

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:)
)
FREEMAN BOSLEY, JR.) **Supreme Court #SC94121**
)
Respondent.)

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

This action is one in which Informant, the Chief Disciplinary Counsel, is seeking to discipline an attorney licensed in the State of Missouri for violations of the Missouri Rules of Professional Conduct. Jurisdiction over attorney discipline matters is established by this Court's inherent authority to regulate the practice of law, Supreme Court Rule 5, this Court's common law and Section 484.040 RSMo. 2000.

STATEMENT OF FACTS

Background

Respondent Freeman Bosley, Jr. has been licensed to practice law in Missouri since 1980, actively engaged in the practice of law since 1997, **App.59 (T. 121-122)** and has no prior disciplinary record.

At all times relevant to these proceedings Respondent maintained with PNC Bank (“PNC”) an attorney trust account, account number XX-XXX-1086 (“Trust Account”), a general operating account, account number XX-XXXX-2241 (“Operating Account”), and an account he utilized for personal expenses, account number XX-XXXX-5143 (“Personal Account”). **App. 18.**

On February 14, 2012, **App. 19, 116**, February 21, 2012, **App.19, 118**, March 4, 2013, **App. 19, 120**, March 8, 2013, **App. 19, 122** and March 25, 2013, **App. 19, 124**, PNC, sent an overdraft notification to the Office of Chief Disciplinary Counsel (“OCDC”) in relation to the Trust Account, in each case indicating that the Trust Account held a negative balance. These notices were provided in accordance with the amended Missouri Supreme Court Rule 4-1.15. Respondent was at all times responsible for the management of the Trust Account. **App. 60 (T. 126-127).**

As a result of OCDC’s receipt of the initial overdraft the OCDC, through its investigative examiner, Kelly Dillon (“Dillon”), began an investigation and audit of Respondent’s Trust Account by writing to Respondent asking him to produce certain bank

records and for an explanation of the overdraft. **App. 33(T. 20).** Subsequently, after much communication between Dillon and Respondent, Respondent was able to provide some, but not all, of the records requested by OCDC and OCDC requested and obtained additional bank records from PNC. **App. 34 (T.20-21).** Respondent was forthcoming in his responses to OCDC and provided the information he could but, as a result of the failings in his recordkeeping, Respondent was unable to provide much of the information requested by OCDC. **App. 19, 36 (T.29-30).** Respondent did not maintain full records reflecting the activity in his Trust Account, the source of funds being deposited into the Trust Account or documentation providing the support and explanation for the withdrawal or disbursements of funds from the Trust Account. **App. 19.** Between OCDC's receipt of the two overdraft notifications in February 2012 and its receipt of the March 2013 overdraft notices the OCDC was in the process of its examination of Respondent's Trust Account and Operating Account. **App. 34 (T. 21).** Dillon testified at the DHP hearing that she did not find Respondent to be dishonest in his responses to the investigation nor that his misconduct was motivated by a selfish motive. **App. 46 (T. 69-70).**

Following the completion of OCDC's audit of Respondent's accounts with PNC an Information was filed in this matter on June 3, 2013. The Information asserted, *inter alia*, that Respondent was guilty of professional misconduct as a result of violating: (a) Rule 4-1.3 by failing to act with reasonable promptness in delivering the funds of clients to clients or third parties (paragraph 13); (b) Rule 4-1.15 by commingling personal funds and client funds in the Trust Account and failing to appropriately safeguard his client's property

(paragraph 14); (c) Rule 4-1.15 by failing to keep complete records of the Trust Account (paragraph 15); (d) Rule 4-1.15 by depositing his own funds into the Trust Account in an amount greater than necessary to cover bank service charges (paragraph 16); (e) Rule 4-1.15 by failing to promptly deliver funds to client and third parties (paragraph 17); and (f) Rule 4-8.4(c) by misappropriating client funds for his own personal use (paragraph 18). **App. 3-14.** Respondent filed his Answer to the Information on September 6, 2013, asserting that Respondent “does not contest any averment in paragraphs 1-18 of the Information.” **App. 16.**

A Disciplinary Hearing Panel (“DHP”) was appointed and a hearing held on December 9, 2013. **App. 29.** Respondent has been represented in these proceedings by counsel, Michael P. Downey, since July 1, 2013. **App. 15-17.** Prior to the December 9, 2013, DHP hearing Respondent and OCDC stipulated to many of the facts discovered during the course of OCDC’s audit of Respondent’s PNC accounts. **App. 18-28.**

Bank statements and records obtained by OCDC from PNC relating to the Trust Account and Operating Account for the period from December 3, 2010, through March 29, 2013, (“PNC Records”) reflect instances of Respondent commingling personal funds with Trust Account funds by depositing earned legal fees into the Trust Account. In particular:

a. Respondent provided consulting services to a utility corporation for which he was paid \$5000 per month for work performed. Respondent invoiced the utility corporation on a monthly basis for the services performed in the prior month. On June 1, 2011, June 6, 2011, October 13, 2011, June 19, 2012, and December 21, 2012, Respondent

deposited checks from the utility corporation into the Trust Account, on each occasion in the amount of \$5,000. Those payments represented compensation for services already performed and as such were earned fees of Respondent. **App. 19-20.**

b. Respondent provided legal services to a board of education for which he billed on an hourly basis for work performed. From January 11, 2011, through September 4, 2012, on twelve occasions Respondent deposited payments received from the educational board for work performed to the Trust Account. **App. 20.**

c. Respondent provided legal services to a real estate development firm for which he received compensation for services performed following completion of those services. On February 24, 2012, Respondent received payment from the real estate development firm for services performed which payment was wire transferred to the Trust Account. **App. 20.**

d. Respondent provided legal services to a healthcare management company pursuant to a written agreement dated March 1, 2012, which provided for Respondent to submit invoices to the healthcare management company for “services provided” and payment within 30 days thereafter. From March 19, 2012, through February 22, 2013, Respondent received ten payments for services provided all of which were deposited into Respondent’s Trust Account. **App.20-21.**

e. Respondent represented L.W. and C.W. in a personal injury matter. On May 8, 2012, Respondent received checks from the insurance carrier in settlement of the personal injury claims that included a separate check payable to Respondent alone for

his fees in relation to such representation. Respondent deposited the check for his earned fees in the Trust Account. **App. 21.**

Respondent paid personal or operating expenses out of the Trust Account by writing checks directly to payees including payments to AT&T, Minuteman Press and Leehman Fiberglass as well as American Express and ACH for credit card processing lease payments. **App. 21.** Further, Respondent paid personal or operating expenses out of the Trust Account by utilizing account withdrawal slips to purchase cashier's checks for payees including the US Treasury, Copy Concepts, CATCO, Northway, SALAMA, ELCO Chevrolet, Rejis Commission and Midwest Accounting as well as various other payees for advertising and lease agreements. **App. 21.**

On numerous occasions Respondent deposited client funds into the Trust Account, retaining a portion of such funds to satisfy payment to third party providers on his client's behalf, and prior to making such payments the balance of the Trust Account fell below the amount of client funds retained in the Trust Account. In particular:

a. On January 31, 2011, Respondent received a settlement check in the amount of \$50,000 on behalf of his client CC. Such settlement proceeds were deposited in the Trust Account. After disbursement of funds to his client and for his fee Respondent retained one third of the settlement proceeds in the Trust Account for payment of a medical lien asserted against the proceeds. On April 11, 2011, Respondent obtained a cashier's check in the amount of \$16,666.67 by executing a withdrawal from his client trust account payable to the Missouri Department of Social Services on behalf of client CC. Respondent

failed to deliver the cashier's check to the Department of Social Services and on May 24, 2011, Respondent deposited the cashier's check to his Trust Account, endorsing the back of the check "not used for purposes intended". Respondent did not pay the medical lien from the retained funds but in July of 2011 the Trust Account had a negative balance, leaving insufficient funds to make payment of the medical lien on behalf of CC. On December 21, 2012, Respondent submitted a check in the amount of \$16,666.67 to the Missouri Department of Social Services on behalf of client CC drawing against funds in Respondent's Operating Account. On January 25, 2013, that check was presented for payment against Respondent's Operating Account and was returned for insufficient funds. On January 29, 2013, the check was presented a second time for payment against Respondent's Operating Account and was again returned for insufficient funds. **App. 22-21, 39 (T 41-42)**. On July 8, 2013, after the Information was filed in this matter and 29 months following the settlement, Respondent paid the amount due the Missouri Department of Social Services on behalf of client CC. **App. 39 (T.41-42)**.

b. On July 25, 2011, Respondent deposited into the Trust Account \$50,000, representing settlement of a portion of his client's claims in regard to a wrongful death cause of action arising out of the death of client FW. On July 29, 2011, Respondent made disbursements of those settlement proceeds but retained \$546.75 in the Trust Account to make payment of an outstanding EMS fee. Respondent failed to pay the EMS fee and on September 9, 2011, the balance in the Trust Account fell to \$0.99 leaving insufficient funds in the account to satisfy the EMS fee. **App. 23**.

c. On August 5, 2011 Respondent deposited \$28,562 into the Trust Account representing settlement proceeds he received on behalf of his client AD. Respondent disbursed the settlement proceeds including a check dated August 12, 2011, to Cyber Diagnostic in the amount of \$2,000 in payment of medical fees on behalf of client AD. The Cyber Diagnostic check was never presented to PNC Bank for payment and by September 9, 2011, there were insufficient funds remaining in the Trust Account to satisfy payment of the check. **App. 23.** On July 8, 2013, after the Information was filed and 23 months after the settlement, Respondent paid the Cyber Diagnostic bill on behalf of his client AD. **App. 40 (T. 44-45).**

d. On September 30, 2011, Respondent deposited \$11,500 into the Trust Account representing settlement proceeds from his representation of client JL. Respondent disbursed the settlement proceeds from the Trust Account except for \$1,650.93 which was retained in the Trust Account to make payment to the City of St. Louis EMS and the Missouri Department of Social Services on behalf of client JL. Prior to making such payments the balance of the Trust Account on October 21, 2011 fell to \$240, leaving insufficient funds in the Trust Account to make payment to those providers. On February 6, 2013, 16 months following the settlement, Respondent paid the EMS and Missouri Department of Social Services bill on behalf of his client JL. **App. 40-41 (T. 48-49).**

e. In October of 2011 Respondent deposited settlement proceeds related to his representation of client TR in the amount of \$30,000 into the Trust Account. Respondent subsequently disbursed a portion of those funds, retaining in the Trust Account

\$3,512.50 for payment of outstanding medical bills on behalf of client TR. Respondent did not make payment to the medical provider and by November of 2011 the balance of the Trust Account fell to \$2,094.85, an amount less than what was retained from client TR's settlement. **App. 24.** As of the date of the DHP hearing, Respondent had failed to make payment to the medical provider. **App. 41 (T49-50).**

f. On January 9, 2012, Respondent deposited \$6,175 into the Trust Account, which amount was from the settlement of his client HL's personal injury claim. On January 12, 2012, Respondent disbursed the settlement proceeds, including sending a Trust Account check in the amount of \$1,660 to client HL's health care provider. On February 10, 2012, and February 12, 2012, the check was returned for insufficient funds in the Trust Account. **App. 24.** As of the date of the DHP hearing, Respondent had failed to make payment to the health care provider. **App. 41-21 (T. 51-53).**

g. On March 20, 2012, Respondent deposited \$13,000 into the Trust Account representing settlement funds he received on behalf of his client EP. After making disbursements from the settlement proceeds in March of 2012 Respondent retained \$7,270.89 of the settlement proceeds in the Trust Account to make payment of outstanding medical bills on client EP's behalf. Respondent did not pay client EP's medical bills and by April 18, 2012, the balance of the Trust Account was less than the amount withheld from client EP's settlement. **App. 25.** As of the date of the DHP hearing, \$6,250.51 retained from the settlement proceeds for payment of EP's outstanding medical bills had not been paid by Respondent. **App. 42-43 (T. 55-57).**

h. On June 11, 2012, Respondent deposited client AJ's settlement check in the amount of \$18,043.96 into the Trust Account. Respondent disbursed the settlement funds but retained \$2,140 in the Trust Account for payment of monies due to client AJ's health care provider. Respondent did not make the payment to the health care provider and by July 18, 2012, there were insufficient funds in the Trust Account to pay the outstanding amount. **App. 25.** As of the date of the DHP hearing Respondent had not made payment to AJ's health care provider. **App. 43 (T. 57-58).**

i. On August 9, 2012, Respondent deposited \$11,500 into the Trust Account representing settlement proceeds he had received on behalf of his client, CM. Respondent disbursed the settlement proceeds but retained \$1,851.00 in the Trust Account to make payment to one of the three CM health care providers listed on client CM's settlement sheet. Respondent made payment to the one health care provider from funds drawn from the Operating Account. Respondent failed to make payment to the other two health care providers listed and as of February 25, 2013, the Trust Account balance was negative and \$51.00 in client settlement funds remained unpaid as of the date of the DHP hearing. **App. 25-26, 43 (T. 59-60).**

j. On December 4, 2012, Respondent deposited \$4,356.50 into the Trust Account representing settlement proceeds he received on behalf of his client, WC. After making disbursements from the Trust Account for Respondent's attorney fees, outstanding medical fees and a portion of the settlement proceeds to client WC, \$143.50 remained in the Trust Account from the settlement. The \$143.50 represented client WC's additional

portion of the settlement proceeds. Respondent failed to pay that amount to client WC and in January of 2013 the Trust Account was overdrawn. **App. 26.** As of the date of the DHP hearing Respondent had failed to disburse the \$143.50 in client funds to his client WC. **App. 43-44 (T. 60-62).**

k. On September 26, 2012, Respondent deposited \$5,250.00 into the Trust Account representing settlement proceeds he received on behalf of his client, MS. After making disbursements from the Trust Account for Respondent's attorney fees and a portion of the settlement proceeds to client MS, \$689.68 remained in the Trust Account from the settlement. On November 5, 2012, the Trust Account only contained \$46.80 and \$689.68 in client MS funds remained unpaid. **App. 26.** As of the date of the DHP hearing, Respondent had failed to disburse \$289.68 of the funds withheld from the settlement proceeds. **App. 44 (T. 62-63).**

l. On September 24, 2012, Respondent deposited \$3,467.40 into the Personal Account representing settlement proceeds he received on behalf of his client, LH. On September 26, 2012, after realizing the deposit error, Respondent transferred the entire client LH settlement amount to his Operating Account, which at the time had a negative balance, instead of the Trust Account. Respondent disbursed the client settlement funds to client LH and her medical providers directly from the Operating Account. **App. 26-27.**

m. On February 7, 2011, Respondent made two disbursements from the Trust Account related to his representation of client ML. The first disbursement was to client ML's medical provider in the amount of \$2,389.00 and the second disbursement was

to client ML in the amount of \$2,926.60. The PNC Records date back to December 3, 2010. Between the dates of December 3, 2010, and the date the funds were disbursed on February 7, 2011, there is no deposit to the Trust Account referencing client ML. On December 16, 2010, the trust account balance fell to \$1,800.00, an amount less than what should have been retained from the client ML settlement. **App. 27.**

Respondent stipulated that he did not maintain full records for his Trust Account **App. 19, 59 (T.123)**, commingled personal funds with Trust Account funds **App. 19**, and paid personal or operating expenses out of the Trust Account. **App. 21.** Further, at the DHP hearing Respondent testified that he failed to promptly deliver the funds of clients to clients or third parties to whom they were owed **App. 59, 71-72 (T. 123-124, 172, 175)**, commingled personal funds with Trust Account funds **App. 71 (T. 172)**, failed to keep complete records of the Trust Account that reflect the date, amount, source and explanation of receipts, withdrawals and disbursements of the funds **App. 71 (T. 172)**, made deposits in the Trust Account of personal funds in an amount greater than an amount necessary to cover bank service charges **App. 63, 72 (T. 137-138, 173)** and that Respondent misappropriated client funds for his own personal use. **App. 72 (T. 175).**

DHP Decision

The DHP issued its Disciplinary Hearing Panel Decision (“Decision”) on February 5, 2014. **App. 139-151.** The DHP accepted Respondent’s and Informant’s Joint Stipulation of Facts in its Decision. **App. 140.** The DHP ruled that Respondent was guilty of professional misconduct as a result of violating Rule 4-8.4(c) by engaging in conduct

involving dishonesty, fraud, deceit or misrepresentation. Noting that Respondent admitted in his Answer that he misappropriated client funds for his own personal use in violation of this Rule, and admitted the same at the time of the hearing, the DHP found “that Respondent acted “with knowledge” as defined by the *ABA Standards*” and not mere negligence. **App. 148-149.** The DHP also found Respondent violated Rule 4-1.3 (Diligence), Rule 4-1.15(c) [now Rule 4-1.15(a)](commingling of funds), Rule 4-1.15(d)[now Rule 4-1.15(a)(7)(f)](failure to keep complete records of client trust accounts), Rule 4-1.15(e)[now Rule 4-1.15(a)(7)(b)](depositing his own funds into the Trust Account in an amount greater than necessary to cover bank charges) and Rule 4-1.15(i)[now Rule 4-1.15(a)(7)(d)](failure to promptly deliver funds to client and third parties). **App. 148.** Based upon its findings the DHP recommended that Respondent be indefinitely suspended with no leave to apply for reinstatement for twenty-four (24) months and Respondent pay court costs incurred by Informant under Rule 5.19(h). **App. 150.**

On February 11, 2014, Respondent, pursuant to Rule 5.19, rejected the DHP recommendation. **App. 152-153.**

POINTS RELIED ON

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

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

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

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010)

In re Colemans, 298 S.W.3d 857 (Mo. banc 2009)

In re Schaeffer, 824 S.W.2d 1 (Mo. banc 1992)

ARGUMENT

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

In his Answer to the Information, Respondent did not contest the misconduct alleged or that his misconduct violated Rule 4-1.3, 4-1.15(c) [now Rule 4-1.15(a)], 4-1.15(d) [now 4-1.15(a)(7)(f)], 4-1.15(e) [now 4-1.15(a)(7)(b)], 4-1.15(i) [now 4-1.15(a)(7)(d)] and 4-8.4(c). Prior to the DHP hearing Respondent stipulated to the facts underlying the allegations of misconduct and Rule violations and testified consistent with that stipulation at the time of the hearing. In conducting the hearing the DHP further developed facts and found the violations as alleged. The misconduct and Rule violations are undisputed by the parties. The remaining issue is the appropriate level of discipline to impose in this case.

It is axiomatic that “The fundamental purpose of an attorney disciplinary proceeding is to ‘protect the public and maintain the integrity of the legal profession’” *In re Crews*, 159 S.W.3d 355, 360 (Mo. banc 2005). The Court regularly relies on the ABA Standards for Imposing Lawyer Sanctions (the “ABA Standard”) when determining the appropriate

sanction to achieve the goals of attorney discipline. *In re Coleman*, 298 S.W.3d 857, 869 (Mo. banc 2009). Under the *ABA Standards*, the factors to be considered “are the ethical duty and to whom it is owed, the attorney’s mental state, the amount of injury caused by the attorney’s misconduct, and, finally, any aggravating or mitigating circumstances.” *Id.* This Court has repeatedly stated that in cases such as this, where an attorney has committed multiple acts of misconduct, the sanction imposed should at a minimum be consistent with the sanction that would be imposed for the most serious of the violations alone. *In re Ehler*, 319 S.W.3d 442, 451 (Mo. banc 2010).

Respondent’s misconduct can be summarized as follows: (a) he repeatedly deposited earned fees into his Trust Account, thereby commingling funds; (b) he repeatedly paid personal expenses out of his Trust Account; (c) the balance in the Trust Account repeatedly fell below the amount of client funds that were being retained in the account; and (d) he repeatedly failed to promptly pay client funds to his clients or to third parties to whom the funds were due. This misconduct primarily violated duties owed by Respondent to his clients, the highest duty amongst those duties listed in the *ABA Standards*.

As indicated, the facts establishing this misconduct are undisputed. The next stage of the analysis, determining Respondent’s “mental state”, at both the time of the misconduct and thereafter when he had an opportunity to mitigate, is a bit more difficult however. The *ABA Standards* notes:

“The mental states used in this model are defined as follows. The most culpable mental state is of intent, when the lawyer acts with the conscious

objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct but without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *ABA Standards*, p. 6.

Concerning the most serious of the violations, that of misappropriation of client funds, the record reflects that the misappropriation resulted from Respondent’s commingling of funds and his failure to properly manage the Trust Account. While the record may not reflect that Respondent had the “conscious objective or purpose” to convert his client’s funds to his own use, Respondent “acted with conscious awareness of the nature or attendant circumstances” of his conduct. Certainly as early as February of 2012 Respondent knew that there were serious issues with his management of the Trust Account when he received the first notice of insufficient funds from PNC and OCDC subsequently commenced its investigation and audit. Yet thereafter Respondent continued to misuse his Trust Account, commingling funds and failing to keep appropriate records relating to the Trust Account until ultimately another notice of insufficient funds in the Trust Account was received in March of 2013. Whether or not Respondent knew of the specific problems with the Trust Account during this time, he had knowledge of problems with the account

and knowingly failed to correct the ongoing problems and continued to engage in misconduct related to his management of the Trust Account. *See In the Matter of Williams*, 711 S.W.2d 518, 521 (Mo. banc 1986) where the Court disbarred Williams for “knowingly and intentionally” failing to correct problems with the client trust account, resulting in a misappropriation of client funds.

Similarly, it is clear that Respondent had knowledge that he had failed to promptly deliver the funds of clients to clients or third parties to whom it was owed and yet continued to fail to deliver the funds. In June of 2013 the Information was filed in this matter alleging a violation for failing to promptly deliver funds to clients or third parties and yet Respondent did not deliver the funds. In September of 2013 Respondent filed his Answer and did not contest that he had failed to promptly deliver client funds and yet continued to fail to deliver the funds. Indeed, up through the date of the DHP hearing in December of 2013 Respondent failed to deliver to his clients or third parties client funds. Respondent acted with knowledge of the “nature or attendant circumstances” of his misconduct.

The *ABA Standards* notes that “The extent of the *injury* is defined by the type of duty violated and the extent of actual or potential harm.” *ABA Standards*, p. 6. In this case, the record reflects that client funds were withheld from clients or third parties to whom funds were owed for an extended period of time and, at least as of the date of the DHP hearing, some of those funds were still being withheld. This created the potential of creditor claims against those clients whose third party creditor claims were not being satisfied as well as denied the clients use of the funds to which they were entitled. In

addition, Respondent's commingling of client and personal funds potentially exposed those client funds to Respondent's own creditors' claims.

Finally, the *ABA Standards* analysis requires a review of any aggravating or mitigating factors. In this case both aggravating and mitigating factors exist. The aggravating factors applicable to this case are:

Standard 9.22 (c) *a pattern of misconduct* and (d) *multiple offenses*: Respondent has engaged in a series of Trust Account violations involving commingling, improper record keeping and failing to promptly disburse client funds.

Standard 9.22 (i) *substantial experience in the practice of law*: Respondent has been licensed to practicing law since 1980 and has been actively engaged in the practice of law since 1997.

Standard 9.22 (j) *indifference to making restitution*: In spite of his knowledge that he was holding client funds that needed to be paid Respondent, up through the time of the DHP hearing in December of 2013, failed to make payment of such funds.

There are however also mitigation factors that should be considered. Those factors are:

Standard 9.32 (a) *absence of a prior disciplinary record*: Respondent has been licensed to practice law since 1980 and has actively engaged in the practice of law for the last approximately 17 years with no prior disciplinary record.

Standard 9.32(b) *absence of a dishonest or selfish motive*: While the DHP found that Respondent had selfish motives, the testimony at the hearing by the OCDC investigative examiner was that Respondent acted without a dishonest or selfish motive.

Standard 9.32(e) *full and free disclosure to disciplinary board or cooperative attitude toward proceedings*: The evidence presented at the DHP hearing by both Informant and Respondent was that Respondent was “forthcoming” and cooperative during the disciplinary proceeding.

This Court has generally held that misappropriation of a client’s funds is always grounds for disbarment. *In re Schaeffer*, 824 S.W. 2d 1, 5 (Mo. banc 1992). However, mitigating and aggravating factors must still be considered, *In re Ehler*, 319 S.W.3d at 451, and the Court has consistently held that “disbarment is reserved only for cases of severe misconduct where it is clear the attorney is not fit to continue in this profession” *In re Crews*, 159 S.W.3d at 360, citing *In re Shunk*, 847 S.W. 2d 789, 792 (Mo. banc 1993).

In *Schaeffer*, the Court disbarred Schaeffer where it found that he had intentionally deposited client’s funds into his general operating account and thereafter made withdrawals from that account for his own purposes, reducing the balance in the general operating account below the level of funds belonging to his client. This case is distinguished in that in all but one instance Respondent’s deposits of client’s funds were into his Trust Account. In the one instance where Respondent deposited client’s funds in another account there is no indication that it was intentional and Respondent subsequently withdrew the client’s funds and made disbursements to his client, without the account balance being insufficient

to satisfy the payments due to his client. This case does not reflect the *intent* to misappropriate as was present in *Schaeffer*.

In *Ehler*, this Court disbarred Ehler for misappropriation resulting from the mishandling of the client trust account. In *Ehler* however, the attorney had prior disciplinary sanctions imposed for similar misconduct. As previously noted, in this case Respondent has no prior disciplinary history.

In *In re Belz*, 258 S.W.3d 38 (Mo. banc 2008) the Court found that Belz had misappropriated his client's funds but, after considering mitigating factors present in the case, determined that an indefinite suspension without leave to apply for reinstatement for three years was the appropriate sanction.¹

In this case, as in *Belz*, the presence of mitigating factors argues in favor of a suspension as the appropriate discipline. The record reflects that Respondent's misappropriation of client's funds arose as a result of his commingling of funds and failure

¹ It should be noted that the Court rejected Belz's argument for a stayed suspension with probation. The Court stated that "misappropriation of client funds presents a paramount risk to the integrity of the legal profession. Our profession relies intrinsically on the trust that clients are willing to place in their lawyers, and few acts of misconduct have the capacity to erode that trust more quickly and thoroughly than the conversion of a client's funds to one's own use." The Court noted that "A stayed suspension is simply not appropriate for this type of misconduct." *In re Belz* at 46-47.

to maintain appropriate systems or records related to the Trust Account. The absence of a dishonest or selfish motive and Respondent's lack of a prior disciplinary history support a sanction less than disbarment. However, the seriousness of the offense of misappropriation of client funds, Respondent's failure to correct the deficiencies in the manner in which he handled client's funds when he had knowledge of the impact of such deficiencies and his knowing failure to make restitution and pay out funds properly belonging to clients or third parties support nothing less than a sanction of actual suspension.

CONCLUSION

Based upon the undisputed facts of this matter, Informant asks this Court to enter an Order finding that Respondent violated Rules 4-1.3 (diligence), 4-1.15(a) (commingling), 4-1.15(a)(7)(b) (depositing personal funds in trust account), 4-1.15(a)(7)(d) (failure to promptly deliver funds to client), 4-1.15(a)(7)(f) (failure to maintain complete records of trust account) and 4-8.4(c) (misconduct). The Court should suspend Respondent's license with no leave to seek reinstatement for at least two years.

Respectfully submitted,

ALAN D. PRATZEL #29141
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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2014, a copy of Informant's Brief is being served upon Respondent's counsel through the Missouri e-filing system pursuant to Rule 103.08:

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CERTIFICATION: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 5,519 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Barry J. Klinckhardt