

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:)
)
JOHN J. PAWLOSKI,) **Supreme Court #SC91152**
)
Respondent.)

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

PROCEDURAL HISTORY

March 16, 2010	Information
April 14, 2010	Stipulation (violations admitted; recommendation for one year suspension with 2 years probation)
July 22, 2010	DHP Decision (approving stipulation)
July 27, 2010	Acceptance of DHP decision by Respondent
August 13, 2010	Acceptance of DHP decision by Informant
October 26, 2010	Court Order for briefing
November 16, 2010	Informant's Motion for More Time to Supplement Record
January 19, 2011	Informant's Second Motion for More Time to Supplement Record
February 22, 2011	Record submitted
March 24, 2011	Motion to Supplement Record with Respondent's Affidavit

BACKGROUND

Respondent, John J. Pawloski, has engaged in a general practice in St. Louis since 1991. He has no previous discipline.

In late 2009, the Office of Chief Disciplinary Counsel received notice from Mr. Pawloski's bank that in March 2009 his trust account was overdrawn. Initial investigation revealed that the account had no other overdrafts during the previous twelve months; but, an audit indicated his trust account was depleted during periods when at least three clients' funds were apparently to be held for their benefit.

COUNT I

From April 2008 through April 2009, Mr. Pawloski used funds in his trust account without assuring that the funds in the account were properly available to him. For instance, he wrote checks to “CASH” from his trust account on March 20, 2008, April 24, 2008, and August 31, 2008, without noting the check, the client, or the purpose of the check. **App. 2-7.** And, during that year he transferred funds from his trust account to his operating account on several occasions without noting the purpose of the transfer. **App. 2-7.** He also paid personal bills from his trust account, including payments to Michelle Pawloski, home or office insurance, and a Father-Son banquet at St. Louis University High School. **App. 2-7.** The audit also revealed that Mr. Pawloski had left personal funds in the trust account. **App. 67-73.**

AARON HASTINGS – COUNT II

Aaron Hastings hired Mr. Pawloski and another lawyer (Richard Lecinski) to pursue his claim following injuries when he was struck by an automobile while working as a tow truck operator. The case settled for \$20,000.00. **App. 8-17.** Although the attorneys reduced their 33% fee from \$6,666.66, to an even \$6,000.00, Respondent mistakenly billed Mr. Hastings twice for a \$700.00 expense. Respondent reimbursed Mr. Hastings during the Office of Chief Disciplinary Counsel investigation into his overdraft. **App. 12-14; 15.** Mr. Hastings has explained that he is happy with Mr. Pawloski’s representation and he has “great confidence in Mr. Pawloski’s legal skill, judgment, ability and ethics.” The Stipulation presented to the Panel incorrectly reported that Mr. Pawloski commingled Hastings’ court cost deposits with his own funds. **App. 67-73.**

TRACY CAMPBELL – COUNT III

Respondent had represented Tracy Campbell since 2004 in a “couple matters.” She hired him to pursue an employment discrimination case against her former employer, Ramada Ltd., and to help her handle various credit issues. Ms. Campbell and Mr. Pawloski agreed that if they prevailed against Ramada that Respondent would hold those proceeds for her until her creditors could be paid. **App. 22-24.** They recovered \$90,000.00 from Ramada. After taking a \$30,000.00 fee and waiving expenses, the remaining \$60,000.00 was initially deposited into Mr. Pawloski’s trust account in May 2008. **App. 22-24; 26.** Ms. Campbell executed a Power of Attorney for Mr. Pawloski to negotiate with her creditors and pay outstanding bills from the Ramada proceeds. **App. 25.** Then, in an effort purportedly to further protect these proceeds, Mr. Pawloski entered into a loan arrangement whereby Mr. Pawloski borrowed the \$60,000.00 proceeds from Ms. Campbell. The stated purpose of the Promissory Note was to allow Mr. Pawloski to negotiate with and reimburse Ms. Campbell’s creditors. **App. 27.** Ms. Campbell formally conveyed the \$60,000.00 in settlement proceeds to Mr. Pawloski, “in exchange for his agreement to indemnify Campbell of and from any creditor claim” **App. 33-34.**

During the period that the Campbell loan was outstanding, Mr. Pawloski made occasional use of those funds for other matters, including payments to himself and for the benefit of other clients. His trust account was depleted to less than the amount remaining still owed to Ms. Campbell. Mr. Pawloski also made several payments for Ms. Campbell

and sent her distributions of \$1,000.00, \$1,500.00, and \$2,000.00 upon her request. **App. 28-29; 31-32.**

Ms. Campbell explained by affidavit that she approved each distribution made by Mr. Pawloski. She reports that “all funds entrusted to Mr. Pawloski have been returned to me, plus an accounting of accrued interest.” **App. 23.**

When Ms. Campbell entered into the loan with Mr. Pawloski, she did so “freely, without pressure, and Mr. Pawloski’s holding of funds was done at my request as I was concerned that if the funds were given to me directly that I would spend said funds,” **App. 23.** She said that she is happy with Mr. Pawloski’s representation. **App. 23; 67-73.**

LAURIE TOBIN – COUNT IV

Laurie Tobin retained Mr. Pawloski to represent her in several matters, beginning in 2005. Most relevant to these matters, he represented her in a legal malpractice case and an attorney lien matter in a related case. In those cases, she received a sum in excess of \$1,200,000.00, but a related case remains open as to additional claims. Ms. Tobin and Mr. Pawloski are also co-principals in a consulting company. **App. 44-46.** And, Ms. Tobin also occasionally serves as a volunteer paralegal/researcher in Mr. Pawloski’s law practice. **App. 67-73.**

Per an agreement between Ms. Tobin and the St. Louis firm of Riezman Berger, proceeds of the successful action were placed in the Riezman Berger trust account. **App. 47-53.** Ms. Tobin is authorized to draw from the Riezman Berger account. At times following the deposit of those funds into the Riezman Berger trust account, Ms. Tobin has withdrawn lesser amounts and deposited them with Mr. Pawloski. On January 13,

2009, Mr. Pawloski deposited \$40,000.00 of Ms. Tobin's funds into his trust account. Those funds were disbursed for Ms. Tobin's benefit and with her approval. **App. 41-42.** By March 20, 2009, the \$40,000.00 had been depleted. Funds from Tracy Campbell's settlement proceeds (which had been loaned to Mr. Pawloski) were also used for Ms. Tobin's benefit. Mr. Pawloski also paid some of Ms. Tobin's bills using his own funds.

Ms. Tobin has no complaint with Mr. Pawloski's handling of her funds. In her affidavit, she reports personal knowledge of Mr. Pawloski's accounting practices involving her funds and Ms. Campbell's funds. She denies any commingling. She explained that Mr. Pawloski had "performed considerable hours of pro bono and public interest litigation." **App. 44-46; 67-73.**

JOANN WHITE – COUNT V

Mr. Pawloski represented JoAnn White and Joyce Lakes in a claim against Jacqueline Brown. Both cases settled in April 2008. **App. 60.** Ms. White's case settled for \$10,000.00. Ms. Lakes' case settled for \$7,403.00. Mr. Pawloski deposited Ms. Lakes' check into his trust account and paid Ms. Lakes her \$2,000.00 "net settlement," after deducting for fees, expenses, and obligations to medical providers. These payments are explained in his "settlement statement" for Ms. Lakes. **App. 59; 61** He deposited Ms. White's \$10,000.00 check into his operating account. Within a few days he transferred \$3,000.00 to his trust account with a notation that the transfer related to the White case. **App. 2-7.** His trust account records indicate that, two weeks later, he paid Ms. White's "net settlement" of \$2,000.00. Then, two weeks after that payment, he paid \$7,443.91 to a medical provider who treated both Ms. Lakes and Ms. White. That

payment was also made from his trust account. It covered negotiated medical bills of \$2,856.29 for Ms. Lakes and \$4,587.62 for Ms. White. **App. 62; 63; 67-73.**

DAVID FUGATE – COUNT VI

The court appointed Mr. Pawloski to represent David Fugate in an ERISA matter. Mr. Pawloski waived his fee. After the case settled, Mr. Fugate sent Mr. Pawloski a check for \$3,300.00. The Stipulation incorrectly reports that Mr. Pawloski deposited Mr. Fugate's fee into his trust account. In fact, the fee (or unsolicited gift – as described by Mr. Pawloski) was deposited into his operating account on December 15, 2008. **App. 64-66; 67-73.**

POST-STIPULATION ACTIVITIES

After the Court asked the parties to brief certain issues, Informant and Respondent agreed to supplement the record following an updated audit of Mr. Pawloski's trust and operating accounts. Bank records were reviewed for both accounts. Included within the review were the last three quarters of 2010. Mr. Pawloski's trust account indicated negligible use. Exceptions include the above described reimbursement of \$700.00 to Aaron Hastings and distributions to Ms. Campbell of the funds she had loaned to Mr. Pawloski, some of which remained in his trust account.

Mr. Pawloski's operating account was also reviewed for the last three quarters of 2010. That account was overdrawn several times during 2010. Distributions to Tracy Campbell were made from that account during that period. Also, filing fees and other expenses for some clients were paid from that account, as well as numerous personal expenses of Mr. Pawloski. **App. 67-73.**

POINT RELIED ON

I.

MR. PAWLOSKI IS SUBJECT TO DISCIPLINE FOR VIOLATING THE FOLLOWING RULES OF PROFESSIONAL CONDUCT:

- (A) RULE 4-1.15 IN THAT HE COMMINGLED CLIENT AND PERSONAL FUNDS IN HIS OPERATING AND TRUST ACCOUNTS; AND**
- (B) RULE 4-1.15 IN THAT HE FAILED TO MAINTAIN ADEQUATE RECORDS OF FUNDS HELD FOR HIS CLIENTS' BENEFIT INTO HIS TRUST ACCOUNT AND OPERATING ACCOUNT.**

Rule 4-1.15

Rule 4-8.4

POINT RELIED ON

II.

THE COURT SHOULD CONSIDER SUSPENDING MR. PAWLOSKI'S LICENSE AND PLACING HIM ON PROBATION BECAUSE PROBATION IS REASONABLE UNDER APPLICATION OF:

(A) ABA SANCTION STANDARDS; AND

(B) MISSOURI SUPREME COURT CASELAW.

In re Wiles, 107 S.W.3d 228 (Mo. banc 2003)

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

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

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

MR. PAWLOSKI IS SUBJECT TO DISCIPLINE FOR VIOLATING THE FOLLOWING RULES OF PROFESSIONAL CONDUCT:

- (A) RULE 4-1.15 IN THAT HE COMMINGLED CLIENT AND PERSONAL FUNDS IN HIS OPERATING AND TRUST ACCOUNTS; AND**
- (B) RULE 4-1.15 IN THAT HE FAILED TO MAINTAIN ADEQUATE RECORDS OF FUNDS HELD FOR HIS CLIENTS' BENEFIT INTO HIS TRUST ACCOUNT AND OPERATING ACCOUNT.**

Some of the stipulated facts, as explained in the Statement of Facts are not supported by other evidence. This Point will note the withdrawn allegations.

Respondent has admitted that his conduct violated the following Rules of Professional Conduct:

- Rule 4-1.15(c) by transferring funds between his operating and trust accounts without client authority and by failing to maintain adequate records of funds received;
- Rule 4-8.4(c) by using client funds for his own use;
- Rule 4-1.15(c) by commingling client funds with his own;
- Rule 4-1.15(c) by depositing client funds into his operating account;
- Rule 4-1.15(c) by applying client funds to other clients' creditors; and

- Rule 4-1.15(c) by depositing earned fees into his trust account.

COUNT II

In the Aaron Hastings matter, Mr. Pawloski mistakenly took \$700.00 in expenses twice. He reimbursed Mr. Hastings during the OCDC investigation. Mr. Pawloski violated Rule 4-1.15 by failing to keep sufficient records to prevent mistakes. Mr. Hastings reported that he was satisfied with Mr. Pawloski's representation.

COUNT III

In the Tracy Campbell matter, Mr. Pawloski undertook unusual actions to help Ms. Campbell pay her creditors and avoid spending her settlement proceeds. Count VI, paragraph 10 of the Stipulation incorrectly reports that Mr. Pawloski used Tracy Campbell's funds to pay expenses relating to Laurie Tobin. That paragraph is incorrect because Ms. Campbell had assigned and loaned those funds to Mr. Pawloski. She assigned and loaned the proceeds to Mr. Pawloski, essentially making him her creditor instead of her fiduciary.

Mr. Pawloski violated Rule 4-1.15 by failing to maintain good records of the Campbell funds and by failing to remove her funds from his trust account once she assigned the proceeds to him. Ms. Campbell reports that she is satisfied with Mr. Pawloski's representation.

COUNT IV

In the ongoing matters involving Laurie Tobin, Mr. Pawloski commingled his fee with other client funds by placing that fee in his trust account. A portion of the \$40,000.00 deposit from Ms. Tobin's account at Riezman Berger was properly payable to

Mr. Pawloski as fees. But, other portions were paid to Ms. Tobin. These actions constitute violations of Rule 4-1.15. Ms. Tobin reports that she is satisfied with Mr. Pawloski's representation.

COUNT V

In the JoAnn White matter, Mr. Pawloski's clients and their medical providers were timely and fully paid, but his methods of depositing one co-client's settlement check into his trust account, the other co-client's check into his operating account and then transferring funds from the operating account to cover his payments to his clients violates Rule 4-1.15. That violation occurred because the initial deposit of funds into the operating account, some of which were owed to third parties or clients, constituted commingling of his personal funds with funds owed to third parties and clients.

COUNT VI

In the David Fugate matter, Mr. Pawloski deposited a fee into his operating account, in accord with the Rules of Professional Conduct. That count is withdrawn.

ARGUMENT

II.

THE COURT SHOULD CONSIDER SUSPENDING MR. PAWLOSKI'S LICENSE AND PLACING HIM ON PROBATION BECAUSE PROBATION IS REASONABLE UNDER APPLICATION OF:

(A) ABA SANCTION STANDARDS; AND

(B) MISSOURI SUPREME COURT CASELAW.

This case, on its face, may appear to support a harsher sanction than probation. Mr. Pawloski commingled funds, used his operating account to hold client funds, and maintained loose accounting practices. But, Informant believes that probation is an adequate sanction for several reasons. First, Mr. Pawloski has no previous discipline. See ABA Sanction Standard 9.32(a). Second, and more importantly, Informant believes that Mr. Pawloski's trust accounting methods can be improved by training and monitoring.

Third, no clear evidence of an intent to either steal or borrow from his trust account has been discovered. Informant discovered no evidence that Mr. Pawloski attempted to deceive his clients or the Office of Chief Disciplinary Counsel. Mr. Pawloski's clients support his explanations with their own affidavits. See ABA Sanction Standard 9.32(a).

Fourth, Mr. Pawloski has admitted his misconduct (See ABA Sanction Standard 9.32(l)); **App. 67-73**, he has also, upon repeated request, provided the Chief Disciplinary

Counsel with the information needed to investigate the case. After the Court ordered the parties to offer evidence on this point, Mr. Pawloski and his lawyer provided another year of bank and client records. Admittedly, at more than one point in the investigation before and after the Court had received the case, the Chief Disciplinary Counsel was required to send follow-up requests and subpoena records from Mr. Pawloski's bank when the Chief Disciplinary Counsel could not confirm that his responses were complete. See ABA Sanction Standard 9.32(e). The applicability of Standard 9.32(e) is fairly questioned.

The two reported decisions applying probation should be considered. In the first case, the Court ordered probation for Missouri attorney Stanley Wiles. *In re Wiles*, 107 S.W.3d 228 (Mo. banc 2003). Attorney Wiles had been previously admonished for four diligence violations, five communication violations, one safeguarding client property violation, and one violation for engaging in conduct prejudicial to the administration of justice. *Wiles*, at 229. And, he had received two more admonitions from Kansas disciplinary authorities. *Wiles*, at 229. The opinion did not describe the new conduct that led to discipline, other than noting that Mr. Wiles had been censured in Kansas. *Wiles*, at 228.

The more recent decision involving probation provides additional guidance. In that 2009 opinion, the Court granted probation to Missouri attorney Larry Coleman. *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009). Mr. Coleman had been admonished in 1990 for violations involving communication and unreasonable fees. Later, in 1999, he was admonished for diligence and communication violations. Finally, in 2008, the Court publicly reprimanded him for "violations regarding diligence, unreasonable fees and

conduct prejudicial to the administration of justice.” *Coleman*, at 859. In the 2009 case leading to probation, the Court found that Mr. Coleman violated these Rules:

- Mr. Coleman violated Rule 4-1.2 by preparing a retainer agreement giving him “exclusive right to when and for how much to settle” his client’s case. And, he violated that Rule by actually agreeing with his client’s opponent to settle her case against her specific direction. *Coleman*, at 864.
- Mr. Coleman violated Rule 4-1.15(c) by commingling his own funds with client funds in his trust account and by failing to keep adequate trust account records. *Coleman*, at 866.
- Mr. Coleman violated Rule 4-1.16 by failing to notify his client at the time of his withdrawal from her case and by failing to take steps to mitigate his withdrawal. *Coleman*, at 866-867.
- That misconduct also led to a finding that Mr. Coleman violated Rule 4-8.4 in that it wasted judicial resources and was prejudicial to the administration of justice. *Coleman*, at 868.
- Upon application of the ABA Sanction Standards, the Court determined that a suspension was an appropriate sanction. *Coleman*, at 869-871.

The *Coleman* and *Wiles* decisions support the use of probation for Mr. Pawloski. Although his records and accounting methods were a shambles, his clients have not complained. Instead, the clients whose money was improperly shifted between Mr. Pawloski’s accounts have sworn that they believe his conduct to be ethical and above board.

The failure of an injured client to complain is considered neither aggravating nor mitigating, per ABA Standard 9.4(f). But, in a 2008 majority opinion, this Court considered the fact that “the client from whose account the funds were taken not only did not complain, but has chosen to remain Mr. Belz’s client even after learning of the misconduct.” *In re Belz*, 258 S.W.3d 38 (Mo. banc 2008) Likewise, in the instant case, Mr. Pawlsoki’s clients did not complain; they submitted affidavits on his behalf; they continue to use his services; and, they continue to believe that he is ethical.

CONCLUSION

Informant asks the Court to find that Mr. Pawloski violated Rule 4-1.15 by:

- commingling his own funds with client funds in his trust account in that he occasionally retained personal funds in his trust account; and
- failing to keep adequate records of client and personal funds.

Informant also asks the Court to suspend Mr. Pawloski's license indefinitely. He should not be eligible for reinstatement for at least one year. Probation for two years under the terms and conditions described in the Stipulation should be favorably considered. Informant believes that Mr. Pawloski's clients can be protected during a period of probation.

Finally, Informant asks the Court to tax all costs in this matter to Respondent, including a \$1,000.00 fee pursuant to Rule 5.19(h).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2011, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First

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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 3,538 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.

Sam S. Phillips

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