

IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:)

JEFFREY LEE MILLER)

Respondent.)

) Supreme Court #SC93720
)
)

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Background

1. Respondent was licensed to practice law in September of 2004. He was assigned Missouri Bar No. 56430.
2. Respondent's license is in good standing.
3. The address Respondent most recently furnished the Missouri Bar and Supreme Court is: 125 South Main Street, Louisiana, Missouri 63353.
4. Respondent has no disciplinary history.
5. During the time frame relevant to this joint stipulation of facts, Respondent had a client trust account and an operating account at Mercantile Bank of Louisiana.

App. 147.

Count I

6. In early January of 2010, Mercantile Bank sent Informant copies of notices of insufficient funds it had sent Respondent concerning checks written on his client trust account.
7. After communicating with Respondent for several months regarding the notices, and with Respondent cooperating with all OCDC requests for documents and information, OCDC performed an audit of Respondent's Mercantile client trust and operating accounts.
8. The audit, together with information obtained from Respondent, revealed the following:

- a. In late September of 2009, \$25,000 was deposited in Respondent's trust account on behalf of a client named Black. Some of the money was owed to Respondent for earned fees.
- b. Between October 9, 2009, and November 16, 2009, Respondent's non-lawyer subordinates wrote eight checks from the trust account to Miller Law Office or Jeff Miller and deposited the funds in the Miller operating account.
- c. Respondent did not reconcile his monthly bank statements in October and November 2009, even though he knew that the staff person who typically reconciled his bank accounts was away from the office during most of those two months.
- d. Respondent had not trained his non-lawyer office staff regarding his professional obligations with respect to the trust account.
- e. Two of the checks written by office staff out of the trust account and deposited in the operating account included amounts intended to be sent to client Black's third party creditors. Those funds were forwarded to the third parties approximately six weeks, three months, and four months after the funds were removed from the trust account.

9. The client whose money was entrusted to Respondent in late September of 2009 never complained to Informant about Respondent's handling of his money.

10. As of August 2010, only Respondent is authorized to sign checks written on the client trust account.

11. Informant subsequently audited Respondent's Mercantile trust and operating accounts for the period from April of 2010 through April of 2011. The audit showed no improprieties. Bank records were obtained for the period from May of 2011 through April of 2013. A full audit was not completed, but the records were determined to be in substantial compliance with the Rules of Professional Conduct.

App. 147-149.

Count II

12. In early December of 2009, Respondent deposited a settlement check received in a client's worker's compensation case in his Mercantile operating account.

13. The client was not paid her share of the settlement funds until early February of 2010.

14. The client never complained to Informant about Respondent's handling of her funds.

App. 149.

Count III

15. On February 10, 2010, Respondent deposited a settlement check received in a client's worker's compensation case in his Mercantile operating account.

16. The client was not paid her share of the settlement funds until May 7, 2010.

17. The client whose money was entrusted to Respondent never complained to Informant about Respondent's handling of her funds.

App. 149-150.

Procedural History

In early January of 2010, one of the banks in which Respondent Miller maintained trust and operating accounts sent notice to the Office of Chief Disciplinary Counsel that the bank had notified Respondent that two checks written out of Respondent's trust account had not been paid due to insufficient funds in the account. A file was opened and a disciplinary investigation initiated.

In May of 2010, disciplinary counsel obtained, through subpoena, Respondent's trust and operating account bank records from July 1, 2009 through April of 2010. Additional bank records were obtained in July of 2010.

On August 17, 2010, Respondent's sworn statement was taken at the Office of Chief Disciplinary Counsel. Several days later, records were subpoenaed from a different bank in which Respondent held accounts, as well as more records from the bank that reported the insufficient funds checks. In April of 2011, following some discussion between Respondent's counsel and staff counsel regarding an appropriate disposition, staff counsel requested that Respondent produce his trust account records from the latest date already obtained (April 2010) to the (then) present to assure Respondent's practice

was conforming to the rules. Disciplinary counsel subpoenaed the records directly from the banks in mid-May 2011 because Respondent had not yet produced them.

On June 23, 2011, an Information was served on Respondent. It was accompanied by a proposed joint stipulation of facts, joint proposed conclusions of law, and a joint recommendation for discipline (indefinite suspension with no leave to apply for reinstatement for one year, stayed, accompanied by a one-year period of probation). Respondent thereafter filed an answer and a motion to dismiss Count I.

On August 3, 2011, a disciplinary hearing panel was appointed to hear the case. In early November of 2011, disciplinary counsel filed an amended information. Respondent filed an answer and a motion to dismiss Count I in mid-January of 2012. The presiding officer of the disciplinary hearing panel withdrew from the panel in late August of 2012. A new presiding officer was appointed on August 31, 2012.

The newly appointed presiding officer set the case for hearing on February 27, 2013. Respondent's counsel advised the presiding officer about a conflict with the February 27 date. The presiding officer thereafter noticed the hearing to occur on March 26, 2013.

On March 26, 2013, the parties appeared for the hearing. After Informant began putting on its case, Respondent's counsel objected to the lack of a records custodian affidavit from the bank in which Respondent maintained his trust account. Informant acknowledged the lack of a records custodian affidavit for Respondent's bank records, which had been produced by the bank pursuant to subpoena after notice to Respondent. Respondent moved for dismissal of the disciplinary case. Informant opposed dismissal

and agreed to produce the records custodian's affidavit at a reconvened (future) hearing. The panel sustained Respondent's objection to introduction of the bank records, but granted Informant's motion to reconvene the hearing at a future date.

On April 1, 2013, Informant filed a second amended information. Respondent filed an answer and a motion to dismiss count I in mid-April, 2013.

The parties thereafter agreed to negotiate a joint stipulation of facts, joint conclusions of law, and a joint recommendation for discipline. Staff counsel submitted the documents to Respondent's counsel by e-mail on May 22, 2013. Respondent signed the joint stipulation on July 22, 2013. The joint stipulation was submitted to the disciplinary hearing panel on July 24, 2013. The panel adopted the joint stipulation on August 28, 2013. The parties concurred in the panel's decision, and the matter was thereafter filed with the Supreme Court on October 9, 2013. On November 26, 2013, the Court ordered the record filed and the case briefed.

POINT RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE HAS ADMITTED VIOLATING MULTIPLE RULES OF PROFESSIONAL CONDUCT IN THAT HE FAILED TO HOLD HIS PROPERTY SEPARATE FROM CLIENTS' PROPERTY, HE DEPOSITED FUNDS BELONGING TO HIMSELF IN THE TRUST ACCOUNT, HE FAILED TO PROMPTLY DELIVER PROPERTY BELONGING TO CLIENTS TO THE CLIENTS, AND HE FAILED TO MAKE REASONABLE EFFORTS TO ENSURE THAT PERSONS UNDER HIS DIRECT SUPERVISORY AUTHORITY ACTED IN A MANNER COMPATIBLE WITH HIS PROFESSIONAL OBLIGATIONS.

In re Forck, No. SC88961 (Mo. banc February 4, 2014)

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

ABA Standards for Imposing Lawyer Sanctions

ARGUMENT

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE HAS ADMITTED VIOLATING MULTIPLE RULES OF PROFESSIONAL CONDUCT IN THAT HE FAILED TO HOLD HIS PROPERTY SEPARATE FROM CLIENTS' PROPERTY, HE DEPOSITED FUNDS BELONGING TO HIMSELF IN THE TRUST ACCOUNT, HE FAILED TO PROMPTLY DELIVER PROPERTY BELONGING TO CLIENTS TO THE CLIENTS, AND HE FAILED TO MAKE REASONABLE EFFORTS TO ENSURE THAT PERSONS UNDER HIS DIRECT SUPERVISORY AUTHORITY ACTED IN A MANNER COMPATIBLE WITH HIS PROFESSIONAL OBLIGATIONS.

The Missouri Supreme Court has inherent authority to regulate the practice of law. *In re Zink*, 278 S.W.3d 166 (Mo. banc 2009). The purpose of attorney discipline is to protect the public and maintain the integrity of the legal profession. *In re Stewart*, 342 S.W.3d 307 (Mo. banc 2011).

Respondent has acknowledged responsibility for multiple instances of ethical wrongdoing regarding his handling of his client trust account. The rule violations started

as soon as a \$25,000 check was deposited in Respondent's client trust account on behalf of a client named Frank Black.¹

Respondent's first misstep was in not communicating with his client about specifically how much Respondent believed Black owed him for services already performed and removing those funds from the trust account as soon as the check cleared. Instead, all the money Miller claimed Mr. Black already owed him was left in the trust account in violation of Rule 4-1.15 (c) and (e)(2010),² thereby commingling funds that he believed were owed to him with funds entrusted to him by the client to satisfy the client's other financial obligations.

Respondent has admitted that funds were withdrawn on October 16, 2009, that were at least in part to be paid to one of Mr. Black's creditors as part of the client's debt reduction plan. A check was not sent, however, to the intended recipient of the October 16 withdrawal until January 11, 2010. Respondent has admitted that his conduct violated

¹ The money was loaned to Respondent's client by a third party. The client's plan was to reduce (by negotiation) and/or satisfy some of the client's debts. Respondent was to assist the client in the debt negotiation process. Respondent was also one of the client's creditors, as the client owed him an indeterminate sum for services already performed. Respondent testified during a sworn statement taken from him during the disciplinary investigation that he discussed with the client that he was owed fees and would be taking some of the \$25,000 to pay past due fees. **App. 22-23, 36-37.**

² All Rule references are to the rule that became effective January 1, 2010.

Rule 4-1.15 (i), which required Respondent to give prompt notice and delivery of the funds to the third party.

Finally, Respondent has admitted he violated Rule 4-5.3(b) by not supervising his subordinates' access to the account. The admitted facts show that Respondent did not reconcile or review his trust account bank records in the several months following the client's \$25,000 deposit. Such reconciliation and/or review would have alerted Respondent to the multiple withdrawals from that account by his wife and daughter. Nor had he trained his office staff, who had signatory authority over the trust account, regarding his professional obligations with respect to the accounts. A subsequent audit of the trust account showed that Respondent's abdication of his professional obligations toward the trust account allowed his non-lawyer subordinates to make multiple, unethical, withdrawals from the account. The vast majority of the funds were shown by the audit to have been deposited in Respondent's operating account and used to pay expenses unrelated to client Black. It is noted that, over time, Respondent testified that Black was reimbursed all the funds unethically removed from the trust account.

Counts II and III arose out of Respondent's settlement of two separate worker's compensation cases. In both instances, Respondent settled the cases, then deposited the settlement checks in his operating account. He has admitted he violated Rule 4-1.15 (c) by depositing the checks in his operating (not trust) account. He has acknowledged violating another subdivision of the rule, 4-1.15(i), by not providing the clients the client's share of the settlement proceeds until months after the checks were deposited.

The disciplinary investigation of this case included acquiring, by subpoena and with notice to Respondent, all of Respondent's trust and operating bank account records from two different banks, covering the time frame from January of 2006 through May of 2011. Literally hundreds of pages of bank records were produced. Nearly all the bank records were audited by the Office of Chief Disciplinary Counsel. In the end, disciplinary authorities were satisfied that Respondent Miller's trust account misconduct was confined to the time frame covered in the Second Amended Information, that is, September of 2009 through May of 2010.

Respondent Miller's sworn statement was taken in this case in August of 2010. In addition to the fact finding that is typically associated with that discovery tool, there was a good deal of discussion wherein disciplinary authorities attempted to explain to Respondent how the rules intersect with the running of his law practice. Nothing has been discovered or reported to OCDC subsequent to the summer of 2010 that would suggest Respondent has not conformed his law practice to the rules.

One aspect of this case distinguishes it from most. If it were not for the overdraft reporting rule, which went into effect January 1, 2010, disciplinary authorities may well have never learned of Respondent's misconduct. Neither the client whose \$25,000 was mishandled, nor either of the two worker's compensation clients whose settlements were likewise mishandled, complained about Respondent Miller to OCDC. Further, attempts by disciplinary authorities to contact and communicate with those individuals were unsuccessful. Based on what Respondent Miller told disciplinary authorities and what was learned from his bank records, all three clients were eventually made financially

whole. While the ABA Standards for Imposing Lawyer Sanctions specifically state, at Standard 9.4(f), that “failure of [an] injured client to complain” should be accorded neither aggravating or mitigating consideration in sanction analysis, the failure of any of the affected individuals to complain or cooperate with disciplinary authorities is notable.

Disciplinary counsel eventually agreed to jointly recommend a stayed suspension with a rigorous probation in this matter primarily because the evidence suggested Respondent Miller’s transgressions were attributable to his ignorance of what was required of him by the safekeeping property rule (Rule 4-1.15) rather than a knowing violation by him of the rules for a dishonest or pecuniary motive. Respondent testified at his sworn statement that once he became aware in late October or early November of 2009 that the trust account was nearly depleted, he directed his office staff to make payments as Mr. Black directed out of the operating account, i.e., out of Respondent’s own funds (since only his own funds should have been in the operating account).

App. 68-71. Respondent advised Black that he would do legal work for Black going forward without charging him, because otherwise, Black’s goal of getting ahead of some of his debts would not be met. **App. 70-71.** Respondent considered it refunding money to Black. **App. 69-70.**

Respondent testified in his sworn statement that Rachael, his office manager, typically reconciled his bank accounts at the time the misconduct in this case was occurring, but that she was away from the office on maternity leave at the time. **App. 42, 47.** The bank accounts were not reconciled while Rachael was away from the office.

App. 48. Rachael and Lori, Respondent's wife who was filling in for Rachael, both were signatories to Respondent's bank accounts during the fall of 2009. Both wrote multiple checks to the Miller Law Office operating account out of the trust account. **App. 148.** Neither Lori nor Rachael has had signatory authority over Respondent's trust account since August of 2010. Respondent signs all checks on his firm's behalf. **App. 75.**

With respect to the worker's compensation settlement checks, Respondent stated at his sworn statement that he deposited the checks in his operating account because he had already done the work and that is what he thought was proper. **App. 80-81.** It was explained to Respondent that checks payable to the client had to be held in trust until paid out. **App. 81, 99.**

Trust account violations can result in the attorney's disbarment. *In re Ehlers*, 319 S.W.3d 442 (Mo. banc 2010). On the other end of the spectrum, inadequate record keeping and failure to pay promptly and deliver to a client funds belonging to the client can result in a reprimand. *In re Elliott*, 694 S.W.2d 262 (Mo. banc 1985) (per curiam). So many factors, ideally those established in the first instance by the ABA Standards for Imposing Lawyer Sanctions, but also those found in disciplinary common law, can be taken into consideration.

Analysis of this case under the theoretical framework of the ABA Standards requires identification of the lawyer's mental state, the extent of actual or potential harm done, determination of what ethical duty the lawyer violated, and consideration of mitigating and aggravating factors. Informant stipulated that Respondent's rule violations were negligent – that he appeared to have acted in ignorance of lawyer trust

accounting principles and his ethical obligations regarding his employee subordinates. The financial injury to his clients was ameliorated, over time, by Respondent's refunding, or repaying, the affected clients. Respondent's efforts to refund Black were started before OCDC became aware of his trust account violations. This Court has said that voluntarily restoring misappropriated funds can be accorded weight as a mitigating factor. *In re Belz*, 258 S.W.3d 38, 46 (Mo. banc 2008). Respondent violated ethical rules governing the trust account, which are duties owed to clients. The aggravating and mitigating factors stipulated to between the parties are found in the Appendix at pages **151-152.**

Finally, Respondent's record of trust accounting compliance since the end of the charged misconduct provides sufficient reassurance to allow disciplinary counsel to jointly recommend stayed suspension with a probation designed to ensure public safety. The proposed probation terms include appointment of a trust account monitor, quarterly certification by Respondent to the OCDC probation monitor regarding the propriety of Respondent's handling of any client funds during the quarter, and submission to the possibility of random trust account audits. Disciplinary authorities are confident that these safeguards will protect the public and prevent any further denigration to the integrity of the profession from Respondent's conduct.

The case of *In re Williams*, 711 S.W.2d 518 (Mo. banc 1986) shares similarities with this case in that both involve family members' access to the attorney's trust account. The *Williams* Court disbarred Williams even though it was his wife, serving as his

secretary and bookkeeper, who was shown to have been primarily responsible for misusing client funds and abusing the trust account. The *Williams* Court disbarred Mr. Williams because the record showed that he had long known the trust account was in serious disarray, yet had not taken corrective action, thereby exposing client funds to the risk posed by the unstable account.

By contrast, an audit of Respondent Miller's bank records back to 2006 revealed no trust account issues predating the misconduct that is the subject of this case. That distinction, along with the evidence that Respondent acted relatively quickly in removing his family members' names from his attorney accounts, is believed to distinguish this case from *Williams*.

Respondent Miller commingled his worker's compensation clients' funds with his own when he deposited settlement checks in his operating account, then failed to pay out to the clients their share of the funds for an unethically long time. This practice is especially troubling when the operating account balance fell below what was owed to the clients before the funds eventually were paid out to the clients. Again, however, depending on the myriad factors particular to each case, commingling has been sanctioned by disbarment, *In re Witte*, 615 S.W.2d 421 (Mo. banc 1981), cert den. 454 U.S. 1025, to stayed suspension with probation. See, e.g., *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009), where commingling was one of Coleman's rule infractions. And, in *In re Tessler*, 783 S.W.2d 906 (Mo. banc 1990), the Court suspended Tessler with leave to apply for reinstatement after six months for, among other misconduct, failing to keep a sufficient balance in his trust account to pay his obligations and delay in paying

over funds collected for a client. Respondent Miller testified during his sworn statement that he deposited his clients' settlement checks in his operating account because he thought, at the time, that that was the correct course of action inasmuch as he had already earned his fee. Of course, that way of thinking evidences a gross disregard for the fiduciary obligation to protect the client's share of the funds, but it does suggest Respondent acted out of ignorance rather than an intention to violate the rules. See *In re Forck*, No. SC88961 (Mo. banc February 4, 2014), slip op. at 10; *In re Coleman*, 295 S.W.3d 857, 871 (Mo. banc 2009).

Disciplinary counsel agreed to jointly recommend stayed suspension with probation in large part because Respondent's misconduct appeared to originate from a lack of appreciation for his ethical obligations regarding client money, but not from an intentional or knowing violation of the rules with a profit motive. While Respondent has shown little or no contrition for his misconduct, he has taken positive steps to rectify his deficient law office management practices. The proposed probation would provide assurance to the Court that Respondent now complies with the safekeeping property rule. The financial harm to Respondent's clients, while potential, was rectified by Respondent. The clients would not talk to disciplinary authorities about the case.

Respondent's misconduct, because it put clients' funds at clear risk over a period of several months and evidenced a reckless and cringe-worthy disregard for his fiduciary obligations, could merit actual suspension. Education and supervision, however,

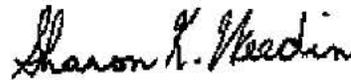
provided through a stayed suspension with probation terms crafted to closely monitor and educate Respondent, is the joint recommendation of disciplinary counsel and Respondent.

CONCLUSION

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

Respectfully submitted,

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel



By: _____

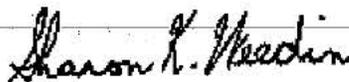
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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2014, the Informant's Brief was sent via U.S. regular mail, postage prepaid, and through the Missouri Supreme Court e-filing system to:

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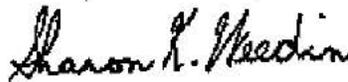


Sharon K. Weedon

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 3,933 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Sharon K. Weedon