

IN THE SUPREME COURT  
STATE OF MISSOURI

IN RE: )  
 )  
JEFFREY LEE MILLER, ) Supreme Court #SC93720  
 )  
Respondent. )

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**RESPONDENT’S BRIEF**

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NIEDNER, BODEUX, CARMICHAEL,  
HUFF, LENOX, PASHOS & SIMPSON,  
LLP

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ATTORNEYS FOR RESPONDENT

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## **TABLE OF AUTHORITIES**

### **CASES**

*In re Coleman*, 295 S.W.3d 857, 869 (Mo. 2009)

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*In re Williams*, 718 S.W.2d 518 (Mo. 1986)

*In re Witte*, 615 S.W.2d 421 (Mo. 1981)

### **OTHER AUTHORITY**

*ABA Standards for Imposing Lawyer Sanctions* (1992)

### **RULES**

*Rule 5.225*

**STATEMENT OF JURISDICTION**

Respondent adopts Informant's Statement of Jurisdiction.

## STATEMENT OF FACTS

Respondent agrees with and adopts Informant's Statement of Facts but writes additionally to emphasize some aspects of the personal background of Jeffrey Miller as it relates to mitigating factors.

Respondent obtained his law license in 2004 at the age of 43. *Informant's Appendix pgs A126-128.* Prior to attending law school, he was a laborer for Coca Cola when he sustained an injury that resulted in his being declared disabled. *Informant's Appendix pgs A128.*

Respondent was a relatively new lawyer during the time period of the violations at issue. *Informant's Appendix pgs A126.* He practiced with another attorney for approximately one year and then began his own solo practice in 2006. *Informant's Appendix pgs A127.* He had recently taken over the practice of another attorney and became very busy. *Informant's Appendix pgs A9.*

Respondent was elected and has served as the President of the Pike County Bar Association since 2009. *Informant's Appendix pgs A126-128.* Respondent has been recognized by the Missouri Bar on the Pro Bono Wall of Fame each year since 2010. *Informant's Appendix pgs A151.*

**POINTS 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.**

**II**

**THE SUPREME COURT SHOULD GRANT RESPONDENT PROBATION BECAUSE THE MITIGATING FACTORS WARRANT A STAYED SUSPENSION WITH PROBATION, IN THAT:**

**A. RESPONDENT WAS A RELATIVELY NEW PRACTITIONER WITH A SOLO PRACTICE WITHOUT THE BENEFIT OF THE GUIDANCE OF A MORE EXPERIENCE PRACTITIONER;**

**B. RESPONDENT DID NOT ENGAGE IN INTENTIONAL MISCONDUCT, IS REGRETFUL FOR THE VIOLATIONS, AND HAS NOW BEEN EDUCATED SO THAT FUTURE VIOLATION WILL NOT OCCUR;**

**C. RESPONDENT HAS FULLY AND FREELY DISCLOSED INFORMATION TO THE DISCIPLINARY BOARD AND HAS COOPERATED WITH THE INVESTIGATION;**

**D. RESPONDENT HAS NO PRIOR DISCIPLINARY RECORD AND HAS A REPUTATION FOR GOOD CHARACTER AND DONATES SIGNIFICANT TIME TO PRO BONO WORK.**

*ABA Standards for Imposing Lawyer Sanctions* (1992)

*In re Coleman*, 295 S.W.3d 857, 869 (Mo. 2009)

*In re Forck*, 418 S.W.3d 437, 441 (Mo. 2014)

### **III.**

**PROBATION IS WARRANTED UNDER MISSOURI SUPREME COURT RULE 5.225, THE ABA STANDARDS FOR IMPOSING LAWYER DISCIPLINE, AND THE CONSIDERATION OF THE PREVIOUS DECISIONS OF THIS COURT IN LAWYER DISCIPLINARY MATTERS.**

*ABA Standards for Imposing Lawyer Sanctions* (1992)

*In re Coleman*, 295 S.W.3d 857, 869 (Mo. 2009)

*Rule 5.225*

*In re Tessler*, 783 S.W.2d 906 (Mo. 1990)

*In re Witte*, 615 S.W.2d 421 (Mo. 1981)

*In re Williams*, 718 S.W.2d 518 (Mo. 1986)

**ARGUMENT**

**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.**

Respondent agrees with the arguments presented by Informant in its Brief and will not set forth the same arguments presented by Informant; however, Respondent does emphasize to the Court the additional reasons that warrant a stayed suspension with probation as set forth in Sections II and III.

**II.**

**THE SUPREME COURT SHOULD GRANT RESPONDENT PROBATION BECAUSE THE MITIGATING FACTORS WARRANT A STAYED SUSPENSION WITH PROBATION, IN THAT:**

**A. RESPONDENT WAS A RELATIVELY NEW PRACTITIONER WITH A SOLO PRACTICE WITHOUT THE BENEFIT OF THE GUIDANCE OF A MORE EXPERIENCE PRACTITIONER;**

**B. RESPONDENT DID NOT ENGAGE IN INTENTIONAL MISCONDUCT, IS REGRETFUL FOR THE VIOLATIONS, AND HAS NOW BEEN EDUCATED SO THAT FUTURE VIOLATION WILL NOT OCCUR;**

**C. RESPONDENT HAS FULLY AND FREELY DISCLOSED INFORMATION TO THE DISCIPLINARY BOARD AND HAS COOPERATED WITH THE INVESTIGATION;**

**D. RESPONDENT HAS NO PRIOR DISCIPLINARY RECORD AND HAS A REPUTATION FOR GOOD CHARACTER AND DONATES SIGNIFICANT TIME TO PRO BONO WORK.**

The ABA *Standards for Imposing Lawyer Sanctions* sets forth a number of mitigating factors for the court to consider when imposing discipline of a lawyer. (1992). “This Court relies on the ABA Standards when imposing sanctions to achieve the goals of attorney discipline. In re Coleman, 295 S.W.3d 857, 869 (Mo. 2009). Section 9.32 of the ABA Standards states that factors which may be considered in mitigation include an absence of a prior disciplinary record, absence of a dishonest or selfish motive, timely good faith effort to make restitution or to rectify consequences of misconduct, full and free disclosure to disciplinary board or cooperative attitude toward proceedings, inexperience in the practice of law, character or reputation, and remorse. All these mitigating circumstances are present in this matter and justify a reduction in the degree of discipline to be imposed upon Respondent.

Respondent obtained his law license in 2004 at the age of 43. *Informant’s Appendix pgs A126-128*. Prior to attending law school, he was a laborer for Coca Cola

when he sustained a serious leg and back injury required approximately 25 surgeries and resulted in his being declared disabled at the young age of 27. *Informant's Appendix pgs A128*. Rather than being limited by the physical disability and simply accepting a check each month, Respondent endeavored to and became a lawyer.

As a lawyer, Respondent has a good reputation in the community. He has never had any prior complaints and has no disciplinary record. *Informant's Brief pg 4*. He was elected and has served as the President of the Pike County Bar Association since 2009. *Informant's Appendix pgs A126-128*. He also has good character as evidenced by his considerable pro bono work. In fact, he has been recognized by the Missouri Bar on the Pro Bono Wall of Fame each year since 2010. *Informant's Appendix pgs A151*. Good character and reputation is a mitigating factor. It is also a mitigating factor that he has no prior disciplinary record.

After obtaining his license, Respondent worked for another attorney in rural Pike County for a little over a year. *Informant's Appendix pgs A126-127*. In 2006, he was practicing as a solo practitioner and has since that time. *Informant's Appendix pgs A126-127*. It was in later 2009 and early 2010 that the conduct violations occurred. Therefore, Respondent was a relatively new attorney with a solo practice that did not have the benefit of the guidance of a more experienced practitioner on properly maintaining a trust account. The inexperience is a mitigating factor.

The violations occurred during a period of October 2009 to May 2010. *Informant's Brief pgs 4-6*. Respondent was questioned by the OCDC at-length about the specific deposits and withdraws from both his trust and operating account and the clients

involved. *Informant's Appendix pgs A79-A122*. Although it is not an excuse to be uninformed of the responsibilities a lawyer has in regards to the trust account, Respondent's actions were due to ignorance rather than an intentional misconduct. The Record is clear and it is agreed upon by both Respondent and the OCDC that the violations were not willful or malicious, which is a mitigating factor.

Since Respondent was advised of the trust account violations, he is now completely aware of his duties related to the trust account. He received information from the staff counsel from the OCDC and has also endeavored to apprise himself of all requirements. The OCDC obtained Respondent's bank records through April 2013 and found no further violations. *Informant's Brief pg 6*. During the period of time of the violations, Respondent had absorbed another attorney's law practice who had retired, and it was a hectic time for Respondent. *Informant's Appendix pg A9*. He acknowledges that he should not have relied so heavily upon his staff and should have overseen his staff and reconciled the accounts regularly. He is regretful of the violations, and he has changed the manner in which he handles money and accounting in his office. *Informant's Appendix pg A75*. He has removed all other staff as signatories, so he is the sole signatory on the trust account. *Informant's Appendix pg A41*. Therefore, even though he has advised his staff on his legal obligations, he also has sole control over the account. Further, he has also updated the accounting software for the law office in order to make entry mistakes less likely. *Informant's Appendix pgs A74-75*. He also reviews reports and reconciles his accounts on a regular basis. It is a mitigating circumstance that Respondent is remorseful and has rectified the problems that led to the violations.

Respondent has been cooperative with the investigation and disciplinary proceedings. *Informant's Brief pg 4*. There have been no complaints to either Respondent or the Bar related to the violations, and the clients were made whole within a short period of time. *Informant's Brief pg 6-7*. If Respondent had been made aware of the overdraft issues with the accounts, he would have reconciled and rectified the problems immediately. Respondent respects his duties to his clients and takes his responsibilities seriously. He would never knowingly injure a client. For example, Respondent was retained by client Black to negotiate certain liabilities. When it became clear that it could not be negotiated for the amount in trust, Respondent even refunded earned fees back to client Black. *Informant's Appendix pgs A68*.

“The purpose of imposing discipline is not to punish the attorney, but to protect the public and maintain the integrity of the profession.” In re Forck, 418 S.W.3d 437, 441 (Mo. 2014). These violations occurred nearly four (4) years ago. Since that time, Respondent has had no violations and has remedied the issues that led to these violations. The OCDC has reviewed his bank account records through April 2013 to ensure the trust account is being properly managed, and there were no violations. Since the purpose is not to punish Respondent, the recommended probation is more than sufficient to protect the public and maintain the integrity of the profession.

### III.

**PROBATION IS WARRANTED UNDER MISSOURI SUPREME COURT RULE 5.225, THE ABA STANDARDS FOR IMPOSING LAWYER DISCIPLINE, AND**

## **THE CONSIDERATION OF THE PREVIOUS DECISIONS OF THIS COURT IN LAWYER DISCIPLINARY MATTERS.**

Respondent qualifies for probation under Rule 5.225. The Rule sets forth when probation is possible in disciplinary matters. It states:

- (2) A lawyer is eligible for probation if the lawyer;
  - (A) Is unlikely to harm the public during the period of probation and can adequately be supervised;
  - (B) Is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; and
  - (C) Has not committed acts warranting disbarment.

Respondent has proven over the last four (4) years that he is not likely to cause harm to the public and has continued to practice law and perform legal services throughout that period of time. He does and has served his clients with integrity during that period of time. Disbarment is not warranted according to ABA Standard 4.11, which states, “Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.” The record is clear that all violations were unintentional. Therefore, disbarment is not warranted and probation is appropriate.

The appropriate sanctions range between a suspension and reprimand, according to the ABA Standards. Section 4.12 states, “Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. Section 4.13 states, “Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.” The difference is the state of mind of the Respondent.

Knowledge is defined as, “the conscious awareness of the nature or attendant circumstances of the conduct without the conscious objective or purpose to accomplish a particular result. “ Negligence is defined as, “the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” The question is the state of mind of Respondent.

Respondent did allow his office staff control over the trust account with signatory authority and he did not properly supervise their use of these accounts during the period of time at issue. Respondent at no time acted with intent. Even if his violations were with knowledge as defined by The ABA Standards, the abundance of mitigating factors make probation in this matter appropriate.

One goal of the ABA Standards is to create consistency in the discipline of lawyers. “Inconsistent sanctions, either within a jurisdiction or among jurisdictions, casts doubts on the efficiency and the basic fairness of all disciplinary systems.” *Standards for Imposing Lawyer Sanctions*. Therefore, this Court should consider its prior rulings to create consistency.

The previous decisions of this Court in disciplinary matters support the proposed sanction. *In re Coleman*, the court imposed a suspension stayed with a period of probation. 295 S.W.3d 857 (Mo. 2009). In that matter, the lawyer committed multiple violations of the Rules of Professional Conduct in his handling of three client cases and improper use of the trust account. *Id.* at 869. The lawyer had drafted and entered into a fee agreement with a client wherein he had a contingency interest in the client’s claim

and also gave himself sole permission to accept or reject a settlement offer. *Id.* at 864. The lawyer then failed to adhere to a client's decision in that he accepted a settlement offer although the client explicitly directed him not to accept it. *Id.* Further, he even filed a motion to enforce the wrongfully accepted settlement. *Id.* The lawyer withdrew from representation of the client without proper notification, failed to advise her on how to protect her interests upon his withdrawal, and negatively impacted her case and ability to obtain another attorney by not responding to her requests for information about her case and whether he was asserting an attorneys lien. *Id.* at 867.

The lawyer also had violations related to his trust account. It was found that the lawyer was regularly commingling his funds with client funds in the trust account. *Id.* at 866. He would leave his earned fees in the trust account and then make payment for his expenses directly from the trust account as needed. *Id.* He also failed to keep an accurate record of the expenses and his client funds. *Id.* It should also be noted that the lawyer had three separate prior disciplinary sanctions entered against him. *Id.* at 859. This Court found that the actions of the lawyer were the result of ignorance of the rules rather than with the intention of violating the rules, and the sanction entered was suspension with the suspension stayed and the lawyer was placed on probation for a period of one year. *Id.* at 871.

The lawyer Coleman had a course of conduct that actually injured the client, which led to a complaint against the lawyer. In this matter, Respondent did not personally receive a complaint from the clients and neither did the Bar. Further, the clients were not actually injured, although there was a delay in their receiving their

money. Like in *Coleman*, the actions of Respondent were a result of the ignorance rather than any intention to violate the rules. Further, Respondent has no prior disciplinary matters and a multitude of mitigating circumstances, whereas the lawyer Coleman had three prior disciplinary sanctions. Therefore, it would be inconsistent for this Court to order more severe sanctions for Respondent.

There are additional cases in which the lawyer received a more severe sanction; however, those matters are certainly distinguishable from this matter. *In re Tessler*, the lawyer received a one year suspension with no stay for probation, which was recommended by the Bar Committee. 783 S.W.2d 906 (Mo. 1990). In that matter, the lawyer failed to file two separate lawsuits within the statute of limitations and did not advise the clients of the mistake. *Id.* at 908. He persistently failed to respond to repeated calls and letters from the clients. *Id.* at 908-909. He also had an insufficient balance in the trust account and when clients advised him that they could not obtain their money due to the insufficiency, he either ignored their complaints or did not attempt to resolve the issue and make the clients whole. *Id.* In fact, one client suffered harm because she bounced checks based upon Tessler's assurances that she could cash the check. *Id.* at 909. He received complaints from three different clients. *Id.* It is also important to note that he did not cooperate with the investigation and the only mitigating factor was that he was having personal problems at the time of the complaints. *Id.*

The circumstances of Respondent are certainly distinguishable from *Tessler*. Respondent was unaware that the clients were not able to obtain their money due to insufficient funds, and they were made whole within a relatively short period of time.

Respondent was always responsive to his clients, and the clients never made any complaints to Respondent or the Bar. Respondent has corrected the circumstances that led to the violations and was completely cooperative with the investigation. Further, the recommendation of the OCDC and the Advisory Committee are that Respondent receives probation.

There are two cases that involve disbarment of lawyers involving trust account violations. *In re Witte*, the lawyer was disbarred. 615 S.W.2d 421 (Mo. 1981). In that matter, the lawyer Witte had made two settlements for his client without her knowledge or consent. *Id.* at 421. He forged his client's signature on both settlement and release documents. *Id.* He then deposited the settlement sums in his personal bank account, used it for his personal expenses, and claimed these on his tax returns as income. *Id.* at 422. It was clear from the evidence that lawyer Witte, with the purpose to misappropriate the client's funds, was intentionally stealing. *Id.* at 428. The state of mind of the lawyer and the absence of any mitigating circumstances resulted in the disbarment of lawyer Witte. Clearly, *Witte* is distinguishable from this matter. Respondent acted without intent and there are a number of mitigating circumstances that apply.

*In re Williams*, the lawyer was also disbarred for violations related to the trust account. 718 S.W.2d 518 (Mo. 1986). In that case, lawyer Williams had deposited a settlement check into his trust account that had been overdrawn. *Id.* at 519. A check was written to the client two days later, but it was returned for insufficient funds. *Id.* The client contacted lawyer Williams, and he provided subsequent checks to the client but

those were also returned for insufficient funds. *Id.* at 520. It was not until the client filed a bar complaint that lawyers Williams made the client whole. *Id.*

Lawyer Williams put the client funds into an account that he knew to be in serious disarray for a long period of time. *Id.* Even with this knowledge, he made no efforts to correct the problem, thereby knowingly putting the client's funds at risk by depositing it into the account. *Id.* The *Williams* case is distinguishable from this matter. Respondent was not aware of the issues with his trust account, and as soon as he became aware of the problem he took action to make the client whole. This was done even before the investigation ensued. Respondent had never previously had any checks that were returned for insufficient funds, which is confirmed by the OCDC reviewing the bank account records of Respondent back to January 2006.

Probation is warranted under the circumstances. Such a sanction is consistent with both Rule 5.225 and The ABA Standards. An examination of the caselaw in disciplinary matters also demonstrates that probation is warranted. It would be inconsistent for this Court to rule otherwise.

### **CONCLUSION**

For all of the foregoing reasons and those stated in Informant's Brief, Respondent respectfully prays that this Court approve the Stipulation and Proposed Terms of Conditions of Probation agreed upon by the parties and enter its order accordingly.

RESPECTFULLY SUBMITTED,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 8<sup>th</sup> day of April, 2014, a true and correct copy of the foregoing was served via the electronic filing system pursuant to Rule 103.08 on:

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/s/ Yvonne M. Yarnell

**CERTIFICATION PURSUANT TO 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 4,475 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

/s/ Yvonne M. Yarnell