

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE :)
)
JOHN J. PAWLOSKI,) **S.Ct. No: SC91152**
Respondent,)
)

RESPONDENT'S BRIEF

ROBERT A. CIUFFA MBE 22754
ATTORNEY AT LAW
9306 OLIVE BOULEVARD
ST. LOUIS, MO 63132
(314) 997-4321
(314) 997-4324-Facsimile
Bobic39@SBCGlobal.net

ATTORNEY FOR RESPONDENT

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PREFACE

The order followed in this brief matches the order of the violations listed in the Stipulation. For expository purposes it was reckoned that the Stipulation and this brief should be coordinated. As a caution, note that the Informant's brief follows a different order.

JURISDICTIONAL STATEMENT

Jurisdiction over attorney discipline is vested in this Court by Article 5, section 5 of the Missouri Constitution, Section 484.040 Revised Statutes of Missouri 2000, Supreme Court Rule 5, and the Common Law.

TABLE OF AUTHORITIES

Cases:

In Re Belz, 258 S.W. 3d 38 (MO Banc 2008).....17

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In Re Wiles, 107 S.W. 3d 228 (MO Banc 2003).....16

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Other Authorities:

Article 5, section 5, Missouri Constitution.....5

ABA Standards for Imposing Lawyer Sanctions (1992 ed.).....15,17

STATEMENT OF FACTS

Respondent adopts the fact statement of Informant as an accurate depiction of the events and issues in this matter. However, as previously noted Informant's sequence does not follow the sequence and the Count designations of the stipulation. The following are the designations that match the stipulation. Count I herein remains the same. Count II properly contains the facts of Count III; Count III contains the facts of Count II; Count IV is actually Count VI; Count V contains the facts of stipulation Count IV; and Count VI is properly Count V.

The "**POST-STIPULATION ACTIVITIES**" described in Informant's brief are generally accurate. It should be noted that since the investigation of Respondent began there has not been a repetition of the offending conduct.

POINTS RELIED ON

I.

MR. PAWLOSKI (RESPONDENT) 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.**

Rule 4-1.15

Rule 4-8.4

POINTS RELIED ON

II.

THE COURT SHOULD CONSIDER AS AN APPROPRIATE AND REASONABLE SANCTION OF MR. PAWLOSKI THE SUSPENSION OF HIS LICENSE AND A PERIOD OF PROBATION UNDER THE 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 (1992ed.)

ARGUMENT

I.

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

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

Respondent has admitted that his conduct violated the Rules of Professional Conduct as described by Informant and listed in the Stipulation. It is also uncontroverted that these violations did not arise from deceit, dishonesty, criminal intent, or conscious disregard. They were and remain the product of skill-less negligence. An honest and honorable man sometimes cannot conceive that his actions would be interpreted as dishonest even when he is betrayed by his skill or the lack of it.

The following “Counts” follow the identity of those same counts in the Stipulation; Informants listing in its brief does not match the stipulation.

COUNT II

At Tracy Campbell’s request Respondent assisted her in paying creditors and helping her avoid dissipation of her settlement proceeds. Ms. Campbell had also assigned and loaned some of these funds to Respondent thereby making Respondent her debtor instead of her fiduciary. It was these funds that Respondent properly used to pay various expenses of Laurie Tobin.

Count VI of the Stipulation in this regard is incorrect.

Nevertheless, Respondent’s recordkeeping was clearly negligent in regard to the Campbell funds and he failed to remove the funds loaned to him from his trust account. This is the nature of Respondent’s violation of Rule 4-1.15 in this instance.

Ms. Campbell reports by affidavit that she is fully aware of Respondent’s disciplinary issues and that she is not only satisfied with Respondent’s representation, she believes him to be ethical, honest, and competent. None of Ms. Campbell’s funds were misappropriated and she remains Respondent’s client.

COUNT III

In the Aaron Hastings matter, Respondent was co-counsel in the handling of this client's legal matters. A settlement statement had been prepared by co-counsel Mr. Lecinski, wherein he adjusted the proceeds to take account of costs or expenses. Respondent's poor record keeping and/or communication with his co-counsel resulted in Mr. Hastings being charged twice for the costs. Interestingly, Respondent had reduced his fee by nearly \$700 and recovered about \$133 more for Hastings than his actual costs. Mr. Hastings is fully aware of all features of this record keeping error and Respondent's disciplinary issues. Nevertheless, Mr. Hastings has asserted by affidavit his satisfaction with Respondent's services and his belief that Respondent is ethical, honest, and competent. Mr. Hastings intends to use Respondent as his attorney in the future.

Once this error was discovered Respondent made full and complete disclosure and restitution to Mr. Hastings. Respondent's record keeping in this instance was a violation of Rule 4-1.15.

COUNT IV

Jo-Ann White and Joyce Lakes and their medical provider were timely and fully paid by Respondent. However, Respondent's deposit of one client's settlement into his operating account and the other into his

trust account and then transferring funds between the accounts to pay the medical provider of both clients with one check is admittedly careless and a violation of Rule 4-1.15. No dishonest motive or deception was present.

COUNT V

Despite the apparent confusion, Respondent correctly deposited David Fugate's unsolicited gift into his operating account. Both Informant and Respondent were in error in the Stipulation.

COUNT VI

Laurie Tobin remains Respondent's client, business associate, and research assistant. As can be seen from her affidavit, she is fully aware of this proceeding and believes that Respondent is ethical, honest and competent. She has not lost a thing nor was she in peril of loss at Respondent's hands. In regard to Ms. Tobin, Respondent negligently commingled his fee with client funds in his trust account. A portion of the \$40,000 from Ms. Tobin's Riezman-Berger account was properly payable to Respondent while other portions were paid to Ms. Tobin. This negligent commingling of funds and poor record keeping were violations of Rule 4-1.15.

ARGUMENT

II.

THE COURT SHOULD CONSIDER APPROPRIATE SANCTIONS OF MR. PAWLOSKI UP TO AND INCLUDING SUSPENSION OF HIS LICENSE AND PROBATION GIVEN THAT THESE REMEDIES ARE REASONABLE UNDER APPLICATION OF:

A.) ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (1992 ED.); AND

B.) MISSOURI SUPREME COURT DECISIONS

Any case involving a lawyer commingling funds raises the specter of potentially dishonest practices. This case, however, presents commingling from negligent behavior and poor accounting skills and practices and the fact that no one suffered a loss. The evidence is clear and abundant that Respondent was not deceptive, dishonest, or untrustworthy. Respondent is also not blameless and fully accepts responsibility. Negligence and poor accounting skills are not recommendations for any fiduciary. Under the circumstances, that Respondent has no discipline history and did not intend to violate the Rules of Professional Conduct, probation is appropriate especially since his conduct can be corrected and his law practice easily monitored. *See In*

Re Coleman, 295 s.w.3d 857,871(MO Banc 2009). The following reasons support the use of probation:

First, Respondent has no previous discipline. He has demonstrated throughout his career fidelity to his clients, honesty, integrity, competence, and accountability. *See ABA Standards, 9.32 a,b,& g.*

Second, Respondent immediately sought to rectify the consequences of his conduct. He made timely full and complete disclosure both to the Office of Chief Disciplinary Counsel and to his clients. *See ABA Standards, 9.32 d & e.* Respondent continues in his open cooperation with Informant even in the face of Informant's occasional impatience at the pace of Respondent's replies. Respondent must still bow to the demands of his practice.

Fourth, there is no evidence of a dishonest intent. There is no evidence of intent to deceive. In fact, respondent's client's support him without reservation in their own affidavits.

Fifth, Respondent admitted his misconduct, displays genuine remorse, has undertake remedial matters, and continues to fully and candidly cooperate with the Office of Chief Disciplinary Counsel. *See ABA Standards, d,e, & l.* Any questioning of the applicability of *ABA Standard, 9.32 e* by Informant can only be attributed to impatience and

not to any failing on the part of Respondent. Occasionally it is easy to discount the obligations of an ongoing law practice when one awaits responses to supplemental requests.

Finally, and most importantly, Respondent's accounting can and has improved by training and monitoring. Respondent is unlikely to harm the public in the future, he is able to perform legal services and practice law without causing the courts or profession to fall into disrepute, and he can be easily and adequately supervised. *See Rule 5.225*

Probation should be granted given the facts and nature of this case. In this regard, two reported decisions of this Court awarding probation provide guidance:

In Re Wiles, 107 S.W. 3d 229 (MO Banc 2003). There *Wiles* had been admonished eleven (11) times on previous occasions in Missouri and two (2) more times in Kansas. *Wiles p. 229* Included in those previous admonitions was at least one for failing to safeguard client property.

In Re Coleman, 295 S.W. 3d 857 (MO Banc 2009) Attorney Coleman had a history of admonishments involving communications, unreasonable fees, and diligence. In 2008 this Court publicly reprimanded Coleman for violations involving diligence, unreasonable fees, and conduct prejudicial to the administration of justice. *Coleman p. 859*

In the 2009 case which led to probation, Coleman was found to have violated Rule 4-1.12 by settling a client's matter against her specific direction; Rule 4-1.15 (c) by commingling funds in his trust account and failing to keep adequate records; Rule 4-1.16 failing to notify the client of his withdrawal and failing to mitigate his withdrawal; and Rule 4-8.4 by wasting judicial resources and prejudice to the administration of justice. *Coleman pp. 864-868.*

Although ABA Standards for Imposing Lawyer Sanctions treats the failure of an injured client to complain as a neutral factor, neither aggravating nor mitigating (*ABA Standards 9.4 f*), this Court has taken a more reasoned approach.

In Re Belz , 258 S.W. 3d 38 (MO Banc 2008). This Court considered 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 hearing of the misconduct.” In the instant case, Respondent's clients remain his clients, they suffered no loss, and have submitted affidavits attesting to Respondent's competence, honesty, and ethics.

CONCLUSION

Respondent prays that this Court accept and adopt the Stipulation and place Respondent on probation for a period of no more than two (2) years

upon the terms and conditions described and set forth in the Stipulation.

Respondent assures the Court and Informant that his clients are safe and protected during the period of probation, and that his misconduct will never be repeated.

Respectfully submitted,

Robert A. Ciuffa
Attorney at Law
9306 Olive Blvd.
St. Louis, MO 63132
(314) 997-4321-phone
Bobic39@Sbcglobal.net

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Robert A. Ciuffa, Respondent's attorney, hereby certify that on this 12th day of April, 2011, two (2) copies of Respondent's Brief and a diskette containing that brief in Microsoft Word format have been sent by Fed-Ex overnight to Informant's counsel, namely: Mr. Sam Phillips
3335 American Ave.
Jefferson City, MO 65109

Robert A. Ciuffa

RULE 84.06(c) CERTIFICATION

I certify to my best information, knowledge, and belief, that this brief:

1. Complies with Rule 55.03;
2. Complies with the requirements of Rule 84.06(b);
3. Contains 2,030 words, according to Microsoft Word, the word processing system used to prepare this brief; and
4. Has been scanned by Malware and Semantic software and the disk containing this brief is virus free.

Robert A. Ciuffa

ADOPTION OF INFORMANT'S APPENDIX

Respondent adopts Informant's Appendix as his own and states that the material collected therein is true and accurate.

Robert A. Ciuffa, Respondent's Attorney