtain whatever counseling is recommended and take any medication recommended by the mental health provider. **App. 58.** Although he does not believe he has a drinking problem and he seldom drinks, he is more than willing to attend AA and abstain from alcohol while on probation. **App. 65.**

⁶ The appointment of Dana Macoubrie to serve as Mr. Koenig's mentor would be subject to Informant's approval.

Panel Member Susan Robinson's Comments During the Hearing

At the conclusion of the hearing, Panel Member Susan Ford Robinson stated that she had requested a hearing on the matter because she was initially concerned about the seriousness of the charges and the recommended discipline of a stayed suspension with probation. **App. 87.** She went on to state that after hearing Mr. Koenig's testimony, including his willingness to take responsibility for his actions, her concerns had been alleviated. **App. 87.**

The Panel's Decision

On March 31, 2011, the Panel issued its decision whereby it unanimously adopted, approved and incorporated the facts, conclusions and recommendations set forth in the Joint Stipulation.

THIS COURT'S HANDLING OF THE CASE

On April 12, 2011, Informant filed a Statement of Acceptance of Disciplinary Hearing Panel Decision with this Court. On May 31, 2011, this Court requested that this matter be briefed.

MR. KOENIG'S ACTIONS SINCE THE DHP HEARING

Mr. Koenig has provided this Court with an Affidavit detailing his actions since the February 2011, hearing. In the Affidavit, Mr. Koenig accepts full responsibility for his actions. **App. 142-145.** Mr. Koenig reports that his personal life continues to improve. **App. 142-145.** Both of his children will be living with him in the fall, he is now engaged, he has begun rebuilding his relationship with his father and is in constant contact with his brother Rick Koenig, who has assisted him both professionally and

personally. **App. 142-145.** Mr. Koenig states that he has not needed anti-depressants in over a year and is not currently seeing a psychologist or psychiatrist. **App. 142-145.** He, however, states that his family physician is closely monitoring his condition. **App. 142-145.** He meets with his family physician on a weekly basis. **App. 142-145.**

Mr. Koenig has opened a small private practice. He was able to lease an office for \$225 per month including utilities. **App. 142-145.** He is limiting his practice to primarily criminal law cases and is only taking cases in Livingston or adjoining counties. **App. 142-145.** He has opened a client trust account and reports that his trust account records are in order. **App. 142-145.** He is consulting with Dana Macoubrie, as a mentor, on a regular basis. **App. 142-145.**

POINT RELIED ON

I.

THIS COURT SHOULD ISSUE A STAYED SUSPENSION WITH PROBATION AGAINST MR. KOENIG'S LICENSE BECAUSE ABA SANCTIONING STANDARDS, CASE LAW AND COURT RULES SUPPORT THIS LEVEL OF DISCIPLINE IN THAT MR. KOENIG'S ETHICAL VIOLATIONS RESULTED FROM HIS SEVERE DEPRESSION, MR. KOENIG HAS SHOWN A SUSTAINED PERIOD OF RECOVERY AND THE PROPOSED PROBATION TERMS PROVIDE A WAY FOR INFORMANT TO CLOSELY MONITOR MR. KOENIG'S CONDITION AND ACTIONS.

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

In re Coleman, 295 S.W.2d 857, 871 (Mo. banc 2009)

In re Storment, 873 S.W.2d 227 (Mo. banc 1994)

In re Conwell, 69 P.3d 589, 594 (Kan. 2003)

Rule 5.225

ABA Standards for Imposing Lawyer Sanctions (1991)

Diagnostic and Statistical Manual of Mental Disorders - Fourth Edition, Text Revision
(DSM-IV-TR)

ARGUMENT

I.

THIS COURT SHOULD ISSUE A STAYED SUSPENSION WITH PROBATION AGAINST MR. KOENIG'S LICENSE BECAUSE ABA SANCTIONING STANDARDS, CASE LAW AND COURT RULES SUPPORT THIS LEVEL OF DISCIPLINE IN THAT MR. KOENIG'S ETHICAL VIOLATIONS RESULTED FROM HIS SEVERE DEPRESSION, MR. KOENIG HAS SHOWN A SUSTAINED PERIOD OF RECOVERY AND THE PROPOSED PROBATION TERMS PROVIDE A WAY FOR INFORMANT TO CLOSELY MONITOR MR. KOENIG'S CONDITION AND ACTIONS.⁷

In matters of attorney discipline, the DHP'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. *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). Professional misconduct is established by a preponderance of the evidence. *Id.* An attorney must comply with the Rules of Professional Conduct as set forth in Supreme Court Rule 4 as a condition of retaining his license. *In re Shelhorse*, 147

⁷ Because the parties stipulated to the rule violations, Informant is only addressing the appropriate level of discipline in this Brief.

S.W.3d at 80. Violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *Id.*

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 Stormont*, 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. ABA Standard § 3.0 states that a court should look at four primary factors in determining which sanction is appropriate. The factors are: (1) the duty violated; (2) the lawyer's mental state; (3) the potential or actual injury caused by the conduct; and (4) aggravating and mitigating circumstances. Injury, per the standards, includes harm to the legal system or the profession. See Definitions of ABA Standards. If there are multiple violations, the Standards provide that the sanction imposed should be, at a minimum, consistent with the sanction for the most serious instance of misconduct and generally should be greater than that sanction. See Theoretical Framework of ABA Standards.

In this matter, Respondent's most serious infraction is the misappropriation of client funds. ABA Standard 4.11 provides that disbarment, absent mitigating factors, is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client. ABA Standard 4.12 provides that suspension, absent mitigating and aggravating factors, is generally appropriate when a lawyer knows or

should know that he is dealing improperly with client funds and causes injury or potential injury to the client.

Mr. Koenig's conduct most closely mirrors ABA Standard 4.12. Mr. Koenig does not dispute that the funds were misappropriated; however, it was not his intent to do so. The checks in question were made payable either to Mr. Koenig or his ex-wife. From a cursory review of the checks, it was clear to Informant's staff that Mr. Koenig's ex-wife forged Mr. Koenig's signature on at least two of the trust account checks. **App. 104.** For the other checks Mr. Koenig does not deny that he signed the checks. **App.84.** Rather, he testified that he had turned over the bookkeeping for the trust account to his wife and that he had not monitored her actions in any way. **App. 84.** Thus, when he signed the checks she prepared he did not know whether the funds belonged to him or the client. Mr. Koenig acknowledges that he is fully responsible for his ex-wife's actions and his lack of supervision. **App. 84.** Due to Mr. Koenig's poor mental health at the time of the misappropriations occurred, Informant believes Mr. Koenig's actions were merely negligent instead of intentional. Thus, the ABA Standards would suggest a suspension is the base level of discipline before considering mitigating or aggravating factors.

In this case, there are several significant mitigating factors. These factors include a lack of prior disciplinary history, Mr. Koenig's severe marital, professional and family problems when the conduct occurred, Mr. Koenig's admission of fault, his somewhat limited experience in the law and his remorse for his actions. ABA Standards § 9.32(a), (c), (e), (f) and (1). Mr. Koenig has also made restitution to all harmed clients except the

Staffords and he has agreed to abide by the decision of the Bar's fee dispute committee regarding the Staffords. ABA Standards § 9.32(d).

The most significant mitigating factor though is that Mr. Koenig was suffering from a recurrent, severe, major depressive disorder when the violations occurred. ABA Standards § 9.32(i). A person with this diagnosis has a reduced level of interest in most or all activities, difficulty sleeping or sleeping more than normal, behavior that is either agitated or slowed down, has diminished energy, has thoughts of worthlessness and has a diminished ability to think, concentrate or make decisions. Diagnostic and Statistical Manual of Mental Disorders - Fourth Edition, Text Revision (DSM-IV-TR). These symptoms would be a major contributing factor to the ethical violations for communication, diligence, and the failure to monitor trust account activities, resulting in misappropriation. Mr. Koenig has now demonstrated a meaningful recovery period of over one and a half years. Moreover, Mr. Koenig's recovery appears to have arrested the misconduct, as Informant has not opened any additional complaints against Mr. Koenig since December 2009.

The aggravating factors in this case also stem from Mr. Koenig's depression. Mr. Koenig has stipulated that he acted in a selfish manner when he used client funds for his own purposes. As discussed above, while Mr. Koenig ultimately benefited from the use of the client funds and takes full responsibility for the wrongdoing, it was more negligence rather than intentional acting upon his part that lead to the misappropriation of the funds. There is also a pattern of misconduct and multiple offenses. ABA Standard §

9.22(b), (c), and (d). Thus, when the mitigating and aggravating factors are weighed, the mitigating factors are much stronger and support a lesser sanction than suspension.

A stayed suspension with probation is a less severe discipline and is supported by the ABA Standards. The Comments to ABA Standard § 2.7, the standard that addresses probation, provides that probation is appropriate for conduct which may be corrected such as improper maintenance of books and records, lack of timely communication with clients or alcohol or chemical dependency. Mr. Koenig's lack of communication, diligence, and proper supervision of his trust account can be corrected and can be monitored by Informant. Like that of alcohol and chemical dependency, depression can be corrected via treatment which Mr. Koenig has received.

In *In re Belz*, 258 S.W.3d 38 (Mo. banc 2008), this Court held that when an attorney intentionally misappropriates client funds and mental illness played a role in the misconduct, a lesser discipline than disbarment may be appropriate. This Court's opinion states that in order to impose a lesser discipline there must be other substantial mitigating factors present.

In *Belz* the attorney suffered from a bipolar disorder and for four years, while in a manic state, made unauthorized withdrawals exceeding \$175,000 from a client's trust. When the attorney believed he was about to die he informed his son and his law partners about the theft. After his law partners advised him of the need to report his actions, the attorney self-reported the theft to Informant and to his clients and resumed treatment for his bipolar disorder. This Court imposed an indefinite suspension whereby the attorney could not seek leave to reapply for three years. Even though there was intentional

misappropriation, this Court reduced the level of ABA recommended discipline because Mr. Belz self-reported his conduct, he voluntarily made restitution, he had no prior disciplinary history, he showed remorse and his clients were not ultimately harmed, as they did receive restitution. *Id.* at 46. In *Belz*, this Court concluded probation was inappropriate because the attorney had acted with a dishonest and selfish motive in taking his client's funds, he had done so multiple times and he had substantial experience with the law.

In Mr. Koenig's disciplinary matter Informant asserts that the appropriate discipline is a stayed suspension with probation instead of suspension. Unlike Mr. Belz, who had practiced law for over thirty years, Mr. Koenig has been licensed for only seven years. Informant also believes the following factors distinguish the two cases: Mr. Belz's conduct spanned at least a four-year period, involved multiple clients and involved over \$175,000 in stolen funds. Mr. Koenig's conduct spanned a much shorter period of time, involved a much smaller amount of money, and occurred while he was very ill and unable to work. In addition, at least two of the trust account checks were signed by Mr. Koenig's wife. With the other checks it appears that Mr. Koenig signed those checks but it does not appear that Mr. Koenig was aware of what had occurred at the time or that he made the conscious decision to use client funds for personal purposes. While Mr. Koenig ultimately bears responsibility for the misappropriation, Informant finds Mr. Koenig's actions must be less egregious than Mr. Belz who made the intentional decision to "borrow" client funds.

This Court has held that the purpose of probation is to educate, rehabilitate, and supervise an attorney to order to enable the attorney to modify his or her professional behavior. *In re Coleman*, 295 S.W.3d 857, 871 (Mo. banc 2009). Mr. Koenig's proposed probation is very detailed and is designed to educate, rehabilitate and supervise his activities. The terms include consulting with a mentor, obtaining malpractice insurance, attending Ethics School, submitting to random audits of his trust account and undergoing mental health evaluations and treatment so that he can better address the stressors which have prevented him from effectively managing his law office practice. Thus, the terms of the probation are designed to correct the problems Informant observed with Mr. Koenig's practice.

Missouri Supreme Court Rule 5.225 provides that a lawyer is eligible for probation if he or she is: (a) unlikely to harm the public during the period of probation and can be adequately supervised, (b) is able to perform legal services and able to practice law without causing the courts or profession to fall into disrepute; and (c) the attorney has not committed acts warranting disbarment. Informant believes Mr. Koenig meets the criteria required by Rule 5.225 and the probation terms will ensure that Mr. Koenig does not harm the public and is able to competently provide legal services without causing the courts or profession to fall into disrepute. Particularly noteworthy is the fact that prior to falling into a deep depression and having an extremely heavy workload, no one had made a complaint against Mr. Koenig. As the Kansas Supreme Court stated, probation is appropriate when (1) a workable, sustainable, detailed plan of probation has been developed, (2) when there are unique circumstances or when it is an

exceptional case with persuasive mitigating factors and (3) when it serves the best interest of the legal profession and the public. Informant asserts that this matter meets these three criteria and probation is appropriate. *In re Conwell*, 69 P.3d 589, 594 (Kan. 2003).

CONCLUSION

For the reasons set forth above, this Court should:

1. Find that Mr. Koenig violated Rules 4-1.3, 4-1.4, 4-1.15(c) and 4-8.4(c).
2. Suspend Mr. Koenig's license for two years with the suspension stayed and Mr. Koenig subject to probation for three years with the terms being those set forth in the stipulated "Term and Conditions of Probation."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of August 2011, two copies of Informant's Brief and a CD containing the brief in Microsoft Word format have been sent via First Class mail to:

The Honorable Robert G. Russell
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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 7,392 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. That Trend Micro software was used to scan the disk for viruses and that it is virus free.

Nancy L. Ripperger

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