IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
MARK BELZ,	**)**	**Supreme Court #SC88985**
	)	
Respondent.	**)**	

INFORMANT'S REPLY BRIEF

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THE COURT SHOULD DISBAR RESPONDENT BECAUSE:

A. HE VIOLATED RULES OF PROFESSIONAL CONDUCT INVOLVING DISHONESTY AND MISAPPROPRIATION OF CLIENT FUNDS.

B. DISBARMENT IS APPROPRIATE IN THAT:

1. THIS COURT HAS CONSISTENTLY DISBARRED LAWYERS FOR MISAPPROPRIATION OF CLIENT FUNDS, EVEN WHEN:

(A) THE LAWYER HAS PAID RESTITUTION,

(B) THE LAWYER HAS RECOVERED FROM A MENTAL CONDITION THAT CONTRIBUTED TO THE MISCONDUCT,

(C) RECURRENCE IS UNLIKELY;

2. ABA SANCTION STANDARDS INDICATE THAT DISBARMENT IS THE BASELINE SANCTION IN INTENTIONAL MISAPPROPRIATION CASES; AGGRAVATING FACTORS MUST BE BALANCED AGAINST MITIGATING FACTORS;

3. OTHER JURISDICTIONS' DECISIONS SUPPORT DISBARMENT AS THE APPROPRIATE SANCTION IN

MISAPPROPRIATION CASES, EVEN WITH DIAGNOSIS OF ARRESTED BI-POLAR CONDITION; AND

4. THE DISCIPLINARY HEARING PANEL RECOMMENDED DISBARMENT.

In re Adams, 737 S.W.2d 714 (Mo. banc 1987)

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

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

Rule 5.225

ARGUMENT

THE COURT SHOULD DISBAR RESPONDENT BECAUSE:

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4. THE DISCIPLINARY HEARING PANEL RECOMMENDED DISBARMENT.

This brief is intended to reply only to issues raised by Respondent in his brief. The Court is directed to Informant's initial Brief and the Appendix for a more thorough analysis.

Clarification: Timing of Respondent's Report to the OCDC

At pages 7 and 9 of his brief, Respondent states that he reported his misconduct to the OCDC in January of 2003. The record indicates that he first submitted a brief letter to the OCDC on May 1, 2003. **App. 110**. In that May 1, 2003, letter, he promised a more full report, which he did submit on June 10, 2003. **App. 111**. During the period between the time he confessed his misconduct to his son in December 2002 to the time of his initial report to the OCDC in May 2003, Respondent took the following actions: he confessed to his partner (who believed the confession was a direct result of Respondent's expectation of imminent death), he recovered from his medical condition, he recalculated the amount he had taken (discovering that he had improperly taken more than $75,000 more than his original estimate of $100,000), he borrowed funds for restitution, he met with his partners to discuss their obligation to report his misconduct, he met with an attorney to discuss his own obligation to report his misconduct, and he met with his psychiatrist. **App. 7, 15, 39, 116-117, 247, 309**.

Respondent's Reliance on 1978 *Miller* Decision is Misplaced

At pages 23 and 24 of his brief, Respondent argues that a 1978 disciplinary case, *In re Miller*, 568 S.W.2d 246 (Mo. banc 1978), should control or guide this Court's analysis as to sanctions in misappropriation cases. The *Miller* case is factually distinguishable in that the 1978 Court found that Mr. Miller actually believed he was helping his client. In contrast, Respondent Belz knew it was wrong on each of the many occasions during the four years that he misappropriated his clients' funds. **App. 13, 21-23, 28-29**. More importantly, the 1978 Court's analysis, to the extent that it permitted a lesser sanction than disbarment in misappropriation cases, was fully rejected in the 1980's, when this Court explained that disbarment was the only proper sanction in those cases: "Any earlier decisions that a lesser sanction might be considered are no longer authoritative," *In re Mendell*, 693 S.W.2d 76, 78 (Mo. banc 1985).

Respondent's Claim of Remorse Must be Tempered by his Continued Denials

Respondent argues that his own actions, like those of the attorney in the *Miller* case, "did not constitute moral turpitude or conscious wrongdoing." Respondent's Brief p. 23-24. It is difficult to understand Respondent's varying positions: On examination, Respondent repeatedly admitted that he knew it was wrong when he took over $175,000 from multiple clients to pay his own mortgage and cover office overhead; but, he continues to argue that it did not constitute "conscious wrongdoing." And, he seeks points in mitigation for remorse, yet he continues to deny that his thefts constitute wrongdoing or moral turpitude. Respondent's calculated effort to claim remorse while minimizing his culpability is also found on pages 30-31 of his brief, where he argues that

disbarment should not be imposed because disbarment "should be reserved only for cases of severe misconduct." He accurately explains the Court's historical position, but he is apparently asking the Court to find that his multiple intentional actions to convert over $175,000, taken over two hundred weeks, did not amount to "severe misconduct," when he knew at each step of the way that his conduct was wrong.

Respondent's Reliance on Simple Neglect Cases is Misplaced

In support of his argument for a stayed suspension and probation, Respondent argues that three Missouri Supreme Court decisions permit mitigation upon proof of a mental condition. (Respondent's Brief p. 17). Those cases, *In re Lang*, *In re Kopf*, and *In re Tessler*, do indeed support that proposition. All three cases, however, involve not misappropriation of client funds but neglect of client matters. The *Tessler* case also included a failure to cooperate. *In re Lang*, 641 S.W.2d 77 (Mo. banc 1982); *In re Kopf*, 767 S.W.2d 20 (Mo. banc 1989); *In re Tessler*, 783 S.W.2d 906 (Mo. banc 1990). As discussed in Informant's brief, this Court has permitted mitigation in certain types of cases, but not in misappropriation cases. (Informant's Brief pp. 17-21). The reasons for that analysis are simple: Disbarment is necessary in misappropriation cases to both maintain the integrity of the profession and to protect the public, *In re Adams*, 737 S.W.2d 714 (Mo. banc 1987). Put another way, "Some acts … may indicate such a lack of respect for the law . . . that disbarment may be warranted" *In re Kazanas*, 96 S.W.3d 803, 809 (Mo. banc 2003).

In his brief at p. 18, Respondent seeks to distinguish the *Adams* case, cited in Informant's Brief, by asserting that Mr. Adams' disease, addiction to chemical

substances, was "not a mental disability" (and is therefore distinguishable from his own bipolar condition for purposes of determining their respective mitigating effects). He offers no support for his assertion and it is, of course, contradicted by what the medical profession, the legal profession, and the courts understand all too well. Per the ABA Sanction Guidelines, chemical dependency should be considered for mitigation in the same manner and subject to the same restrictions as mental disability, Standard 9.32(h) ABA Standards for Imposing Lawyer Sanctions (1992 amendment).

Model Rules for Conditional Admission

Have No Application in This Case

Respondent argues that the ABA's new Model Rules for Conditional Admission justify probation in this case. At least two problems are inherent is his argument. First, the Model Rules are indeed just models, and have been neither adopted nor relied on in Missouri. More importantly, those new Model Rules were never intended to guide courts in determining sanctions in discipline cases, where lawyers, like Respondent, have violated rules of professional conduct. The ABA's Standards for Imposing Lawyer Sanctions provide that guidance. Those Standards have not been amended by the Conditional Admission Model Rules. Application of the ABA Sanction Standards is discussed at pages 21-30 of Informant's Brief.

Respondent's Explanations From

Outside the Record Should be Rejected

On pages 20-21 of his brief, Respondent attempted to explain the following phrases that he told his treating psychiatrist when he first met to talk about his misuse of client funds:

> "Thought I could make more money to nail down retirement. Felt I was paying too much of the overhead. Increased pressure to perform for myself. Didn't think of consequences."

Respondent's Brief (p. 20). **App 257, 381-382**.

Respondent's new explanation, and his denial that his misuse of funds was intended to nail down his retirement, are offered for the first time in his brief. Neither that denial nor his explanation – that the statement somehow related to his partner – can be found in the record. They should not be considered credible evidence.

Probation is Not Permitted When Disbarment is Warranted

Respondent argues at pages 27-32 that Missouri Supreme Court Rule 5.225 permits probation in this case. He correctly lists the minimal criteria for probation established in that rule:

A lawyer is eligible for probation if he or she:

> (1) Is unlikely to harm the public during the period of probation and can be adequately supervised;
>
> (2) Is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; and,

(3) Has not committed acts warranting disbarment.

Missouri Supreme Court Rule 5.225(a)(1-3).

Under Section a(2) of Rule 5.225, even if the Court accepts Respondent's suggestions that he is unlikely to harm the public during a probationary period and is able to perform legal services (after intentionally misappropriating over $175,000 over a four year period, knowing it was wrong) the Court must still decide whether his continued practice would cause the legal profession to fall into disrepute. (See also Informant's Brief, page 19).

And, by the very terms of Section a(3) of the rule, probation is not even subject to consideration when disbarment is warranted. As described in Informant's initial Brief, this Court consistently disbars lawyers who misappropriate funds. (Informant's Brief pp. 17-21). Suspensions, even without probation, have not been acceptable dispositions in misappropriation cases for over twenty years.

Respondent's argument, at page 30 of his brief, appears to be that the acts he committed do not warrant disbarment - not because he didn't commit them - but because other circumstances should mitigate. His point is not only inconsistent with this Missouri law as established by this Court in many misappropriation cases, it is a circular and illogical effort to put mitigating circumstances into the determination of whether the acts committed (in themselves) warrant disbarment. Lest there be confusion, here are the facts again: Respondent admitted intentionally taking and using over $175,000 in client funds to pay his personal mortgage and office overhead, on more than thirty occasions over a four year period, knowing it was wrong. Those acts at least warrant - if not

mandate – disbarment: "Misappropriation of a client's funds, entrusted to an attorney's care, is always grounds for disbarment." *In re Schaeffer*, 824 S.W.2d 1, 5 (Mo. banc 1992) (quoting from *In re Mentrup*, 665 S.W.2d 324, 325 (Mo. banc 1984)).

This Court's probation rule (Rule 5.225) has provided a tremendous benefit to the disciplinary system. In proper settings, it allows the lawyer being disciplined an opportunity to improve his or her practice, while on probation. It does not, however, permit probation when disbarment is "warranted." Even if the Court decided to deviate from existing case law and impose a suspension in this misappropriation case, Respondent would not be eligible for probation. Under Rule 5.225, probation is never available where the baseline sanction would be disbarment. To read the rule otherwise would defeat the whole meaning of Section c(3).

CONCLUSION

Probation is not available in this case because Respondent intentionally misappropriated client funds, conduct warranting disbarment. Subsequent mitigation does not change the fundamental premise of Rule 5.225 - that probation is not available when lawyers engage in such conduct. The policies established in Rule 5.225(a) are consistent with the law established by this Court's decisions in disciplinary cases: Disbarment is the only appropriate sanction in misappropriation cases. The Court should enter an order of disbarment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 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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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 2,349 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.

_____
Sam S. Phillips