

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

FREEMAN BOSLEY, JR.

Respondent.

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Supreme Court #SC94121

INFORMANT'S REPLY BRIEF

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POINTS RELIED ON

CONSISTENT WITH THIS COURT'S PRIOR RULINGS AND THE ABA SANCTION STANDARDS A SUSPENSION OF RESPONDENT'S LICENSE IS APPROPRIATE WHERE RESPONDENT HAS ENGAGED IN MULTIPLE, REPEATED AND KNOWING VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT CONCERNING THE MAINTANENCE AND USE OF A CLIENT TRUST FUND ACCOUNT AND FAILED TO PROTECT HIS CLIENT'S PROPERTY.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

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

ARGUMENT

CONSISTENT WITH THIS COURT'S PRIOR RULINGS AND THE ABA SANCTION STANDARDS A SUSPENSION OF RESPONDENT'S LICENSE IS APPROPRIATE WHERE RESPONDENT HAS ENGAGED IN MULTIPLE, REPEATED AND KNOWING VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT CONCERNING THE MAINTANENCE AND USE OF A CLIENT TRUST FUND ACCOUNT AND FAILING TO PROTECT HIS CLIENT'S PROPERTY.

The facts in this case are undisputed and establish that Respondent commingled funds, failed to promptly deliver funds to clients, failed to keep complete banking records and misappropriated client funds for his own personal use. In the period during which OCDC audited Respondent's Trust Account and Operating Account, December 2010 through March 2013, on thirty identified occasions Respondent commingled personal funds with his client's funds, twenty-nine times by depositing earned fees in his Trust Account and on one other occasion by putting client funds into his personal account. During this same period Respondent routinely utilized the funds held in his Trust Account to pay personal and operating expenses. On twelve occasions during the audited time period Respondent placed client funds in his Trust Account only to have the balance fall below the amount of the client funds being held prior to disbursal of those client funds.

Finally, it is undisputed that although Respondent was aware of these issues with his Trust Account as early as February of 2012 when he received an overdraft notice from his bank for the Trust Account, he failed to make restitution to those clients whose funds he had mishandled until after the OCDC investigation commenced. In fact, at the time of the DHP Hearing in December of 2013, eight of the twelve issues with clients whose funds had not been properly disbursed still remained unresolved in whole or in part. **Respondent's Brief, p. 12.**

Respondent argues that in the face of this extensive record of undisputed misconduct, an appropriate sanction is a stayed suspension with probation. To reach this conclusion Respondent's Brief is filled with improper reference to settlement discussions, misstatement of applicable law, reference to matters extraneous to the record and unsupported by anything other than Respondent's assertions, mischaracterization of testimony, excuses and contradictions in his own argument.

A. Respondent's Brief includes improper argument that should be excluded.

Respondent's brief references settlement discussions between Informant and Respondent that were unsuccessful because Respondent failed to make restitution to his clients as Respondent represented was being done during the course of those discussions. It is well settled that the content of settlement negotiations and evidence related to settlement negotiations is not admissible and should be excluded. *Hancock v. Shook*, 100 S.W.3d 786,799 (Mo. banc 2003). Respondent's inclusion of references to those discussions is improper and should be excluded.

Respondent also seeks to argue that probation is appropriate because he is in merger discussions with an out of state law firm that, if the merger goes through, will assume “most or all of the business operations of the two firms.” **Respondent’s Brief p. 17.** There is nothing in the record that supports this assertion, at best it is speculative, and it should be disregarded.

B. Respondent is incorrect when he argues that the Hearing Panel committed “errors” in its Decision.

Respondent argues that there are three “errors” in the Hearing Panel Decision, *to wit*: (a) there was no evidence before the Hearing Panel on which it could base its conclusion that Respondent violated Rule 4-8.4(c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; (b) the Hearing Panel’s Decision was in error when it found that Respondent “admits in his Answer he misappropriated client funds for his own personal use”; and (c) there was no “begrudging admission” by Respondent of the misappropriation at the Hearing. **Respondent’s Brief, p. 19.** In fact, it is Respondent who is in error in each of these assertions.

Respondent primarily relies on OCDC investigator Kelly Dillon’s testimony for his assertion that there is no basis for the Hearing Panel’s conclusion that Respondent acted with dishonesty or selfish motive in his mishandling of client funds. A careful review of that testimony reflects that Respondent is mischaracterizing Ms. Dillon’s statements before the Hearing Panel. Ms. Dillon did testify that Respondent was forthcoming, cooperative and appeared to be acting without selfish motive **in his dealings with her during OCDC’s**

investigation. At no time did Ms. Dillon indicate that she had a similar opinion of Respondent's conduct when handling his client funds. The testimony at issue is as follows:

Question: You indicated in dealing with Mr. Bosley that he was always forthcoming *with you*?

Answer: Correct.

Question: Did you ever see any dishonesty there?

Answer: No, I did not.

Question: Did you ever see Mr. Bosley acting with any sort of selfish motive?

Answer: No.

App. 57 (T. 69-70).

The Hearing Panel Decision indicates its decision was based on Respondent's own admission of misappropriating client funds for his personal use and using the Trust Account as "a personal piggy bank" on the numerous occasions that he withdrew funds from his Trust Account to pay personal or operating expenses. Based upon Respondent's conduct and the "reasonable inferences therefrom" the Hearing Panel found that Respondent acted "with knowledge" in his misuse of client funds. While Informant has not asserted in its Brief that Respondent acted with a dishonest or selfish motive, contrary to Respondent's assertion, there was ample evidence in the record upon which the Hearing Panel, and this Court, could make such a determination. **App. 254-255.**

Respondent also curiously asserts that the Court was in error when it found that Respondent admitted in his Answer that he violated Rule 4-8.4 (c) in his misappropriation of client funds for his own personal use. The Information, in addition to alleging the specific facts reflecting misappropriation in earlier paragraphs, asserts in paragraph 18 as follows:

18. Respondent is guilty of professional misconduct under Rule 4-8.4(c) by misappropriating client funds for his own personal use.

App. 11.

In his Answer to the Information Respondent states, “Mr. Bosley does not contest any averment in paragraphs 1-18 of the Information.” **App. 27.** Respondent, an experienced attorney, is certainly aware that under Rule 55.09, Missouri Rules of Civil Procedure, “Specific averments in a pleading to which a responsive pleading is required...are admitted when not denied in the responsive pleadings.” Respondent certainly knew when he filed his answer not contesting “any averment” in the Information that he was admitting those allegations. To argue otherwise at this time is disingenuous.

Respondent finally asserts that the Hearing Panel was in error when it referenced his “begrudging admission” that he had misused client funds for his own personal use. In fact, the record reflects that not only did Respondent make this admission, he did so after having time to reflect on the question and consult with his attorney. At the Hearing Respondent testified as follows:

Question: you take no issue that you misappropriated client funds for your own personal use?

(Discussion off the record).

. . . .

Respondent: Yes.

Question: So let the record reflect that the respondent is conferring with counsel prior to answering this question.

Respondent: Yes.

. . . .

Question: No disagreement with that?

Respondent: No.

App. 83 (T.175)

Respondent stipulated to the facts that form the basis of the finding that he misappropriated client funds for his own personal use, he admitted the violation in his Answer, and he admitted, after consultation with his attorney, that he took no issue with the assertion that he misappropriated client funds for his own personal use at the Hearing. Now, however, Respondent seeks to step away from that admission because it forms the basis, in part, for the sanction recommended by the Hearing Panel.

C. Prior precedents cited by Respondent are distinguishable from this case.

Respondent asserts that a stayed suspension with probation is supported by the prior rulings of this Court in *In re Wiles*, 107 S.W.3d 228 (Mo. banc 2003) and *In re Coleman*,

295 S.W.3d 857 (Mo. banc 2009). Both those cases however are distinguishable from this matter and do not involve the totality of egregious misconduct in handling client funds involved in this case.

The *Wiles* case was a reciprocal disciplinary proceeding following Wiles' stipulation to misconduct for which Wiles was publically censured in a Kansas proceeding. The Kansas proceeding involved a number of ethical violations, primarily concerning diligence and communication, where Wiles had failed to effect prompt service of process, resulting in the dismissal of his client's claim because of the statute of limitations. Wiles subsequently failed to inform his client of the dismissal. During his representation there was one instance of Wiles commingling client funds with his own funds when he deposited settlement proceeds in his operating account. Because another check deposited in the operating account had not yet cleared for payment, when he issued a check out of his operating account to pay his client's portion of the settlement proceeds, the client check was returned for insufficient funds. *In re Wiles*, 274 Kan. 1103, 1105-6 (2002). A mitigating factor in the Kansas court's consideration of the appropriate sanction for Wiles misconduct was that when the check was returned Wiles *immediately* forwarded certified funds to his client. *Id.* at 1108. In its proceedings the Missouri court entered a stayed suspension with a probationary period of one year. *In re Wiles*, 107 S.W.3d at 230.

In *Coleman*, the attorney was found to have commingled personal and client funds when he sometimes left his portion of settlement proceeds in his trust account and would write checks to pay personal obligations directly out of the remaining portion of those

proceeds which represented Coleman's portion of the settlement proceeds but were still held in the trust account. The Court found that Coleman "did not misuse funds by using client funds to pay personal bills or convert any client funds" but did violate Rule 4-1.15 by using the trust account for personal use. *Coleman*, 295 S.W.3d at 866. In ordering a stayed suspension with a probationary period of one year the Court noted that Coleman's actions "arose out of ignorance of the rules of professional conduct instead of an intention to violate the rules, and it is likely that his misconduct can be remedied by education and supervision." *Id* at 871.

The facts of this case are vastly different than those facts in either *Wiles* or *Coleman*. Unlike in *Coleman*, Respondent here did misuse funds by using client funds for personal use and converting client funds. Respondent has stipulated to the numerous occasions where he withdrew funds from the Trust Account to make payment of personal obligations. While making those withdrawals from his Trust Account, Respondent has stipulated that on at least twelve occasions client funds that should have been in the Trust Account were gone as the balance of the Trust Account had fallen below the amount of client funds that Respondent was supposed to be holding in that account.

Similarly, the misconduct in *Wiles* as it relates to the handling of client funds is less egregious than Respondent's misconduct in our instant case. In *Wiles* there was only one instance of commingling compared to the thirty instances of commingling of funds identified in OCDC's audit and admitted by Respondent. In *Wiles* there was not the misappropriation of client funds for personal use present in this case. The attorney in *Wiles*

also immediately made restitution to his client when he discovered that his payment of client funds had been returned for insufficient funds in the account. As has been admitted by Respondent, in some instances it has taken Respondent *years* to make restitution to his clients and even then such efforts were made only after these proceedings were commenced.

D. Respondent overstates the impact of other factors that he argues should be considered in mitigation.

Respondent asserts that there are other mitigating factors that should be considered by the Court in determining the appropriate sanction in this matter. In that regard, Respondent asks this Court to consider that Respondent: (a) “has done a great deal for the Community and the Legal Profession”; (b) “The Court has further clarified its own Rules” since the dates of Respondent’s misconduct; and (c) that Respondent has no prior disciplinary action and this disciplinary proceeding arises from overdraft notices and “not client complaints”. While in some instances it may be appropriate for the Court to consider these matters, Respondent overstates the impact such factors should have in this case.

Respondent provides a list of personal achievements which he asserts support a stayed suspension in this matter. Respondent is correct that factors of “character or reputation” may be considered in mitigation. *ABA Standards 9.32(g)*. It must be noted however that the achievements listed by Respondent were almost all accomplished in Respondent’s performance of his duties in political office and do not reflect achievements or “character or reputation” of Respondent in the community as a lawyer.

Respondent also argues that this Court should consider that it adopted revised Rules relating to a lawyer's obligations in handling client money in July 2013, thereby providing additional clarity to those obligations which Respondent did not have at the time of his misconduct. Respondent does not state what he thought was unclear about the prior versions of the Rules at issue here or how his conduct may have been different had the revised Rules been in existence at the time of his misconduct.

In fact, the specific language of the Rules relating to a lawyers' obligations with regard to their trust accounts that were in existence during the time of Respondent's misconduct, and which were asserted in the Information, is mirrored in the revised Rules. In that regard, the language of prior Rule 4-1.15(c) is duplicated in the new Rule 4-1.15(a); the language of prior Rule 4-1.15(d) is duplicated in the new Rule 4-1.15(a)(7)(f); the language of prior Rule 4-1.15(e) is duplicated in the new Rule 4-1.15(a)(7)(b); and the language in prior Rule 4-1.15(i) is duplicated in the new Rule 4-1.15(a)(7)(d). The Rules in existence at the time of Respondent's misconduct were certainly sufficient to put Respondent on notice of his obligations in relation to client funds and his Trust Account. The revision of Missouri Supreme Court Rules 4-1.45 through 4-1.155 should not be considered as a mitigating factor in this matter.

Respondent also asserts that his lack of prior discipline and that this proceeding was not initiated as a result of a client complaint should be considered as mitigating factors. Respondent is correct that the absence of a prior disciplinary record is a mitigating factor that may be considered in this matter. *ABA Standard 9.32(a)*. However, Respondent is

incorrect that the absence of a client complaint should also be a mitigating factor. Citing *ABA Standard 9.4(f)* this Court has stated that the failure of an injured client to complain is considered neither aggravating nor mitigating. *In re Belz*, 258 S.W. 3d 38, 46 (Mo. banc 2008).

E. Other aggravating factors support a sanction stronger than a stayed suspension.

Respondent's actions *after* the issues with his handling of client funds were brought to his attention strongly suggest that a stayed suspension and probation in this matter is inappropriate. In February of 2012, Respondent was aware of issues with his handling of the Trust Account when he received notice from his bank that the account was overdrawn. Yet Respondent continued to mishandle the Trust Account, resulting in the Trust Account being overdrawn again in March of 2013.

Respondent repeatedly failed to provide timely restitution to his clients even when he knew he had not properly disbursed his client funds to his clients or third parties to whom it was owed. For example, Respondent settled a case on behalf of one client, identified in these proceedings as CC, on January 31, 2011. Respondent disbursed some of the funds from the settlement, including paying himself the attorney fee he was due for the representation, but retained \$16,666.67 of the settlement to satisfy a medical lien. In April of 2011 Respondent was ready to pay the lien and obtained a cashier's check in the amount of \$16,666.67 for that purpose. Respondent, however, failed to satisfy the lien at that time but rather returned the cashier's check to the Trust Account with the notation "not used for

purposes intended”. **App. 49 (T.38)**. By July of 2011 the Trust Account was overdrawn following a series of miscellaneous withdrawals from the Trust Account including withdrawals for personal expenses. **App. 49 (T. 39)**. Although Respondent had not paid his client’s lien for which he had held funds in trust from the settlement proceeds, those funds were gone. With this knowledge, Respondent still made no attempt to satisfy his client’s lien until January of 2013 when on two occasions he issued a check out of his *operating* account to satisfy the lien and on both occasions the check was dishonored because of insufficient funds in the account. Again, with this knowledge Respondent made no further effort to pay his client’s lien until over six months later when, one month following the filing and service of the Information in this matter, Respondent finally satisfied his client’s lien on July 8, 2013, over 29 months following Respondent’s receipt of his client’s settlement proceeds. **App. 50 (T. 42)**.

The Information in this matter was filed and served in June of 2013 and included in that Information were twelve identified clients for whom Respondent had improperly mishandled client funds and disbursements due to these clients or third parties on behalf of these clients had not properly been made. In spite of these allegations, which Respondent admitted in his Answer filed in September of 2013, Respondent still had not made restitution to eight of these twelve clients by the time of the Hearing on December 9, 2013. The Hearing Panel held the record open until December 27, 2013 to provide Respondent with an opportunity to confirm that all the “clients implicated in this matter have been fully

paid monies owed them that were deposited in Respondent's trust account." **App.179-180.** Respondent still failed to make payment to all his clients' owed money by that date.¹

Respondent, while admitting that he knew he had not properly disbursed funds owed to these clients and admitting that he had violated his obligation to do so, nonetheless continued to fail to timely disburse client funds during the pendency of these proceedings. This is a significant aggravating factor that argues against a stayed suspension with probation in this matter.

In addition, as referenced in Informant's Brief, the record reflects that Respondent "acted with conscious awareness of the nature or attendant circumstances" of his acts. **Informant's Brief, p. 18-20.** Respondent received his first notice of overdraft in his Trust Account in February of 2012 yet Respondent continued to mishandle the account resulting in another overdraft notice in March of 2013. At least as early as June of 2013 upon his receipt of the Information Respondent knew that he had not promptly returned client funds

¹ Respondent asserts that bad weather and the Christmas holiday prevented him from making restitution between the date of the Hearing and the December 27 date to the last client to be paid by Respondent, identified as WC in the Information (mistakenly referenced as CW in Respondent's Brief). Respondent received settlement proceeds on behalf of WC on December 4, 2012, and according to Respondent, WC was not paid money due him from the settlement until January 8, 2014. What Respondent does not explain is why payment was not made to WC during the previous twelve month period.

that were due and yet failed to provide restitution to those clients until after the Hearing. Respondent's knowing misconduct supports a stronger sanction than a stayed suspension.

CONCLUSION

Respondent does not deny the acts of misconduct and in fact in his Brief “agrees with and adopts Informant’s Statement of Facts.” **Respondent’s Brief at 5.** The issue to resolve therefore is what sanction is appropriate in light of the extensive record of misconduct with, and misappropriation of, client’s funds. This Court has stated that “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(Mo. banc 1992). The Court has, however, also recognized that it will “consider the presence of aggravating and mitigating factors in each case when assessing the appropriate punishment.” *In re Belz*, 258 S.W.3d 38, 42 (Mo. banc 2008). In light of the seriousness of the misconduct, the pattern of misconduct, Respondent’s indifference to making restitution and the other aggravating factors, the mitigating factors cited by Respondent are insufficient to make this an appropriate case for a stayed suspension with probation. Indeed, Respondent’s continuing misconduct following the initiation of these proceedings by failing to promptly make payment to his clients while at the same time acknowledging that such payments were due indicates that probation is neither likely to be successful nor appropriate. Accordingly, Informant respectfully requests that the Court suspend Respondent’s license with no leave to seek reinstatement for at least two years.

Respectfully submitted,

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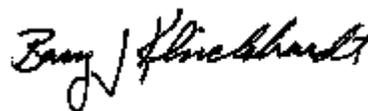
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2014, a copy of Informant’s Reply Brief is being served upon Respondent’s counsel via first class mail, postage prepaid, and the Missouri e-filing system pursuant to Rule 103.08:

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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 3816 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Barry J. Klinckhardt