IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
	)	
DANIEL J. KAZANAS	**)**	**Supreme Court # SC 83033**
	)	
	)	
Respondent.	**)**	

INFORMANT'S REPLY BRIEF

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ARGUMENT

I.

THE SUPREME COURT SHOULD DISBAR RESPONDENT AS RECOMMENDED BY THE SPECIAL MASTER BECAUSE INFORMANT DEMONSTRATED BY MORE THAN A PREPONDERANCE OF THE EVIDENCE THAT RESPONDENT VIOLATED RULES 4-8.4(c) AND 4-8.4(d) IN THAT RESPONDENT COMMITTED PROFESSIONAL MISCONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT AND MISREPRESENTATION AND ENGAGED IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE BY (1) STEALING MONEY FROM HIS LAW FIRM, (2) PLEADING GUILTY TO WILLFULLY FILING A MATERIALLY FALSE FEDERAL TAX RETURN, (3) REFUSING TO SURRENDER HIS LAW LICENSE IMMEDIATELY AT THE TIME OF THE SENTENCING HEARING AS STIPULATED AND AGREED TO IN HIS PLEA BARGAIN WITH THE UNITED STATES, AND (4) ENGAGING IN A PATTERN AND COURSE OF CONDUCT THAT WAS MARKED BY MORAL TURPITUDE IN HIS PRIVATE, PROFESSIONAL AND SOCIAL DUTIES.

The Respondent's Brief is rife with excuses, selective memory, factual misstatements and legal misinterpretation intended to sidestep personal and professional responsibility for his misdeeds and criminal conduct. Respondent steadfastly pursues an approach under which he blames others for his predicament, whether it be the KCK law firm for causing Respondent to have to resort to stealing money from the firm, or the

government for selectively prosecuting Respondent, or even his own attorneys for advising him with regard to his decision not to surrender his law license on the date of sentencing. Incredibly, Respondent believes in his own mind that his misfortune is simply the result of a "financial dispute" between himself and the KCK law firm. **See Respondent's Brief at pages 1 and 53.** In fact, Respondent is guilty of moral turpitude of the worst kind and lacks the moral character and honesty to continue to hold a license to practice law in the State of Missouri.

The Special Master heard testimony on this matter for two full days. He was able to judge the veracity and character of each witness. In recommending disbarment, the Special Master took note of Respondent's unreasonable beliefs and Respondent's failure to take responsibility for his misconduct. The Master found as follows:

> "In conclusion, the Master wishes to comment that he believes that Respondent convinced himself that he was entitled to additional compensation; that he had a binding agreement with the firm to pay him 30% of the fees on his business; that the firm wrongfully denied him that money; that he was fully entitled to enforce the agreement by self help; that putting the money in his and his wife's joint checking account with the return address stamp and forged signature was not wrong, and that under reporting these funds to the IRS was justified because it would all be straightened out eventually. No matter how sincerely he believed each of these propositions, no one in his position who did believe them should be allowed to practice law." **Master's Report at 7.**

Respondent's serious ethical violations warrant disbarment. In addition,

Informant submits that disbarment is the only way that Respondent will finally understand and appreciate the seriousness of his violations of the Rules of Professional Conduct. The fact that Respondent refuses to accept responsibility for his misconduct should not dissuade this Honorable Court from imposing the harshest discipline upon the Respondent's license. To the contrary, Respondent's refusal to acknowledge the wrongful nature of his conduct is an aggravating circumstance under Section 9.22 of the ABA's Standards for Imposing Lawyer Sanctions (1991 ed.).

While Respondent's Memorandum is rife with factual and legal errors and omissions, Informant will concentrate on the most brazen misstatements and omissions in the belief that a "house of cards" is best toppled by attacking its foundation.

No fee-splitting agreement ever existed. Respondent asserts that at the Master's hearing, John Kilo did not "emphatically" deny the existence of the alleged fee-splitting arrangement between KCK and Respondent. **See Respondent's Brief at pages 16 and 48.** This is incorrect.

When asked at the Master's hearing whether Respondent requested or demanded at the January 1994 meeting with Mr. Kilo that Respondent be paid a share or percentage of the fees that he was generating on behalf of KCK, Mr. Kilo stated "absolutely not." **Tr. I at 119.** Mr. Kilo also denied that he ever had the authority to bind KCK or the Executive Committee at KCK in any of his meetings or dealings with Respondent. **Tr. I at 121.**

Respondent attempts to prove that a fee-splitting agreement existed with the KCK law firm by resorting to the self-serving testimony of friends and associates who have no

personal knowledge. Thus Respondent recounts the testimony of Peter Katsinas, Nick Karakas and Margaret Grinstead, whose only "knowledge" of the alleged agreement comes from what Respondent himself told them. Respondent's attempts to bootstrap this issue should be summarily rejected for the following reasons:

- As stated at pages 6-7 of Informant's Brief, the uncontroverted evidence established that no attorney at KCK ever received a pre-determined share or percentage of attorney's fees collected from firm clients. Such an agreement would be contrary to the very purpose of a law firm (or any other corporate entity) where the shareholder/attorney experiences financial rewards in direct relation to the success or failure of the entire enterprise. In addition, John Kilo, Ed Cody and Robert Trame flatly denied the existence of any such agreement with Respondent or with any other attorney at KCK during all of the years that the firm existed.
- Nick Karakas, one of Respondent's witnesses called to support Respondent's assertion that an agreement existed, is a convicted felon who pled guilty to money laundering in 1989. **Tr. II at 323.**
- The testimony of Peter Katsinas, Nick Karakas and Margaret Grinstead must be examined in the context of their close personal relationship with Respondent. Both Messrs. Katsinas and Karakas were "trusted friends" who gave significant financial assistance to Respondent. In fact, Peter Katsinas previously owned the home on Henry Avenue where Respondent lives and guaranteed Respondent's debt when he sought to purchase the home. **Tr. II at 282.** In addition, after Respondent was suspended from the practice of law, Mr. Katsinas hired

Respondent as President of his lumber company, O'Neill Lumber, even though Respondent had no prior experience in the lumber industry. **Tr. II at 339-340.**

- Margaret Grinstead has been a close personal friend of Respondent since at least 1979. **Tr. II at 130.** In addition, she had no knowledge of any attorney's compensation arrangements at KCK. **Tr. II at 135.** Respondent never told Ms. Grinstead about any alleged agreement while he was at the firm and never told her that he had stolen money from the firm during the period from 1994-1996. **Tr. II at 135-136.**

The best evidence that no fee-splitting agreement ever existed can be gleaned from the fact that Respondent acted surreptitiously with regard to his misappropriations from 1994 through 1996 and continued to hide the theft of KCK funds until confronted by the FBI in September 1998. Even after he began to "self enforce" the alleged agreement, why would he fail to disclose his actions to his fellow shareholders if such an agreement actually existed? Why would he not demand an accounting of monies due under the alleged agreement if such an agreement existed in the first instance? The answer is simple: no such agreement existed and Respondent knew it.[1]

[1] Respondent refers to the insurance policy obtained by John Kilo as security for the numerous personal loans that Mr. and Mrs. Kilo made to Respondent. Respondent's Brief at page 37. It was a prudent business decision for Mr. Kilo to take out the insurance policy in order to insure repayment of the loans that he and his wife were regularly making to Respondent. Respondent's suggestions to the contrary are irrelevant and

Respondent ignores the August 1998 meeting with John Kilo. Respondent, apparently believing that it is best to ignore harmful evidence rather than confront and explain it, fails to discuss or even refer in his Brief to the events surrounding the August 1998 meeting with John Kilo where Respondent first mentioned the alleged fee-splitting agreement and had the audacity to claim that additional monies were due and owing to him from the KCK firm, all the time hiding from Mr. Kilo the fact that he had already embezzled $169,172.44 from the law firm. Respondent's Brief fails to mention or discuss Informant's Exhibit 3, the document drafted by Respondent and given to Mr. Kilo at the August 1998 meeting to support Respondent's claim that KCK purportedly owed him additional funds. This failure on the part of Respondent to discuss or explain Informant's Exhibit 3 is significant because it destroys the very foundation of Respondent's entire argument.The calculations contained in Informant's Exhibit 3 are inconsistent with the calculations contained in Respondent's Exhibit A and lead to the inescapable conclusion that no such agreement existed.

Respondent admitted his liability when he gave the KCK bonding company a consent judgment in the amount of $164,000. Respondent asserts that he filed a lawsuit against KCK in September 2000 "in order to have a trier-of-fact settle the issue of the 70/30 fee-division arrangement, and specifically as to whether there was still an amount due and owing Respondent from KCK." **Respondent's Brief at page 40.** The

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constitute another attempt to deflect the Court's attention to issues other than his misappropriation of money from the KCK law firm.

assertion is false. Respondent's lawsuit was intended for purposes of harassment aimed at KCK and was dismissed with prejudice by Respondent when the United States filed its Motion to Revoke Defendant's Sentence due to Respondent's dilatory tactics. The truth of the matter is that Respondent admitted his liability for his theft and embezzlement when he gave Travelers Property Casualty Company, the KCK bonding company that paid the loss, a consent judgment in the amount of $164,000.00. **Tr. II at 222; Respondent's Exhibit R.** Why give a consent judgment for $164,000 if you believe you do not owe the money in the first instance? Why give a consent judgment for $164,000 if you only stole money from KCK to which you believed you were entitled? The reason is clear: no fee-splitting arrangement ever existed and Respondent embezzled the funds in the belief that he would never be caught.

Calvin Culp's testimony is itself fatally flawed and should be summarily rejected by this Court. Respondent relies heavily upon the work and testimony of Calvin Culp to purportedly establish that the amounts stolen by Respondent closely approximate the 30% due Respondent under the alleged fee-splitting arrangement. Specifically, Respondent cites extensively to Respondent's Exhibit A, the Culp summary of client fees purportedly taken by Respondent. There are, however, several fatal flaws in Mr. Culp's testimony and in Respondent's Exhibit A:

- Mr. Culp relied on Respondent's misrepresentations and directions in determining which clients to include in Respondent's Exhibit A. **Tr. II at p. 247.** Many of the clients included in the Culp summary, however, were not introduced to the KCK law firm by Respondent and did not belong to Respondent. Respondent testified

as follows:

Q: Is it fair to say that on Exhibit A there are clients listed who were not - - didn't come to the firm as your clients? They came as clients of someone else at the firm, but then at some later point - - is that correct, first of all?

A: Yes.

Q: And at some later point you were either approached or for some other reason opened a file on a separate matter for that same client, correct?

A: A separate matter for that same client, correct.

Q: Correct. And to the extent that that occurred and fees were generated as a result of that matter, you considered those fees to be your fees, and part of - - and part of this alleged agreement, correct?

A: Everything but "alleged agreement." There was an agreement.

Tr. II at pp. 252-253.

Respondent admitted that many of the clients listed in Respondent's Exhibit A were introduced by and belonged to other attorneys at the KCK law firm. Thus, Respondent admitted that Apted-Hulling **(Tr. II at 247)**, Credit Resources **(Tr. II at 248)**, Manchester Auto Parts **(Tr. II at 248)**, Wolf Imports **(Tr. II at 250)**, Personality Dimensions **(Tr. II at 250-251)**, Robert Mayfield **(Tr. II at 251)** and

Janet Lydon **(Tr. II at 251)** did not belong to Respondent.[2]

- Mr. Culp assumed that all of the clients listed in his summary (Respondent's Exhibit A) were clients of Respondent because Respondent had so advised him and because Mr. Culp reviewed "client ledgers" prepared by Respondent and taken by Respondent when he left the KCK law firm. **Tr. II at 96-97.** Mr. Culp admitted, however, that Respondent's Exhibit A was wrong if clients not belonging to Respondent were in fact included in the document. Thus, Mr. Culp testified as follows:

    Q: And if it turns out in rebuttal or otherwise that there's evidence that some of these people [included in Respondent's Exhibit A] were not clients of Mr. Kazanas's, then this document is factually incorrect; is that not right?

    A: It would need to be adjusted, that's correct.

    Tr. II at 97.

As discussed above, it is undisputed that numerous clients listed on Respondent's Exhibit A were not clients of Respondent. As a result, Respondent's Exhibit A should be ignored and Mr. Culp's testimony should be summarily rejected.

- Mr. Culp admitted that Respondent's Exhibit A was never finalized and that it

[2] Robert Trame, a shareholder at the KCK law firm, confirmed that numerous clients listed in the Culp summary were not Respondent's clients and belonged to other attorneys at KCK. **Tr. I at 312-316.**

contained errors. Thus, Mr. Culp testified as follows:

Q: Is "close" good enough in this exhibit?

A: This document [Respondent's Exhibit A] was prepared - - it was never totally finalized by me as far as making sure there were no errors because Mr. Kazanas pled guilty to the charge, so I never had to worry about making sure it was what I'll call trial ready.

Q: So this document may have errors in it because you haven't made a trial ready review, correct?

A: Of course. There may be incidental errors in it, yes.

Tr. II at 102.

Based upon the foregoing, it is clear that the testimony and work of Calvin Culp, Respondent's primary witness called in order to attempt to establish that the money stolen by Respondent equaled 30% of fees generated by his clients, was shoddy, incomplete and based upon factually incorrect assumptions. Mr. Culp's testimony and Respondent's Exhibit A should be rejected.

Respondent forged, embezzled and stole $169,172.44. Respondent objects to Informant's characterization that Respondent forged, stole or misappropriated checks from the KCK law firm. Incredibly, Respondent now attempts to oppose and discount the facts expressly agreed to in the Stipulation, claiming that the parties agreed to the Stipulation in order to provide "efficiency of time" needed "because of the limited

amount of trial time assigned to this Hearing."[3] **Respondent's Brief at page 58.** The facts speak for themselves.

Between 1994 and 1997, Respondent stole $169,172.44 from the KCK law firm by variously (i) forging John Kilo's name on checks made payable to KCK, (ii) stealing a KCK address stamp, altering it, and applying the stamp in the endorsement area of such checks, (iii) signing his own name to such checks even though Respondent was not authorized to sign KCK checks, (iv) requesting that KCK clients make checks payable to Respondent personally instead of to the KCK law firm and depositing such checks into his personal account, (v) bartering with a KCK client for personal services in lieu of that client paying KCK for attorney's fees owed to the firm.

Notwithstanding Respondent's protestations to the contrary, there can be no doubt that he forged John Kilo's signature. Respondent's own witness, Calvin Culp, testified that a forgery occurs when "somebody's signing somebody else's name without their permission." **Tr. II at 94.** Mr. Culp then admitted that Respondent forged the signature

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[3] Informant is troubled by this assertion and the implications that flow from it. Respondent and his counsel never stated or even intimated at any time prior to or during the trial in this matter that they were not provided with sufficient time to present their case or that they stipulated to any facts due to "efficiency of time." Informant believes that the Master gave both parties ample time to present their respective cases. The Stipulation contains facts that both parties agreed to and signed voluntarily and without any outside pressure. Respondent's assertion should be rejected.

of John Kilo. **Tr. II at 94-95.**

Respondent asserts that he lacked the intent to defraud because he made no attempt to conceal his conduct by depositing the KCK funds into his personal bank account. **Respondent's Brief at pages 54-55.** Respondent's logic is twisted. Respondent's intent to defraud is demonstrated by the fact that he misappropriated the funds in the first instance without the knowledge or consent of KCK. The intent to defraud is shown by the fact that Respondent stole funds to which he was not entitled. The intent to defraud is also shown by the fact that Respondent never told either his fellow shareholder-attorneys at KCK or his "trusted friends" (i.e., Messrs. Katsinas and Karakas) about his scheme. Respondent never even told his wife about his scheme, instead telling her that he was "moonlighting." **See Informant's Exhibit 1.** Even Calvin Culp acknowledged there was no way for the KCK firm to discover Respondent's scheme. **Tr. II at 116-117.**

Respondent engages in illogical self-aggrandizement by stating that he claimed a portion of the stolen funds on his 1995 and 1996 income tax returns, "even though he did not receive any Form W-2 or Form 1099 for such funds." **Respondent's Brief at page 56.** Informant is unaware of any case where a person has been provided with a W-2 form or a Form 1099 for stolen, misappropriated and embezzled funds. In addition, it is the height of moral turpitude that Respondent would attempt to take credit for the very conduct that led to a federal felony conviction.

Respondent claims that there was going to be an "exchange of checks" between himself and the KCK law firm that would have represented the balance of the funds he

failed to claim on his income tax returns. Respondent's Brief at page 26. Respondent's claim is pure fantasy. How could there ever have been an exchange of checks when KCK never knew that he had stolen the money in the first instance? One must ask when Respondent was planning on disclosing his misconduct to KCK so that an accounting could occur. He only admitted his scheme when confronted on the front porch of his residence by the FBI. The reality is that Respondent was never planning on telling anyone that he had stolen the money and, to this day, would never have told anyone if he could have avoided it. Disbarment, not suspension, is the appropriate discipline for such moral turpitude and total absence of moral character.

Respondent was not John Kilo's agent when he forged Mr. Kilo's signature. At pages 55-56 of his Brief, Respondent argues that he was acting as the agent for John Kilo when he signed Mr. Kilo's name of the backs of checks payable to KCK and deposited those checks into his personal account. He supports this wild assertion by stating that he had previously signed Mr. Kilo's name to pleadings, letters and forms. John Kilo testified that he never authorized Respondent to sign Mr. Kilo's name to the checks and never authorized him to transact the checks by depositing the KCK funds into Respondent's personal bank account. **Tr. I at 133, 137.**

More significant and troubling, Respondent's assertion regarding agency is a misstatement of the facts in this case. Respondent first attempted to deposit the KCK checks into his personal account by applying the stolen and altered "return address" stamp and signing his own name to the endorsement area on the back of the checks. He forged John Kilo's name only after the bank teller refused to accept the deposit. Thus,

Respondent testified as follows:

> "Well, starting in November of '94, the checks that I retained would go into my personal account, you know, preprinted deposit slips and what would not go into my account. If the check was made payable to Klutho, Cody & Kilo or some combination of that, I wanted it to clear on the back of the check that that was the name that was on the front of the check, so we had a return address stamp at the law firm, so I used it. It said Klutho, Cody & Kilo, P.C., and then underneath it 5840 Oakland Avenue, St. Louis, Missouri, 63110, so I would – I took the stamp, and I covered the street address and the city, state and zip code with a Post-it sticker, and I stamped it on the check, and then I'd sign my name. The first deposit I went to Boatmen's Bank on Hampton and Chippewa, and I presented the deposit to the teller. The teller said, "We can't accept this deposit," and I said, "Why?" And she said, "Because, you know, one of these three people have to sign," and she was referring to Klutho, Cody or Kilo, and I said, "That's not necessary. These are my fees. I'm an owner of this company, and I am depositing them in my account," and she says, "Well, we're not going to accept this check," and I said, "Because one of these three have not signed on the back of the check?" And she says, "Correct." So I said, fine. I turned the check over, and I signed John Kilo's name either above the name or below it. I can't recall now." **Tr. II at pages 185-186.**

Respondent forged John Kilo's signature in order to complete his scheme. He did

so without the consent, authority or knowledge of John Kilo. Even Respondent's own expert witness, Calvin Culp admitted that Respondent conduct in this regard constituted a forgery of John Kilo's signature. **Tr. II at 94-95.**

The "return address" stamp. Respondent emphasizes the fact that the "return address" stamp that he took from KCK, altered and then applied to the back of checks stolen from the KCK was "continuously available to all employees of KCK, stored by the receptionist desk at KCK." **Respondent's Brief at pages 22 and 54.** Informant does not understand the significance of this point. Certainly, Respondent can not be suggesting to this Court that KCK was negligent and should have foreseen that one of its attorneys, a shareholder no less, might steal the return address stamp, alter it and then use it to fraudulently deposit law firm funds in his own personal account.

Respondent refused to surrender his license. Respondent attempts to explain his failure to surrender his license by asserting that there was concern "as to the meaning of 'surrender'" and that it was "unconverted [sic]" that a misconception developed regarding the rules governing the suspension/disbarment of attorneys. **Respondent's Brief at page 74.** This attempt to sidestep responsibility should likewise be rejected.

Informant addressed the surrender issue in detail in its Brief at pages 41 through 45. A careful review of the chronology of events leads to the inescapable conclusion that Respondent, after learning of the probable ramifications of surrendering his license, decided not to comply with his prior agreement to immediately and voluntarily surrender his license on the date of sentencing. Instead, he inquired of the Office of Chief Disciplinary Counsel about becoming inactive under Rule 6.03 instead of surrendering

his license under Rule 5.25. **See Stipulation Exhibit 15.** Ultimately, Respondent simply refused to surrender on the date of sentencing and began sending out letters claiming that he had been victimized. **See Stipulation Exhibits 6 and 7.**

The testimony of First Assistant United States Attorney Michael Reap is significant on this issue. Mr. Reap testified that Respondent had not dealt fairly, reasonably and responsibly with the Office of the United States Attorney. **Tr. I at 294.** Despite the fact that his office was "beyond gracious on this plea bargain", Respondent did not deal in good faith with Mr. Reap's office. **Tr. I at 294.** In fact, Mr. Reap stated unequivocally that "if I had to do this over again, I would have tried this case, Mr. Graham, and I think I said that to you. I'm saying that as an officer and a lawyer." **Tr. I at 294.** Mr. Reap later testified that "[w]e agreed to dismiss those charges [embezzlement] for the plea agreement. Again, I wish I hadn't done that. We wouldn't be here today, and I have strong opinions on this." **Tr. I at 299.**

The case law cited by Respondent supports his disbarment. Respondent argues at length that his misconduct warrants only a suspension, citing in support the decision of the Nebraska Supreme Court in *State ex rel. Nebraska State Bar Association v. Frederiksen*, 635 N.W.2d 427 (Neb. 2001). The facts in the *Frederiksen* case are clearly distinguishable from the case at bar and the holding in *Frederiksen* only supports Respondent's disbarment. Informant notes the following distinguishable facts:

- The attorney in the *Frederiksen* case misappropriated approximately $15,000 from his law firm. The Respondent in the case at bar misappropriated $169,172.44, more than eleven times the amount misappropriated in *Frederiksen*.

- The attorney in the *Frederiksen* case had firm clients pay fees to him directly. The Respondent in the case at bar took the additional significant steps of forging John Kilo's name to many of the checks and applying a stolen and altered KCK address stamp to the checks. In assessing the issue of moral turpitude and fitness to practice law, Respondent's conduct is much more serious and warrants a more severe discipline than that involved in the *Frederiksen* case.
- In the *Frederiksen* case, the attorney, out of a feeling of guilt, voluntarily disclosed his misconduct to his law firm. The Nebraska Supreme Court noted this fact in assessing Frederiksen's moral character to practice law. In the case at bar, Respondent steadfastly failed to disclose his misappropriations to anyone, including his fellow partners at KCK, his "trusted friends" (i.e., Messrs. Katsinas and Karakas) or even his wife. After leaving the firm, instead of having pangs of guilt, Respondent prepared and gave Mr. Kilo a document that purported to show that the KCK law firm owed him even more money than he had surreptitiously stolen to that point. **See Informant's Exhibit 3.** He refused to disclose his misconduct until confronted by FBI agent Jeff Jensen in September 1998, almost five years after he had begun embezzling money from KCK and almost two years after he had left the KCK law firm.
- The Court in the *Frederiksen* case found that the attorney was "genuinely remorseful and noted that he is embarrassed by his actions and vows that they will never be repeated." 635 N.W.2d at 433. In addition, the Court noted that the attorney had made full restitution to his law firm. Id. at 437. No such remorse has

ever been expressed by Respondent in the case at bar. To the contrary, Respondent refused at trial to acknowledge the scope of his thefts from the KCK firm or even to admit that he had embezzled funds to which he was not entitled. Instead, Respondent characterized his conduct as "self enforcement" of a non-existent agreement. Respondent publicly demonstrated his refusal to acknowledge the wrongful nature of his conduct by writing letters in which he blamed his problems with the government on everyone but himself and downplaying the felony to which he stated he "conditionally" pled guilty as only "relat[ing] to the manner in which I calculated my portion of the fees that were collected from my clients." In addition, in his Brief, Respondent states that his misfortune is the result of a "financial dispute" between himself and the KCK law firm. **See Respondent's Brief at pages 1 and 53.** Finally, Respondent failed to make full restitution to either the firm or the insurance carrier for his misappropriation of funds from KCK.

It is interesting that the Nebraska Supreme Court in *Frederiksen* suspended the offending attorney for three years for misappropriating $15,000 from his law firm, even after the attorney admitted his guilt and notified his firm of the theft, made restitution to the firm and expressed "genuine remorse" for his actions. In the case at bar, where Respondent misappropriated $169,172.44 from the KCK law firm and where none of the *Frederiksen* mitigating factors are present, Informant submits that disbarment is the only appropriate discipline.

The other cases cited in Respondent's Brief are distinguishable because they

involve mitigating circumstances that are simply not present in this case. Thus, *In re Kelly*, 713 So.2d 458 (La. 1998) involved an attorney who acknowledged the wrongful nature of his actions, cooperated in the disciplinary investigation, promptly made full restitution and suffered from depression at the time of his violations. *In re Disciplinary Action against Haugan*, 486 N.W.2d 761 (Minn. 1992) involved an attorney who made restitution, with interest, to the law firm from which he had taken funds. *In re Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. McClintock*, 442 N.W.2d 607 (Iowa 1989), involved an attorney who admitted his wrongdoing, reported his violation to the state disciplinary authority and cooperated in its investigation and made full restitution to his law firm. *In re Holly*, 417 N.W.2d 263 (Minn. 1987), involved an attorney who voluntarily disclosed his misconduct to his firm, admitted that his conduct was an ethical violation, made full restitution to his law firm and had a substance abuse problem at the time of the misconduct. *The Florida Bar v. Stalnaker*, 485 So.2d 815 (Fla. 1986), involved an attorney that the Court concluded had reason to believe that he had permission from his law firm to divert the funds in question. None of the above cases relied upon by Respondent involve similar mitigating circumstances. In the case at bar, Respondent did not acknowledge his violations, did not cooperate in the Informant's investigation, failed to make restitution and did not suffer from any emotional or physical disability that could conceivably explain his misconduct.

Disbarment is warranted not only because of the $169,172.17 that Respondent stole from KCK, but also because of the intricate scheme that Respondent devised and implemented to carry out his misconduct. In *In re Maier*, 664 S.W.2d 1 (Mo. banc 1984),

this Court disbarred an attorney who schemed to misappropriate in excess of $40,000 from his law firm by falsely preparing law firm checks and other documents for his own use. In ordering disbarment, the Court specifically noted that the attorney had engaged in a "prolonged deceitful scheme" to misappropriate funds and that such conduct disclosed an absence of the requisite judgment, character and integrity required of an officer of the court. 664 S.W.2d at 2.

The New Mexico Supreme Court recently disbarred an attorney who misappropriated funds from his law firm and employed an elaborate scheme of deception to conceal his misconduct, including the establishment of a secret trust account and intercepting law firm bills to clients and reissuing those bills on the attorney's own letterhead. *In re Reynolds*, 131 N.M. 471, 39 P.3d 136 (N.M. 2002). The attorney argued as a mitigating factor that the misappropriated funds came from his law firm rather than from a client. The court rejected this argument, noting that "we have not hesitated to disbar lawyers who stole from the firms where they were employed." 131 N.M. at 476.

There is no ethical distinction between a lawyer who for personal gain willfully defrauds a client and one who for the same untoward purpose defrauds his partners. *In re Siegel*, 627 A.2d 156, 159 (N.J. 1993). Respondent repeatedly breached his fiduciary duties to his firm by stealing his partners' shares of client fees. Such conduct warrants disbarment. See, e.g., *Kaplan v. State Bar of California*, 804 P.2d 720 (Ca. 1991); *In re Maier*, 664 S.W.2d 1 (Mo. banc 1984); *In re Krob*, 944 P.2d 881 (N.M. 1997); *In re Allen*, 710 N.Y.S.2d 389 (N.Y. 2000); *In re Salinger*, 452 N.Y.S.2d 623

(N.Y. 1982); and *In re Murdock*, 968 P.2d 1270 (Or. 1998).

Respondent's disciplinary record is of no consequence in this case because he has refused to acknowledge the wrongful nature of his conduct. Respondent argues that there are mitigating reasons that support a finding by this Court "that this disciplinary proceeding is not a clear case of severe professional misconduct." **Respondent's Brief at pages 78-83.** The Court should reject this assertion based on the fact that Respondent has failed to acknowledge the wrongful nature of his conduct. This is, in fact a clear case of severe professional misconduct and Respondent's suggestion to the contrary provides ample evidence of the his consistent refusal to accept responsibility for his actions.

As support for his assertion that assertion that he has shown remorse for his misdeeds, Respondent cites to volume II of the Master's Hearing transcript at pages 177 (lines 13-23), 188 (lines 20-25) and 189 (lines 1-15). Informant suggests that the only remorse reflected in those passages is remorse that his misdeeds were discovered. Informant further suggests that Respondent's true state of mind regarding his scheme is reflected at Volume II, page 264, line 15 through page 267, line 15 of the Master's Hearing transcript. In these few pages, Respondent refuses to acknowledge that he forged any endorsement, refuses to acknowledge that he was defrauding the KCK law firm and refuses to acknowledge that he was even withholding KCK funds. Respondent testified:

> Q: You didn't answer my question. Why did you not tell him [i.e., John Kilo] that you were writing his name on the checks, and using that stamp, and putting them into your personal account?

A: It was not necessary.

Q: Isn't it possible that if you told him that, maybe he'd have said, "Get out of here. You're fired for stealing from the firm"?

A: That's possible.

Tr. II at page 267.

Informant submits that Respondent's true state of mind is shown in the above passages and in the letters that Respondent wrote to his "friends" and to the Lawyers Weekly in August 2000, just days after his sentencing. **<u>See</u> Informant's Brief at pages 18-19 and Stipulation Exhibits 6 and 7.**

There has never been any contrition or true remorse expressed by Respondent. It was this attitude that caused the Special Master to find as follows:

> "In conclusion, the Master wishes to comment that he believes that Respondent convinced himself that he was entitled to additional compensation; that he had a binding agreement with the firm to pay him 30% of the fees on his business; that the firm wrongfully denied him that money; that he was fully entitled to enforce the agreement by self help; that putting the money in his and his wife's joint checking account with the return address stamp and forged signature was not wrong, and that under reporting these funds to the IRS was justified because it would all be straightened out eventually. No matter how sincerely he believed each of these propositions, no one in his position who did believe them should be allowed to practice law." **Master's Report at 7.**

CONCLUSION

Respondent clearly committed professional misconduct involving dishonesty and moral turpitude by pleading guilty to willfully filing a materially false federal tax return and by engaging in a pattern and course of misconduct that was marked by baseness, vileness and depravity in his private and social duties, that was contrary to the accepted and customary rule of right and duty between man and man and that was contrary to justice, honesty, modesty and good morals. His conduct violated Rules 4-8.4(c) and 4-8.4(d) of the Rules of Professional Conduct. The significant presence of cognitive awareness in his misconduct, coupled with his refusal to take responsibility for, or even acknowledge, the nature and extent of his wrongdoing, require disbarment.

Respectfully submitted,

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ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

This is to certify that on this 23rd day of August, 2002, two copies of Informant's Reply Brief and a disk containing the Brief in Word format have been sent via First Class United States Mail, postage prepaid, to:

Maurice B. Graham
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St. Louis, MO 63101.

_____

CERTIFICATION: SPECIAL RULE NO. 1(c)

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

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Special Rule No. 1(b);

3. Contains 6,463 words, according to Microsoft Word 2000, which is the word processing system used to prepare this Brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus-free.

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