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IN THE MISSOURI SUPREME COURT

IN RE:	)	
	)	
DARRYL BRENT JOHNSON, JR.	)	**S. C. No. SC93707**
	)	
Respondent.	)	

RESPONDENT'S BRIEF

CARVER, CANTIN & GRANTHAM

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FOR RESPONDENT

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STATEMENT OF JURISDICTION

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

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STATEMENT OF FACTS

DANELS REPRESENTATION

In 2009, Gayle Danels hired Darryl Johnson to represent her in the dissolution of her second marriage. (T. 129-130). In May of 2009, she and Mr. Johnson agreed upon a retainer of $1,500.00, of which $700 was paid at their meeting in May of 2009. (T. 131). Mr. Johnson's billing records reflected total payments of $850.00 while Ms. Danels maintained it was "probably around $2,500. (T. 148, 173). During her second meeting, which Ms. Danels described as more casual, Attorney Johnson went through a questionnaire that had previously been provided to and filled out by Ms. Danels. (T. 164). The questionnaire attempted to identify issues that might arise during the course of litigation. (T. 164). Ms. Danels mentioned in the questionnaire that her husband had been unfaithful on a number of occasions and that she expected that he was going to accuse her of having a number of adulterous affairs. (T. 164). Being aware of this, Attorney Johnson advised Ms. Danels that if there was physical evidence, such as videos or pictures depicting sexual activity in which she or her husband had been engaged that now was the time to disclose that information. (T. 164). To demonstrate his point, attorney Johnson showed Ms. Danels three photographs of nude or semi-nude individuals that had been admitted into evidence in divorce proceedings where Mr. Johnson had

represented opposing spouses in the litigation. (T. 164-165, 174). According to Mr. Johnson he displayed the photographs to make the point that if such material was present in Ms. Danels case, that he should be made aware it. (T. 165-166).

Ms. Danels recalled in her testimony that she had witnessed the photographs (T. 132), that Mr. Johnson had indicated his preference for large breasts (T. 134), and that she was uncomfortable with the presentation (T. 134), but nevertheless did not fire Mr. Johnson, and continued with him as her counsel for over a year until May 25, 2010. (T. 136). Mr. Johnson denied commenting about breast size or showing her an autographed photograph of a stripper. (T. 166)

After hiring Mr. Johnson to represent her in her second divorce, she subsequently hired him to represent her in a Motion to Modify arising out of her first divorce decree in which her ex-husband had moved to transfer custody of their minor children from her to him. (T.142). At her request, Attorney Johnson represented her in a contested Motion to Modify. (T. 168). He agreed to not charge an additional retainer and instead agreed to bill her by the hour for the additional work. (T. 168). The modification was resolved favorably following a hearing in which an older child was declared emancipated and a younger child was returned to Ms. Danel's custody. (T.168-169).

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On February 4, 2010, Attorney Johnson sent a statement to Ms. Danels showing an arrearage of $1,740.00, which she admitted that she owed. (T. 144, Exhibit 4). On or about April 24, 2010, another statement for services rendered was sent to Gayle Danls. (T. 144-145, Exhibit 5). It showed a balance of $2,849.15, the validity of which Ms. Danels did not deny. (T. 145). Also, during this time, Ms. Danels and Mr. Johnson's office entered into an agreement where she would pay $50.00 per week. (T. 145-146, Exhibit 6). One $50.00 payment was made. (T. 170).

On May 25, 2010, Gayle Danels sent a letter to Mr. Johnson instructing him to withdraw from her divorce case. (T. 146-147). In her letter discharging Mr. Johnson, there was no mention of inappropriate behavior on his part. (T. 147). Her complaint appeared to be that she had difficulty getting a hold of him. (T. 147). During the course of Mr. Johnson's representation, Ms. Danels estimated that she paid him a total of $2,500.00 for work in two separate family law cases. (T. 148). Firm records from Mr. Johnson's office, however, indicated total payments of $850.00 (T. 173).

After her discharge of Mr. Johnson on May 25, 2010, Ms. Danels made no further payments on the arrearage she owed to Darryl Johnson in the amount of $3,686.00. (T. 148, T. 151). Due to Ms. Danels' arrearage and inability to make payments according to an agreed upon payment arrangements, her

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account was turned over to Creditor's Financial Services, LLC for collection. (T. 170, 171, 172). Attempts at collection were made in August, 2010 by the collection agency through correspondence to Ms. Danels. (T. 172). Subsequently on August 30, 2010 Ms. Danels filed a complaint with the Office of Chief Disciplinary Counsel, which is the subject of this proceeding. (T. 172).

RESPONDENT'S TRUST ACCOUNT

Paul William Jenkins, Jr., who prefers to be called Bill, is the bookkeeper for the law firm, Johnson and Johnson. (T. 48-49). He has a degree in business administration and economics from Westminster College in Fulton, Missouri and for 30 years was in management at Roadway Express in Strafford, Missouri. (T. 49). After his retirement, he was offered and accepted the position of accountant with the Johnson and Johnson Law Firm. (T. 50).

In August, 2011, Mr. Jenkins attempted to transfer money from one Johnson and Johnson Law Firm account to another through an electronic online transfer with Liberty Bank. (T. 52). The Johnson & Johnson Law Firm maintained four (4) primary accounts: an operating account, a payroll account, a money market fund account, and a trust account. (T. 51). At the time of the August transaction, Mr. Jenkins was using bank software that had been recently implemented by Liberty Bank in Springfield, Missouri. (T. 52). It was Mr. Jenkins intent then to transfer money from a money market account maintained

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by the firm to the firm's operating or payroll accounts. (T. 52). Instead, he mistakenly transferred money from the firm's trust account, which in effect caused the trust account to be overdrawn. (T. 52). The bank's software permitted transfer of funds even when it created a negative balance. (T. 52). Mr. Jenkins believes that his unfamiliarity with new software supplied by Liberty Bank was the cause of the transfer from the trust account to another of the firm's accounts. (T. 53). No member of the firm had instructed him to take money out of the trust account and place it in the operating account on this particular occasion. (T. 53).

As a result of the overdraft, the bank notified the Office of Chief Disciplinary Counsel as is required under rules and regulations governing attorney trust accounts. (T. 9). This, in turn, caused the Office of Chief Disciplinary Counsel to write a letter to the Johnson and Johnson Law Firm regarding the overdraft. (T. 53). Lynn and Darryl Johnson were not present when the letter from Office of Chief Disciplinary Counsel arrived. (T. 58). Darryl Johnson's administrative assistant, who passed it along to Mr. Jenkins, opened the letter. (T. 58). Mr. Jenkins took it upon himself to respond to the letter, and wrote the Office of Chief Disciplinary Counsel explaining how the error had occurred, and that the overdraft was corrected on the next business day. (T. 54, 58).

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Subsequently, Darryl Johnson had conversations with the Office of Chief Disciplinary Counsel, and as a consequence turned over financial records of the firm's operating and trust accounts covering the period from February 11, 2011 to October 2011. (T. 37).

The Office of Chief Disciplinary Counsel performed an audit of transactions during that period, and concluded that advance fees were being deposited in the firm's operating account when they should have been deposited into the trust account. However, even though the funds were mistakenly placed in the operating account, monthly statements went to clients that detailed the amount of time expended against the retainer amount, and the remaining balance or deficient, as the case might be. (T. 56-57). When asked, the auditor for the Office of Chief Disciplinary Counsel, Kelly Dillon, testified that there was not a deliberate attempt at deception through any of this billing because everything was accounted for in communications with client on a monthly basis. (T. 37). In particular, the firm's accounting practice was to label those deposits as advance payments, and to bill against them, even though the funds were placed in the operating account instead of the trust account. (T. 56). At any given month, clients knew exactly how much of their retainer was left. (T. 57). Examples of these transactions were contained in informant's Exhibits 6 through 16 at the disciplinary hearing.

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Additionally, the audit discovered that on several occasions filing fees were paid out of the operating account when, according to the Office of Chief Disciplinary Counsel, the filing fee should have been deposited in trust, and paid out of trust once the bank had collected the funds. (T. 39).

Contemporaneously with the production of the additional financial information, the Johnson and Johnson Law Firm hired attorney Lori Levine to represent them before the Office of Chief Disciplinary Counsel. (T. 63). Ms. Levine wrote the Office of Chief Disciplinary Counsel, and sought its advice and suggestions about improved accounting techniques for the Johnson and Johnson Law Firm. (T. 63). As a consequence of those discussions corrective measures were undertaken. (T. 64). Both Lynn and Darryl Johnson and Bill Jenkins all participated in a CLE program on trust accounting. (T. 64). After the training, accounting practices at the firm were amended in October 2011to come into compliance with accounting policies preferred by the Office of Chief Disciplinary Counsel. (T. 65).

No complaints about the operation of the trust account have been received since August 2011, and it is clear that there was never a concern about misappropriation of funds by Mr. Johnson. (T. 41). Although the trust account issues arose in 2011 and corrective measures were instituted shortly thereafter,

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the incident did not become part of the basis for the information in this case until 2013. (T. 44).

JOHN RAY

In September 2010, John Ray consulted with Darryl Johnson about the possibility of his ex-wife seeking relocation with the couple's children to another area of the state. (T. 111). At that time, Mr. Ray had not received a Notice of Relocation, and was seeking advice about what to do in the event his wife sought to relocate. (T. 101). Mr. Johnson did not have a specific recollection of that discussion, but agreed that it was likely that those matters were discussed in the September 2010 consultation. (T. 101). Mr. Ray did receive a relocation notice sometime in January 2011, but didn't seek counsel from Mr. Johnson until approximately February 11, 2011 when a preliminary consultation occurred. (T. 102). Mr. Johnson and Mr. Ray spoke again on the telephone on February 15th and on February 16, 2011, Mr. Ray went to Mr. Johnson's office, paid him a $2,000.00 retainer, and dropped off the Notice of Relocation that he had received. (T. 104, 114). Upon receipt of the retainer and the Notice of Relocation, Mr. Johnson's office waited an additional two days before opening the file, and it appears that it was not reviewed by a paralegal or Mr. Johnson until the following Monday, which would have been February 21, 2011. (T. 114). Mr. Johnson agreed that if he had looked at the documentation

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at the time it was received in his office, he would have noticed that 25 days of the 30-day period for objections to the relocation notice had already expired. (T. 117-118). Although Mr. Ray provided the original Notice of Relocation on or about February 16, 2011 to Mr. Johnson he did not provide the date of service or any documentation supporting the date of service. (T. 115). The original notice was served on Mr. Ray's second wife on a date that was unknown to Mr. Johnson. (T. 115).

On March 11, 2011, Darryl Johnson filed a Motion to Prevent Relocation of Minor Children, and a Motion to Modify. (T. 115). Subsequently, the Motion to Prevent Relocation was dismissed as being untimely filed. (T. 98).

At his disciplinary hearing, Mr. Johnson admitted that even though he was not provided the actual date of service of the Notice of Relocation that he should have made the effort to find this information out, and determine how much time he had to respond to the actual notice. (T. 115-116). By his account, it appeared that he had less than 5 days to respond when he received the notice from Mr. Ray, and thereafter delayed opening the file for 2 days following his retention and didn't prepare an objection until March 11, 2011. (T. 118, 121).

CHRISTOPH ARNOLD

Attorney Darryl Johnson filed a divorce petition on behalf of Katherine Arnold on February 28, 2011. (T.81). Over the next months, several attempts

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were made, without success, to serve Christoph Arnold with the petition. (T. 81).

In late June 2011, Christoph Arnold, apparently being unaware of Darryl Johnson's representation of his wife, called Mr. Johnson's office and spoke with a paralegal about setting up an appointment to see Mr. Johnson. (T. 73-74). In that telephone conversation, he did not speak with Mr. Johnson. (T. 74). Later, on July 7, 2011, Mr. Arnold went to Darryl Johnson's office. (T. 70). Mr. Arnold was asked to fill out a client information sheet at which point it was discovered by office staff that the Johnson and Johnson Law Office represented Christoph Arnold's wife, Katherine, in her dissolution of marriage action. (T. 71, 76,). Although Mr. Johnson was unaware of the coincidence, members of his staff took it upon themselves to serve Mr. Arnold with a summons and petition in the Arnold dissolution action. (T. 80). At no time did Mr. Arnold meet or speak with Mr. Johnson, tender a fee or receive advice from anyone in Mr. Johnson's office. (T. 77). At the disciplinary hearing Mr. Arnold could not say who made the decision to serve him. (T. 77, 78-79). At the time of his appearance at the Johnson and Johnson Law Office on July 7, 2011, the Arnolds had been separated since November 2010, and the divorce petition had been pending since February 28, 2011. (T. 72, 81).

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Up to and including the time of service of process, Darryl Johnson had no contact with Christoph Arnold, had taken no money from him, and had no discussions of any sort with Mr. Arnold. (T. 80). Additionally, he did not direct anyone to serve papers on Mr. Arnold when he appeared at the Johnson and Johnson Law Office. (T. 80).

THE DISCIPLINARY HEARING PANEL DECISION

On or about July 30, 2013, the Disciplinary Hearing made the following findings:

FINDINGS OF FACT

COUNT I

1. Respondent showed photographs depicting nude breasts of female person to a female client without prior request or consent.

COUNT II

2. Count II was orally dismissed at the hearing.

COUNT III

3. Respondent failed to timely file a Motion to Prevent Relocation of Residence of Minor Children and an untimely such Motion was dismissed by the Court.

4. Respondent failed to voluntarily advise his client, Mr. Ray, of his failure and the action of the Court.

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COUNT IV

5. Respondent's Law Office trust and operating accounts were in the same bank and a misunderstanding of the functioning of the software for electronic transfer between accounts resulted in a notice of overdrafting on the trust account by Respondent's Law Office.

6. The notice was received by the Office of Disciplinary Counsel on August 16, 2011 from the bank.

7. At that point in time, Respondent's Law Office did not have procedures in place to comply with the requirements of Rule 4 of handling money. As a consequence some advanced legal fees and some funds received on behalf of clients were being deposited directly into an operating account.

8. Upon notice of the violations of Rule 4, Respondent corrected his Law Office procedures to comply with the requirements of Rule 4 and educated his personnel to the requirements of Rule 4.

COUNT V

9. Respondent filed a Petition for Dissolution of Marriage on behalf of a wife-client on February 28, 2011 and arranged for service of the Summons and Petition by an assigned Private Process Server.

10. Service of the Summons and Petition upon the husband was delayed by difficulty in locating the husband.

11. The husband arranged for an appointment with Respondent for possible representation without knowing a Petition had been filed, that a Summons had been issued or that Respondent represented his wife.

12. When the husband appeared for the appointment, he was served with the Summons and Petition at the direction of office personnel.

13. There is no evidence that Respondent had knowledge of the specific appointment or the actions directing the service of the process at his office and no evidence the husband was harmed thereby.

CONCLUSIONS OF LAW

14. Respondent violated Rule 4-1.3 by failing to use reasonable diligence and promptness in filing the appropriate motion to prevent relocation of children as described in Count III.

15. Respondent violated Rule 4-1.4 by failing to keep his client informed of a motion hearing.

16. Respondent violated Rule 4-1.4 by failing to provide competent representation to the client in Count III.

17. Respondent violated Rule 4-1.5(c) by comingling personal funds and client funds in his Operating Account, thus failing to hold client funds separate from his own.

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18. Respondent's unsolicited display of partially nude photographs to a female client, was not a direct violation of Rule 4-1.7 or Rule 4-1.8(j); however, the conduct was not reasonably necessary to the representation of the client and posed a substantial risk that the client would perceive the purpose of the display as done for personal purposes of the lawyer. As such, the conduct exhibited a failure to recognize that the lawyer occupies the "highest position of trust and confidence" toward the client and must "exercise [ ] sensitive professional and moral judgment guided by the basic principles underlying the Rules. Rule 4-1.8, Comment, para. 17, and Rule 4, Preamble, para. 9.

RECOMMENDATION

The Disciplinary Hearing Panel recommends that, pursuant to rule 5.16, Respondent be publicly reprimanded.

Respectfully submitted,

Dated: 7-21-13

/s/ Donald E. Bonacker
Donald E. Bonacker
Attorney Member
Presiding Officer

Dated: 7-30-13

/s/ John C. Holstein
Attorney Member

Dated: 7-23-13

/s/ Dr. Larry Quinalty
Lay Member

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POINTS RELIED ON

I.

RESPONDENT DENIES THAT HE VIOLATED RULE 4-1.7(a)(2) AS SET FORTH IN COUNT I OF THE INFORMATION BY CREATING A CONCURRENT CONFLICT OF INTEREST IN THAT THERE WAS NO INAPPROPRIATE SEXUAL INTEREST IN GAYLE DANELS AND THAT SEMI NUDE PHOTOGRAPHS SHOWN TO HER WERE WELL WITHIN COUNSEL'S DUTY TO ADVISE HER OF THE POTENTIAL DANGERS INVOLVED IN A DISSOLUTION OF MARRIAGE ACTION ESPECIALLY WHERE BOTH PARTIES HAD MADE ALLEGATIONS OF MARITAL INFIDELITY.

In re Howard, 912 S.W.2d 61, 62 (Mo. banc 1995).

In re Mirabile, 975 S.W.2d 936, 941 (Mo. 1998)

In re Weier, 994 S.W.2d 554, 555 (Mo. banc, 1999).

II.

RESPONDENT ADMITS THAT IN 2011 HE DEPOSITED ADVANCE FEE PAYMENTS INTO AN OPERATING ACCOUNT AND COMMINGLED CLIENT FUNDS WITH THE FUNDS OF THE LAW FIRM OF JOHNSON AND JOHNSON BUT DENIES THAT HE

MISAPPROPRIATED FUNDS IN THAT ADVANCE FEES WERE NOT DISPERSED BEFORE BEING EARNED AND MONTHLY STATEMENTS WERE FURNISHED TO CLIENTS SHOWING RETAINER BALANCES AFTER EARNED FEES HAD BEEN DEDUCTED.

In re Howard, 912 S.W.2d 61, 62 (Mo. banc 1995).

III.

RESPONDENT ADMITS THAT HE WAS NEGLIGENT IN FAILING TO DILIGENTLY REPRESENT THE INTERESTS OF JOHN RAY IN THAT HE DID NOT MAKE SUFFICIENT EFFORT TO DETERMINE THE SERVICE DATE OF A NOTICE OF RELOCATION OF HIS EX-WIFE AND CHILDREN AND THEREBY FAILED TO MAKE A TIMELY OBJECTION TO THE RELOCATION OF HIS EX-WIFE AND CHILDREN TO PLATTE COUNTY, MISSOURI.

In re Howard, 912 S.W.2d 61, *In re* 62 (Mo. banc 1995).

In re Mirabile, 975 S.W.2d 936, 941 (Mo. 1998)

IV.

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RESPONDENT DENIES THAT HE DIRECTED OR PERMITTED HIS LAW OFFICE STAFF TO USE INFORMATION GAINED FROM A PROSPECTIVE CLIENT, WHICH DISADVANTAGED CHRISTOPH ARNOLD IN VIOLATION OF RULES 4-5.3 AND 4-8.4(A) AND AGREES WITH PARAGRAPH 13 OF THE FINDINGS OF THE DISCIPLINARY PANEL THAT "THERE IS NO EVIDENCE THAT RESPONDENT HAD KNOWLEDGE OF THE SPECIFIC APPOINTMENT OR THE ACTIONS DIRECTING THE SERVICE OF THE PROCESS AT HIS OFFICE AND NO EVIDENCE THE HUSBAND WAS HARMED THEREBY."

In re Howard, 912 S.W.2d 61, 62 (Mo. banc 1995).

In re Mirabile, 975 S.W.2d 936, 941 (Mo. 1998)

V.

RESPONDENT SHOULD BE ADMONISHED OR REPRIMANDED FOR HIS MISCONDUCT BECAUSE AN ADMONISHMENT OR REPRIMAND IS THE MOST APPROPRIATE SANCTION PURSUANT TO THE AMERICAN BAR ASSOCIATION STANDARDS FOR IMPOSING LAWYER SANCTIONS AND ACCORDING TO MISSOURI CASE LAW.

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In re Madison, 282 S.W.3d 350, 360 (Mo. banc 2009)

In re Downs, 363 S.W.2d 679, 691 (Mo. banc 1963).

In re Stewart, 342 S.W.3d at 309 (Mo. 2011).

POINTS RELIED ON

I.

RESPONDENT DENIES THAT HE VIOLATED RULE 4-1.7(a)(2) AS SET FORTH IN COUNT I OF THE INFORMATION BY CREATING A CONCURRENT CONFLICT OF INTEREST IN THAT THERE WAS NO INAPPROPRIATE SEXUAL INTEREST IN GAYLE DANELS AND THAT SEMINUDE PHOTOGRAPHS SHOWN TO HER WERE WELL WITHIN COUNSEL'S DUTY TO ADVISE HER OF THE POTENTIAL DANGERS INVOLVED IN A DISSOLUTION OF MARRIAGE ACTION ESPECIALLY WHERE BOTH PARTIES HAD MADE ALLEGATIONS OF MARITAL INFIDELITY.

STANDARD OF REVIEW

In an attorney disciplinary proceeding, "this Court reviews the evidence de novo, determines independently by the credibility, weight and value of the testimony of the witnesses, and draws its own conclusions of law." *In re Howard,* 912 S.W.2d 61, 62 (Mo. banc 1995).

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Typically, the one before whom a witness testifies is in a far better position to determine the credibility of the witness and the weight to be given to the testimony than a tribunal reviewing only the cold record. *Davis v. Research Medical Center,* 903 S.W.2d 557, 568 (Mo.App.1995). In the era when factual findings in a judge-tried case were, as here, reviewed de novo, Judge Lamm summed up this principle artfully:

> Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it…*In re Mirabile*, 975 S.W.2d 936, 941 (Mo. 1998).

As set forth above, the Court is entitled to review this matter de novo but that is not to say that this Court should be deprived of findings and conclusions of a learned panel below. The panel in this case is comprised of a jurist who has held every judicial position available in this state from associate circuit judge to circuit judge to judge of the court of appeals and as a judge of this Court. A veteran, retired circuit judge who provided decades of judicial service to the Circuit Court of Greene County, Missouri joined him in hearing the

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evidence and Dr. Larry Quinalty, the lay panel member, joined both the Honorable John C. Holstein and the Honorable Don Bonacker.

ARGUMENT

As noted by the disciplinary panel, the evidence tendered at the disciplinary hearing does not support that a conflict of interest existed between client Gayle Danels and attorney Darryl Johnson. *See* ¶ 18, Disciplinary Hearing Panel Decision.

In May of 2009 Gayle Danels employed Darryl Johnson to represent her in the dissolution of her second marriage. (T. 131). Ms. Danels filled out a client information form and indicated among other things that her spouse had been unfaithful and that he would make allegations that she had participated in adulterous affairs. (T. 164). In Ms. Danels' initial conference, Attorney Johnson, being aware of the possibility of adulterous marital conduct, showed Ms. Danels seminude photographs of women that had been admitted into evidence in cases where he represented the opposing spouse. (T. 164). This demonstration was designed to impart upon Ms. Danels the importance of fully disclosing any evidence of misconduct that might later be used against her or her estranged husband. (T. 164). No attempt was made to lure Ms. Danels into a sexual liaison and no touching or other unwanted sexual advances occurred at that meeting or at any other time during the course of Mr. Johnson's

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representation. Moreover, there was no evidence to suggest a sexual interest in Ms. Danels.[1]

Also important to note is how the undercurrent of Ms. Danels' failure to honor her financial obligations to Mr. Johnson may have affected her desire to file a complaint with the Office of Chief Disciplinary Counsel. Initially, she was told that she would have to pay a retainer of $1,500.00. Ms. Danels initial payment was $700.00. Subsequent to employing Mr. Johnson in her divorce case, Ms. Danels was sued by her first husband who was attempting to remove custody of their children from Ms. Danels and obligate her to pay child support. Mr. Johnson at Ms. Danels request undertook representation of Ms. Danels in that matter and achieved a successful result following hearing.[2] After paying a total of $850 for representation in both cases, Ms. Danels continued to be

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[1] During Ms. Danels testimony she recalled that in addition to being shown seminude photographs Respondent remarked that he preferred large breasts in women and that the photographs and comments made her uncomfortable with the presentation (T. 134). Mr. Johnson admitted showing seminude photographs to Ms. Danels but denied making comments concerning breast size. (T. 166).

[2] An older child was declared emancipated and a younger child was returned to Ms. Danels custody. (T. 168-169).

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represented by Mr. Johnson for over a year until she discharged him from further service on May 25, 2014. (T. 148, 151). At the time of his discharge Ms. Danels owed an undisputed balance of $3,686.00 for legal services. (T. 144-146). In her letter discharging Mr. Johnson, Ms. Danels made no mention of unwanted sexual advances or sexual misconduct of Mr. Johnson. (T. 147).

After repeated unsuccessful attempts to work out payment arrangements with Ms. Danels, her account was turned over to Creditor's Financial Services, LLC for collection. (T. 170-172). The agency in August 2010, sent correspondence to Ms. Danels requesting payment for the unpaid balance owed to the Johnson and Johnson Law Firm. (T. 172). Subsequently on August 30, 2010, Ms. Danels filed a complaint with the Office of Chief Disciplinary Counsel, which is the subject of Count IV of the information in this case.

After hearing the evidence the disciplinary panel concluded, "Respondent's unsolicited display of partially nude photographs to a female client, was not a direct violation of Rule 4-1.7 or Rule 4-1.8(j)." However, it did conclude that the showing of seminude photographs "was not reasonably necessary to the representation of the client and posed a substantial risk that the client would perceive the purpose of the display as done for personal purposes of the lawyer." *See* Paragraph 18, Disciplinary Hearing Panel decision. It went on to say "As such, the conduct exhibited a failure to recognize that the lawyer

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occupies the "highest position of trust and confidence" toward the client and must "exercise [ ] sensitive professional and moral judgment guided by the basic principles underlying the Rules. Rule 4-1.8, Comment, para. 17, and Rule 4, Preamble, para. 9."

Respondent agrees that a lawyer should occupy the "highest position of trust and confidence" toward the client and must "exercise [ ] sensitive professional and moral judgment guided by the basic principles underlying the Rules." However, these statements are an amalgamation of sentiments given out of context, which Respondent regards as a general statement of the role of an attorney but not a rule under which a disciplinary action might be pursued. For example, the language "highest position of trust and confidence" is part of a sentence taken from paragraph 17 of the commentary to Rule 4-1.8 under the general heading of **Client-Lawyer Sexual Relationships.** The adjoining admonition that a lawyer must "exercise [ ] sensitive professional and moral judgment guided by the basic principles underlying the Rules" is found under paragraph [9] of the preamble to Rule 4 and appears to fall into the category of general advice or policy statement rather than a rule of conduct. In any case, what is clearly understood from the panel's decision is that "Respondent's unsolicited display of partially nude photographs to a female client, was not a direct violation of Rule 4-1.7 or Rule 4-1.8(j)."

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In contrast, Informant cites one case, *In re Howard,* 912 S.W.2d 61 (Mo. banc, 1995), as guidance for the Court to decide this case. Informant's reliance on *Howard* is mislaid.

For example, in *Howard* the offending conduct was described as Mr. Howard suggesting that a Wanda Sargent accompany him on personal out-of-town trips (while her husband was away in the Army). *Howard* at 62. On another occasion he grabbed Ms. Sargent and tried to embrace and kiss her, compelling her to pull out a can of mace. *Id.* Following this episode Howard was discharged as the Sargents' attorney.

With another client, Debra F. Brandt, Mr. Howard in a recorded telephone conversation suggested that Ms. Brandt come to his office for "a few drinks" and "a little loving." *Id.* Two days before argument in Ms. Brandt's case, Mr. Howard informed her he wouldn't appear unless she paid him $850 or had sex with him. *Id.*

Mr. Howard's conduct is far more egregious than anything Mr. Johnson is supposed to have done even when viewed in a light most favorable to Informant.

While Mr. Johnson is aware that displaying seminude photographs to Ms. Danels might have been done in poor taste, there is at least a colorable reason

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for doing so given Ms. Danels' report of infidelity allegations against her and her husband.

Additionally, there was no testimony that on any occasion Mr. Johnson touched or assaulted Ms. Danels as was the case in *Howard,* and unlike this case, the distillation of the truth was not muddied by Ms. Danels' unpaid attorney fees.

Informant goes on to state:

By engaging in unwanted sexual advances, Respondent undermined Danels' faith in his continued services and adversely affected the representation. She characterized his conduct as "weird" and "uncomfortable" and ultimately terminated the attorney-client relationship, even though it meant that she would thereafter be forced to represent herself without the benefit of legal counsel for the remainder of the dissolution proceedings. *Informant's Brief,* p. 23.

These assertions are plainly untrue. After the one and only incident in which Ms. Danels alleges Mr. Johnson showed her the offending photographs, she continued with Mr. Johnson, without subsequent complaint of sexual misconduct, as her counsel for more than a year until May 25, 2010. (T. 146-147). During the year Mr. Johnson served as Ms. Danels' attorney he actively litigated without complaint her divorce and the motion to change custody filed by her first husband.

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Informant maintains Mr. Johnson's statement that they "could work something out" is filled with sexual innuendo. This, however, does not square with the facts. First, Ms. Danels was quoted a retainer of $1,500.00. (T. 131). She did not tender the retainer but instead paid $700 at her second conference with Mr. Johnson and agreed to pay the balance at the rate of $100 per week but admitted that she didn't make those payments. (T. 141). Later on, after having made no payments, she agreed to pay $50.00 per week on her balance. (T. 170). In the end, she paid a total of $850 on her bill of $4,386 for legal services rendered. [3] The record reflects that Mr. Johnson rendered valuable legal services to Ms. Danels and on two occasions attempted to make payment arrangements that were largely ignored by Ms. Danels. On balance, it is far more likely that Mr. Johnson offered to make payment arrangements involving money rather than engage in an illicit form of compensation.

Later on in Informant's brief, Informant makes the statement "In this regard, there is no disputing the fact that Danels found Respondent's conduct sufficiently disturbing that she decided to terminate the attorney-client relationship and represent herself in the dissolution action." *Informant's Brief,* P.24. Again, this assertion is untrue. The fact that Ms. Danels continued her

[3] The total of $4,386 is comprised of the balance owed at the termination of services plus $700 that was paid at the time of Mr. Johnson initial employment.

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representation with Mr. Johnson for over a year belies informant's contention that Ms. Danels was profoundly upset. To believe Informant's statement one must completely discount the judgment of a former member of this Court, a very experienced former circuit court judge and a highly educated lay panel member.

There is much more evidence to support a finding that (a) Ms. Danels was not offended by the showing of the photographs as witnessed by her continuation with Mr. Johnson as her lawyer for over a year; (b) she was motivated to avoid paying a debt she owed by initiating a complaint with the Office of Chief Disciplinary Counsel; (c) at no time prior to the making of her complaint did she complain to Mr. Johnson or anyone else about sexual harassment including in her discharge letter directed to Mr. Johnson in May 2010; and (c) there is not the slightest evidence to suggest that Mr. Johnson failed to competently provide legal services to Ms. Danels during the course of his representation. In summary, Ms. Danels' claims do not have the ring of authenticity and certainly are not supported by a preponderance of the evidence.

It is indisputable that Respondent has learned lessons from his experience in this cause of action and no longer includes a photographic presentation when warning clients of the perils of marital misconduct. Nevertheless, it would be a mistake to believe that a preponderance of the evidence supports a conclusion

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that Darryl Johnson had a sexual interest in Gayle Danels, such that it created a conflict of interest where he placed his sexual appetites above the interests of his client. *In re Weier,* 994 S.W.2d 554, 555 (Mo. banc, 1999).

II.

RESPONDENT ADMITS THAT IN 2011 HE DEPOSITED ADVANCE FEE PAYMENTS INTO AN OPERATING ACCOUNT AND COMMINGLED CLIENT FUNDS WITH THE FUNDS OF THE LAW FIRM OF JOHNSON AND JOHNSON BUT DENIES THAT HE MISAPPROPRIATED FUNDS IN THAT ADVANCE FEES WERE NOT DISPERSED BEFORE BEING EARNED AND MONTHLY STATEMENTS WERE FURNISHED TO CLIENTS SHOWING RETAINER BALANCES AFTER EARNED FEES HAD BEEN DEDUCTED.

STANDARD OF REVIEW

In an attorney disciplinary proceeding, "this Court reviews the evidence de novo, determines independently by the credibility, weight and value of the testimony of the witnesses, and draws its own conclusions of law." *In re Howard,* 912 S.W.2d 61, 62 (Mo. banc 1995).

ARGUMENT

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Paul William Jenkins, Jr., who prefers to be called Bill, is the bookkeeper for the law firm, Johnson and Johnson. (T. 48-49).

In August, 2011, Mr. Jenkins attempted to transfer money from one Johnson and Johnson and Johnson Law Firm account to another through an electronic online transfer with Liberty Bank. (T. 52). The Johnson and Johnson Law Firm maintained four (4) primary accounts: an operating account, a payroll account, a money market fund account, and a trust account. (T. 51). At the time of the August transaction, Mr. Jenkins was using bank software that had been recently implemented by Liberty Bank in Springfield, Missouri. (T. 52). It was Mr. Jenkins intent then to transfer money from a money market account maintained by the firm to the firm's operating or payroll accounts. (T. 52). Instead, he mistakenly transferred money from the firm's trust account, which in effect caused the trust account to be overdrawn. (T. 52). The bank's software permitted transfer of funds even when it created a negative balance. (T. 52). Mr. Jenkins believes that his unfamiliarity with new software supplied by Liberty Bank was the cause of the transfer from the trust account to another of the firm's accounts. (T. 53). No member of the firm had instructed him to take money out of the trust account and place it in the operating account on this particular occasion. (T. 53).

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As a result of the overdraft, the bank notified the Office of Chief Disciplinary Counsel as is required under rules and regulations governing attorney trust accounts. (T. 9). This, in turn, caused the Office of Chief Disciplinary Counsel to write a letter to the Johnson and Johnson Law Firm regarding the overdraft. (T. 53). Lynn and Darryl Johnson were not presence when the letter from Office of Chief Disciplinary Counsel arrived. (T. 58). Darryl Johnson's administrative assistant, who passed it along to Mr. Jenkins, opened the letter. (T. 58). Mr. Jenkins took it upon himself to respond to the letter, and wrote the Office of Chief Disciplinary Counsel explaining how the error had occurred, and that the overdraft was corrected on the next business day. (T. 54, 58).

Subsequently, Darryl Johnson had conversations with the Office of Chief Disciplinary Counsel, and as a consequence turned over financial records of the firm's operating and trust accounts covering the period from February 11, 2011 to October 2011. (T. 37).

The Office of Chief Disciplinary Counsel performed an audit of transactions during that period, and concluded that advance fees were being deposited in the firm's operating account when they should have been deposited into the trust account. However, even though the funds were mistakenly placed in the operating account, monthly statements went to clients that detailed the

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amount of time expended against the retainer amount, and the remaining balance or deficit, as the case might be. (T. 56-57). When asked, the auditor for the Office of Chief Disciplinary Counsel, Kelly Dillon, testified that there was not a deliberate attempt at deception through any of this billing because everything was accounted for in communications with clients on a monthly basis. (T. 37). In particular, the firm's accounting practice was to label those deposits as advance payments, and to bill against them, even though the funds were placed in the operating account instead of the trust account. (T. 56). Each month, clients knew exactly how much of their retainer was left. (T. 57). Examples of these transactions were contained in informant's Exhibit 6 through 16 at the disciplinary hearing.

Contemporaneously with the production of the additional financial information in 2011, the Johnson and Johnson Law Firm hired attorney Lori Levine to represent them before the Office of Chief Disciplinary Counsel. (T. 63). Ms. Levine wrote the Office of Chief Disciplinary Counsel, and sought its advice and suggestions about improved accounting techniques for the Johnson and Johnson Law Firm. (T. 63). As a consequence of those discussions corrective measures were undertaken. (T. 64). Both Lynn and Darryl Johnson and Bill Jenkins all participated in a CLE program on trust accounting. (T. 64). After the training, accounting practices at the firm were amended in October

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2011 to come into compliance with accounting policies preferred by the Office of Chief Disciplinary Counsel. (T. 65).

No complaints about the operation of the trust account beyond the overdraft were ever received and especially not since August 2011. It is clear that there was never a concern about misappropriation of funds by Mr. Johnson. (T. 41). Although the trust account issues arose in 2011 and corrective measures were instituted shortly thereafter, the incident did not become part of the basis for the Information in this case until 2013. (T. 44).

From the evidence presented at the disciplinary hearing it is evident that the law firm of Johnson and Johnson was placing what Respondent, his wife and the bookkeeper denominated as advance fees into its operating account. It is equally apparent that there was no misappropriation of funds or fraudulent activity within the operating account and certainly no claim of wrongdoing by any client. In reality, the Johnsons were using their operating account as a trust account and dutifully notifying clients of their retainer balance after earned fees were deducted on a monthly basis. The Johnson and Johnson trust account was used primarily to hold proceeds from personal injury settlements and third party transactions until dispersed to clients or others.

Once the error in accounting practices was brought to the attention of Respondent and his wife and law partner, Lynn, corrective action was taken in

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the form of accounting instruction from the Office of Chief Disciplinary Counsel. They also received instruction from Ms. Levine whom they had hired to advise them in the correct operation of their trust account and to facilitate communication with the Office of Chief Disciplinary Counsel. All of these measures were taken in 2011 without further complaint from OCDC or others.

III.

RESPONDENT ADMITS THAT HE WAS NEGLIGENT IN FAILING TO DILIGENTLY REPRESENT THE INTERESTS OF JOHN RAY IN THAT HE DID NOT MAKE SUFFICIENT EFFORT TO DETERMINE THE SERVICE DATE OF A NOTICE OF RELOCATION OF HIS EX-WIFE AND CHILDREN AND THEREBY FAILED TO MAKE A TIMELY OBJECTION TO THE RELOCATION OF HIS EX-WIFE AND CHILDREN TO PLATTE COUNTY, MISSOURI.

STANDARD OF REVIEW

In an attorney disciplinary proceeding, "this Court reviews the evidence de novo, determines independently by the credibility, weight and value of the testimony of the witnesses, and draws its own conclusions of law." *In re Howard,* 912 S.W.2d 61, 62 (Mo. banc 1995).

Typically, the one before whom a witness testifies is in a far better position to determine the credibility of the witness and the weight to be

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given to the testimony than a tribunal reviewing only the cold record. *Davis v. Research Medical Center,* 903 S.W.2d 557, 568 (Mo.App.1995). In the era when factual findings in a judge-tried case were, as here, reviewed de novo, Judge Lamm summed up this principle artfully:

> Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it…*In re Mirabile*, 975 S.W.2d 936, 941 (Mo. 1998).

As set forth above, the Court is entitled to review this matter de novo but that is not to say that this Court should be deprived of findings and conclusions of a learned panel below. The panel in this case is comprised of a jurist who has held every judicial position available in this state from associate circuit judge to circuit judge to judge of the court of appeals and as a judge of this Court. A veteran, retired circuit judge who provided decades of judicial service to the Circuit Court of Greene County, Missouri joined him in hearing the evidence and Dr. Larry Quinalty, the lay panel member, joined both the Honorable John C. Holstein and the Honorable Don Bonacker.

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ARGUMENT

In September 2010, John Ray consulted with Darryl Johnson about the possibility of his ex-wife seeking relocation with the couple's children to another area of the state. (T. 111). At that time, Mr. Ray had not received a Notice of Relocation, and was seeking advice about what to do in the event his wife sought to relocate. (T. 101). Mr. Johnson did not have a specific recollection of that discussion, but agreed that it was likely that those matters were discussed in the September 2010 consultation. (T. 101). Mr. Ray did receive a relocation notice sometime in January 2011, but didn't seek counsel from Mr. Johnson until approximately February 11, 2011 when a preliminary consultation occurred. (T. 102). Mr. Johnson and Mr. Ray spoke again on the telephone on February 15th and on February 16, 2011, Mr. Ray went to Mr. Johnson's office, paid him a $2,000.00 retainer, and dropped off the Notice of Relocation that he had received. (T. 104, 114). Upon receipt of the retainer and the Notice of Relocation, Mr. Johnson's office staff waited an additional two days before opening the file. (T. 114). Once opened, the matter was not reviewed by a paralegal or Mr. Johnson until the following Monday, which would have been February 21, 2011. (T. 114). Mr. Johnson agreed that if he had looked at the documentation at the time it was received in his office, he would have investigated the date of service and would have realized that 25

days of the 30-day period for objections to the relocation notice had already expired. (T. 117-118). Although Mr. Ray provided the original Notice of Relocation on or about February 16, 2011 to Mr. Johnson he did not provide the date of service or any documentation supporting the date of service. (T. 115). It appears that the original notice was served on Mr. Ray's second wife on a date that was unknown to Mr. Johnson. (T. 115).

On March 11, 2011, Darryl Johnson filed a Motion to Prevent Relocation of Minor Children, and a Motion to Modify. (T. 115). Subsequently, the Motion to Prevent Relocation was dismissed as being untimely. (T. 98).

At his disciplinary hearing, Mr. Johnson admitted that even though he was not provided the actual date of service of the Notice of Relocation that he should have made the effort to find this information out, and determine how much time he had to respond to the actual notice. (T. 115-116). By his account, it appeared that he had less than 5 days to respond when he received the notice from Mr. Ray, and thereafter delayed opening the file and preparing an objection until March 11, 2011. (T. 118, 121).

The Disciplinary Hearing Panel concluded that Respondent violated Rule 4-1.4 by failing to provide competent representation to the client in Count III and by failing to keep his client informed of a motion hearing. Respondent does not disagree with the panel's findings and conclusions.

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IV.

RESPONDENT DENIES THAT HE DIRECTED OR PERMITTED HIS LAW OFFICE STAFF TO USE INFORMATION GAINED FROM A PROSPECTIVE CLIENT, WHICH DISADVANTAGED CHRISTOPH ARNOLD IN VIOLATION OF RULES 4-5.3 AND 4-8.4(A) AND AGREES WITH PARAGRAPH 13 OF THE FINDINGS OF THE DISCIPLINARY PANEL THAT "THERE IS NO EVIDENCE THAT RESPONDENT HAD KNOWLEDGE OF THE SPECIFIC APPOINTMENT OR THE ACTIONS DIRECTING THE SERVICE OF THE PROCESS AT HIS OFFICE AND NO EVIDENCE THE HUSBAND WAS HARMED THEREBY."

STANDARD OF REVIEW

Respondent directs the Court to the standard of review previously set forth in Arguments I, II and III.

ARGUMENT

Attorney Darryl Johnson filed a divorce petition on behalf of Katherine Arnold on February 28, 2011. (T.81). Over the next months, several attempts

were made, without success, to serve Christoph Arnold with the petition. (T. 81).

In late June 2011, Christoph Arnold, apparently being unaware of Darryl Johnson's representation of his wife, called Mr. Johnson's office and spoke with a paralegal about setting up an appointment to see Mr. Johnson. (T. 73-74). In that telephone conversation, he did not speak with Mr. Johnson. (T. 74). Later, on July 7, 2011, Mr. Arnold went to Darryl Johnson's office. (T. 70). Mr. Arnold was asked to fill out a client information sheet at which point it was discovered that the Johnson and Johnson Law Office represented Christoph Arnold's wife, Katherine, in her dissolution of marriage action. (T. 71, 76,). Although Mr. Johnson was unaware of the coincidence, members of his staff took it upon themselves to serve Mr. Arnold with a summons and petition in the Arnold dissolution action. (T. 80). At no time did Mr. Arnold meet or speak with Mr. Johnson, tender a fee or receive advice from anyone in Mr. Johnson's office. (T. 77). At the disciplinary hearing Mr. Arnold could not say who made the decision to serve him. (T. 77, 78-79). At the time of his appearance at the Johnson and Johnson Law Office on July 7, 2011, the Arnolds had been separated since November 2010, and the divorce petition had been pending since February 28, 2011. (T. 72, 81).

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Up to and including the time of service of process, Darryl Johnson had no contact with Christoph Arnold, had taken no money from him, and had no discussions of any sort with Mr. Arnold. (T. 80). Additionally, he did not direct anyone to serve papers on Mr. Arnold. (T. 80).

In its findings the Disciplinary Hearing Panel made the following observation:

13. There is no evidence that Respondent had knowledge of the specific appointment or the actions directing the service of process at his office and no evidence the husband was harmed thereby.

In other words, there is *no support* in the record for Informant's contention that (a) Respondent had a duty to look after the affairs of a person whom he had never spoken; (b) Respondent violated Rule 4-5.3(c) by failing to make reasonable efforts to ensure that his staff's conduct was compatible with Respondent's professional obligations; and (c) by failing to take a reasonable remedial action once he learned that his staff had acted in a manner toward a prospective client that Respondent himself could not have undertaken. *Informant's Brief,* P. 29.

If Informant's complaint is considered in the light of Respondent's duty to his own client Katherine Arnold it is likely that she would have had grounds

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for a complaint if Respondent had followed the actions Informant wishes Respondent had taken.

If Respondent had abandoned his duty to arrange for service of process on Mr. Arnold, or, having obtained service, taken "remedial action" to nullify service on Mr. Arnold once it was obtained, would he have been acting to the benefit of his client?

What Informant seems to be advocating is that Respondent had a duty to assist an adverse party over the interests of his own client. This, of course, is contrary to the most fundamental aspects of our adversarial system of justice.

The Disciplinary Hearing Panel had it right. Aside from a record bereft of evidence showing any connection between Respondent and the actions of his staff in obtaining service on Mr. Arnold, there was no showing that he was prejudiced by service of process.

On balance, the record does not offer even a modicum of support for Informant's position in Count V of the Information.

V.

RESPONDENT SHOULD BE ADMONISHED OR REPRIMANDED FOR HIS MISCONDUCT BECAUSE AN ADMONISHMENT OR REPRIMAND IS THE MOST APPROPRIATE SANCTION PURSUANT TO THE AMERICAN BAR ASSOCIATION STANDARDS FOR

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IMPOSING LAWYER SANCTIONS AND ACCORDING TO MISSOURI CASE LAW.

ARGUMENT

Respondent admits that he commingled client funds with funds in the operating account of the Johnson and Johnson Law Office and that advance fee payments should have been placed in the firm's trust account and dispersed when earned. Respondent also admits that he was negligent in his representation of John Ray in that he should have investigated more thoroughly the date of service of a notice of relocation of his ex-wife and children. In each instance, however there are significant mitigating factors to be considered.

Each disciplinary case ultimately stands on its own facts, but the ABA Standards for Imposing Lawyer Sanctions provides guidance for appropriate discipline. *In re Madison,* 282 S.W.3d 350, 360 (Mo. banc 2009); *In re Downs,* 363 S.W.2d 679, 691 (Mo. banc 1963). Following the model laid out in ABA Standard 3.0, four factors are considered in determining the appropriate discipline: (1) the duty violated; (2) the lawyer's mental state; (3) the potential or actual injury caused by the lawyer's misconduct; and (4) aggravating and mitigating circumstances. *In re Stewart*, 342 S.W.3d 307, 309 (Mo. 2011).

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When the foregoing standards for determining appropriate discipline are applied to the agreed upon and admitted facts in this cause of action it is reasonable that the sanction of a admonition or reprimand be imposed.

It is widely accepted that "the purpose of discipline is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession. Those twin purposes may be achieved both directly, by removing a person from the practice of law, and indirectly, by imposing a sanction which serves to deter other members of the Bar from engaging in similar conduct." *In re Stewart*, 342 S.W.3d at 309 (Mo. 2011).

The ABA Standards for Imposing Lawyer Sanctions, Standard 5.1 addresses actions that result in the Failure to Maintain Personal Integrity:

5.11 **Disbarment** is generally appropriate when:

(a) a lawyer engaged in serious criminal conduct a necessary element of which included intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation or theft . . .; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

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5.12 **Suspension** is generally appropriate when a lawyer knowingly engages in criminal conduct, which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

5.13 **Reprimand** is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

5.14 **Admonition** is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

Among these choices, we can conclude that Respondent's conduct was not criminal and while it does reflect on his fitness to practice, it does not seriously do so.

ABA standards 9.22(a), 9.22(b), 9.32(l) and 9.32 (e) direct us to consider prior disciplinary offenses, dishonest and selfish motivation along with remorse and full and free disclosure to and cooperation with the disciplinary authority.

Respondent has not previously been disciplined and there is no evidence that his conduct is part of a pattern. It is true, nevertheless, that he emphatically denies the allegations in Count I of the Information as well as Count V and asks the Court to rule against Informant in those matters. With regard to Counts III

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and IV, however, Respondent acknowledges his wrongdoing but relies on mitigating evidence in both counts.

Count III concerning the operation of the Johnson and Johnson trust account arose of a mistaken transfer of funds executed electronically by the firm's office accountant. There is no evidence that fraud or misrepresentation was involved and certainly no misappropriation of funds or criminal conduct. Once discovered, corrective action was taken and no further problems have been noted. Moreover, the improper accounting methods used by the Johnson and Johnson Law Firm were revised without prejudice to any client.

The facts here when applied to the ABA standards point to an admonition. Justification for imposing a more severe punishment, under ABA standards, requires a course of knowing or criminal conduct. The operation of the Johnson and Johnson trust account is more attributable to a misunderstanding of accounting procedures than a deliberate and knowing attempt to bend or break the rules that accompany lawyer trust accounts. Seen for what it is: the deficient operation of the trust account in this case does not meet the reprimand or suspension criteria that "a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely

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reflects on the lawyer's fitness to practice law." *ABA Standards for Imposing Lawyer Sanctions*, 5.12.

The basis of Count IV is lawyer inattention and failure to take timely action. Again, it does not involve dishonesty, fraud, deceit, misrepresentation or knowing conduct. Respondent and his staff are guilty of not investigating more thoroughly the service date of a domestic relocation notice but his failure was the product of neglect and not deliberate, fraudulent or knowing conduct.

The testimony at the Disciplinary Panel Hearing established that (a) Respondent was employed on Wednesday, February 16, 2011, (b) a paralegal in Respondent's office didn't open the file until Friday, February 18, 2011, (c) Respondent first saw the file on Monday, February 21, 2011 and (c) Respondent filed objections to the relocation and a motion to modify on March 11, 2011. The testimony also revealed that among the documentation provided to counsel there was no receipt of knowledge showing when the notice had been served on Mr. Ray's second wife. Of course, it can be easily argued that Respondent should have investigated the service date because time was certainly of the essence and had he done so he would have determined that only five (5) days remained to file objections following his employment on February 16, 2011. The chronology is important because Respondent believes it speaks

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to neglect rather than deliberate and knowing conduct that would justify a more severe sanction than a reprimand or admonition.

CONCLUSION

Altogether, Respondent's conduct was not criminal in nature and does not "seriously adversely reflect on Respondent's fitness to practice." According to ABA Standards for Imposing Lawyer Sanctions, 5.12, absent criminal conduct that seriously adversely reflects on a lawyer's fitness to practice, an admonition is the appropriate discipline. Accordingly, Respondent respectfully suggests that an admonishment or reprimand would be the appropriate sanction for Respondent's violation of the Rules of Professional Conduct.

Respectfully submitted,

By

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ATTORNEYS FOR RESPONDENT

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CERTIFICATE OF SERVICE

I certify that on this 9th day of February, 2013, a true and correct copy of the foregoing was served via the electronic filing system pursuant to Rule 103.08 on:

Allen Pratzel
Chief Disciplinary Counsel
3335 American Avenue
Jefferson City, MO 65109

Thomas D. Carver

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 9885 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Thomas D. Carver