IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
JAMES A. BURT	)	**Supreme Court No. SC94899**
	)	
Respondent.	)	
	)	

INFORMANT'S BRIEF

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ATTORNEYS FOR INFORMANT

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STATEMENT OF JURISDICTION

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

NOTE ON CITATION

Informant will cite to the Record as "App." Included at pages 80-168 of the Record is the transcript and exhibits from the December 2, 2014 disciplinary hearing. When citing to the transcript in the Statement of Facts, Informant will first cite to the page of the Record ("App.) and then cite to the specific page ("Tr.") and line or lines ("L.") of the transcript where the evidence may be found. In an effort towards brevity, Informant will only cite to the Record ("App.") in the Argument section.

STATEMENT OF FACTS

Background

James A. Burt ("Respondent") was licensed to practice law in Missouri in September 1983. **App. 98 (Tr. 69, L. 7).** From 1990 to 2003, Respondent practiced at the Strong Law firm in Springfield, Missouri. **App. 99 (Tr. 71, L. 4-9).** From January 2012 to December 2013, Respondent maintained a solo practice in Ozark, Missouri. **App. 99 (Tr. 71, L. 10-25).** Respondent considers himself retired from the practice of law, but plans to keep his law license active and take continuing legal education ("CLE") courses. **App. 98 (Tr. 69, L. 11-15).** Respondent also has a PhD in economics and provides expert testimony in this field. **App. 98 (Tr. 68, L. 12-14).**

In November 2013, the Office of Chief Disciplinary Counsel ("OCDC"), Informant herein, received a notice from Ozark Bank that Respondent's trust account was overdrawn. **App. 142.** A disciplinary matter was opened and, following an investigation, the OCDC filed a single count Information against Respondent on May 5, 2014, related to Respondent's safekeeping of client property and handling of his trust account. **App. 2-5.** Respondent filed an Answer on May 23, 2014. **App. 16-17**. On December 2, 2014, this attorney discipline case was heard by the duly appointed disciplinary hearing panel. **App. 174**.

On January 28, 2015, a two person majority of the hearing panel entered its written decision, setting forth its finding of facts and conclusions of law. **App. 174-185**. The panel majority found that Respondent violated Rule 4-1.15 and recommended that he be reprimanded. **App. 179, 184.** The third panel member dissented in a separate opinion and

recommended that Respondent be cautioned or admonished. **App. 170-172**. On February 25, 2015, Informant, pursuant to Rule 5.19 provided notice to the Chair of the Missouri Supreme Court Advisory Committee that it rejected the decision of the disciplinary hearing panel. **App. 186**

The OCDC Investigation

On or about November 15, 2013, OCDC received a notice from Ozark Bank that Respondent had presented an item to his trust account in the amount of $1,000.00 for payment that resulted in insufficient funds. **App. 142.** Thereafter, between November 2013 and February 2014, OCDC received six additional notices from Ozark Bank that Respondent's trust account was overdrawn. **App. 143-160.** Said notices were provided pursuant to Ozark Bank's mandatory reporting obligation under Missouri Supreme Court Rule ("Rule") 4-1.15. **App. 84 (Tr. 11, L. 17 through Tr. 12, L. 13).**

Following receipt of the initial overdraft notice, the OCDC commenced an investigation of Respondent's trust account, which included correspondence with Respondent and requests that Respondent produce certain information, including bank statements and an explanation for the overdrafts. **App. 85 (Tr. Pg. 16, L. 12 – 20).**

On or about December 9, 2013, Respondent responded to the OCDC's requests by letter. **App. 164-165.** Attached were several bank statements for his trust account. **App. 164.** Respondent also provided the following explanation for his trust account overdraft: "The overdraft occurred as a result of me paying ordinary expenses of the practice, and some personal bills, out of the trust account in October, 2013. Although not very

compelling, I put personal funds into the account for the purpose of paying my bills in that I had run out of operating account checks." ***Id.***

Thereafter, the OCDC continued to receive overdraft notifications from Ozark Bank for Respondent's trust account. **App. 85 (Tr. 17, L. 22-25).** The OCDC then requested that Respondent provide additional information, including bank statements, copies of deposited items, and copies of canceled checks. **App. 86 (Tr. 19, L. 3-13).** When Respondent did not produce said items, the OCDC subpoenaed them from the bank. ***Id.***

Information and Answer

After examining the bank records and all other information, the OCDC filed an Information against Respondent on January 28, 2015. **App. 2-5.** Therein, the OCDC specifically charged that Respondent:

- Made numerous deposits of personal funds into his trust account in amount in excess of paying bank service charges, in violation of Rule 4-1.15(b), effective July 1, 2013 (**App. 4, Paragraph ("Para.") 11)**;
- Used funds in the trust account to pay personal expenses other than bank service charges, in violation of Rule 4-1.15(b), effective July 1, 2013 **(*Id.* at Para. 12)**;
- Commingled personal funds with property belonging to clients and third persons, in violation of Rule 4-1.15(c), effective January 1, 2010 and Rule 4-1.15(a), effective July 1, 2013 **(*Id.* at Para. 13)**; and

- Failed to maintain and preserve a complete record of his trust account, in violation of Rule 4-1.15(d), effective January 1, 2010 and Rule 4-1.15(f), effective July 1, 2013 **(App. 5, Para. 14)**.

On May 23, 2014, Respondent filed his answer, admitting the violations in paragraphs 11, 12, and 14. **App. 16-17**. Respondent denied commingling funds as alleged in paragraph 13, stating that "there were no client funds in the account after February 14, 2013." **App. 16.**

Disciplinary Hearing

On December 2, 2014, this matter proceeded to a hearing on the record. Both the Information and Answer were admitted into evidence. **App. 83 (Tr. 6, L. 1-18).** Informant presented evidence through the testimony of its employee and investigative examiner, Kelly Dillon. ***See, e.g.,* App. 83 – 94 and 108-109.** Respondent testified on his behalf. ***See, e.g.,* App. 95 – 108.**

Using the information subpoenaed from the Bank, Informant prepared a spreadsheet (Hearing Exhibit # 3) detailing all transactions in Respondent's trust account beginning January 31, 2013. **App. 140-141.** ***See also* App. 86 (Tr. 21, L. 20-23).** Using the spreadsheet, Informant presented evidence of multiple specific instances of Respondent both depositing personal funds (including funds from investment accounts and personal loans) into his trust account and paying personal expenses (including credit cards and taxes) from his trust account. **App. 140-141.** ***See also, e.g.,* App. 87-88 (Tr. 23, L. 6 through Tr. 27, L. 13).**

Informant also produced evidence that Respondent made several cash withdrawals or checks payable to cash from his trust account, which also constituted a separate violation of Rule 4-1.15, effective July 1, 2013. **App. 90 (Tr. 35, L. 11-22).** Counsel for Informant made an oral motion that the pleadings conform to the evidence. Respondent did not object and the motion was sustained. **App. 94-95 (Tr. 53, L. 24 through Tr. 54, L. 8).** ***See also*** **App. 174.**

Respondent testified that he knew he was closing his practice at the end of December 2013. **App. 95 (Tr. 55, L. 7-8).** He stated that he was out of checks for his operating account and that a personal account had been closed due to fraudulent activity (forgeries on the account). **App. 95 (Tr. 55, L. 8-13).** Respondent further testified that he did not think it was impermissible to deposit personal funds into his trust and use the trust account for personal purposes because there were no client funds in the account and that no clients would be harmed by his conduct. ***See*** **App. 95 (Tr. 55, L. 16 through Tr. 56, L. 12).** Respondent admitted specific instances of depositing personal funds into his trust account. **App. 98 (Tr. 68, L. 7-19).** Respondent claimed ignorance of Rule 4-1.15's prohibition against depositing personal funds in a trust account. ***See*** **App. 96 (Tr. 55, L. 11-16).**

On cross-examination, Respondent admitted that he did not inform the OCDC of the fraudulent activity on his personal account. **App. 108 (Tr. 106, L. 7-15).** He further admitted that he did not have any documents at the hearing from the bank supporting his fraud claim. ***See*** **App. 108 (Tr. 106, L. 16 through Tr. 107, L. 3).**

Respondent testified that the reason his trust account was overdrawn was because his credit card company, Citibank, continued to make electronic withdrawals from his trust

account after he specifically wrote them in January 2014 and advised them to stop making withdrawals from his trust account. ***See, e.g.*, App. 97-98 (Tr. 64, L. 15 through Tr. 67, L. 16).** Respondent produced a letter that he had written to Citibank, which was marked as Exhibit "C" and received into evidence. **App. 163.** On cross examination, Respondent stated that Citibank called him when he was out-of-town and he authorized the bank to make a one-time withdrawal from his trust account, but the bank continued to make withdrawals thereafter. **App. 102 (Tr. 82, L. 23 through Tr. 83, L. 4).**

As to the issue of commingling, Informant produced evidence that the starting balance in Respondent's trust account at the time of the audit was $124.62; Respondent's trust account records, when examined, could not establish whether that amount included personal funds of Respondent or client funds. **App. 88-89 (Tr. 29, L. 20 through Tr. 30, L. 4) and App. 140.** Informant's trust account examiner testified that a key risk inherent with commingling attorney and client funds is that such conduct pierces the protective veil of the attorney trust account, and exposes client funds to garnishment by any creditors of the attorney. **App. 89 (Tr. 31, L. 12 through Tr. 32, L. 4).**

Respondent denied commingling, stating that he had no client money in his trust account. **App. 95 (Tr. 55, L. 16 through Tr. 56, L. 21).** Respondent testified that he only deposited client funds into trust account twice in the two year history of his solo practice. **App. 95 (Tr. 56, L. 23-25).** The first deposit in 2012 was a $1,500.00 retainer fee for client

"J.B." in a rent-and-possession case. **App. 95 (Tr. 56, L. 25 through Tr. 57, L. 3).** [1] Respondent testified that he had spent $1,375.00 of this fee but that he ultimately decided to return the entire $1,500.00 to the client. ***See, e.g.,* App. 95-96 (Tr. 57, L. 1 through Tr. 59, L. 9).**[2] Subtracting Respondent's $1,375.00 fee from the $1,500 deposit leaves $125.00. As explained, the starting balance in Respondent's trust account during the time frame of the OCDC audit was $124.62.

Respondent produced a copy of the $1,500.00 refund check to his client, but as noted by the hearing panel chair, the check was written from Respondent's operating account, and not his trust account. **App. 96 (Tr. 59, L. 10 through Tr. 60, L. 10).** The copy of the check was marked as Exhibit "A" and received into evidence. **App. 161.** The second deposit was a client settlement in 2013. ***See, e.g.,* App. 96-97 (Tr. 61, L. 4 through Tr. 63, L. 13).** Respondent also produced a copy of the check marked as Exhibit "B" showing that this money was also paid to this client from his operating account. **App. 162.**

On cross-examination, Respondent was questioned using his trust account checking ledger that Respondent brought to the hearing. **App. 99 (Tr. 72, L. 15 through Tr. 73, L. 3).** Specifically, Respondent was asked to explain the $1,500.00 deposit from client J.B.

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[1] For privacy and confidentiality reasons, clients will be referred to by initials rather than full names.

[2] Although not explicitly stated or explained by Respondent, the Court will note that $1,500.00 minus $1,375.00 is $125.00, or very close to the $124.62 starting balance in Respondent's trust account during the time frame of the OCDC audit.

Respondent explained that $1,000.00 was a flat fee for legal services, and $500.00 was for expenses. **App. 99 (Tr. 73, L. 9-11).** Of this $1,500.00, the ledger showed that respondent wrote two checks – one for his fee in the amount of $1,000.00 and one to a third party in the amount of $307.50. **App. 99 (Tr. 73, L. 9-22).** (Respondent had previously testified that the $307.50 amount was paid to a private instigator to locate and serve parties.) **App. 96 (Tr. 59, L. 20-23)**. Respondent was asked to explain how his starting trust account balance could be $124.62 and contain no client funds, when the two checks drawn against client J.B.'s $1,500.00 retainer totaled $1,307.50, which should have left a balance in the trust account of $192.50. ***See, e.g.,*** **App 99 - 100 (Tr. 73, L. 4 through Tr. 75, L. 15).** Respondent offered no explanation other than stating that the bank deposited less than $1,500.00 and instructing counsel for Informant to review the bank statements. **App. 100 (Tr. 74, L. 16 through Tr. 75, L. 15).**

After hearing Respondent's testimony, the OCDC recalled its witness Kelly Dillon in rebuttal. Ms. Dillon testified that Respondent's testimony about receiving calls from a credit card company, obtaining loans from a family member, and paying taxes from his trust account raised concerns about creditors piercing the protective veil of the client trust account. **App. 108 (Tr. 108, L. 9 through Tr. 109, L. 5).**

Ms. Dillon also stated that Respondent's testimony and trust account ledgers appeared to establish commingling of funds. ***See, e.g.,*** **App. 108-109 (Tr. 109, L. 9 through Tr. 110, L. 5).** Ms. Dillon explained that the $124.62 starting amount in Respondent's trust account had to be client money because Respondent's deposit of

$1,500.00 of client J.B.'s money into the trust account had not been fully exhausted after Respondent took his fee ($1,000.00) and paid a third party ($307.50).

POINTS RELIED ON

I.

RESPONDENT VIOLATED RULE 4-1.15 BY DEPOSITING PERSONAL FUNDS INTO HIS TRUST ACCOUNT; USING HIS TRUST ACCOUNT TO PAY PERSONAL EXPENSES; COMMINGLING PERSONAL FUNDS WITH CLIENT FUNDS IN HIS TRUST ACCOUNT; FAILING TO KEEP ADEQUATE TRUST ACCOUNT RECORDS; AND MAKING WITHDRAWALS FROM HIS TRUST ACCOUNT TO CASH.

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

Missouri Supreme Court Rule 4-1.1.5

POINTS RELIED ON

II.

UPON APPLICATION OF THE ABA SANCTION STANDARDS, INCLUDING AGGRAVATING AND MITIGATING FACTORS, AND PRIOR DECISIONS OF THIS COURT, THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE, WITH SAID SUSPENSION BEING STAYED AND RESPONDENT PLACED ON PROBATION FOR A PERIOD OF NOT LESS THAN TWO YEARS.

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

In re Wiles, 102 S.W.3d 228 (Mo. banc 2003)

Missouri Supreme Court Rule 5.225

ABA Standards for Imposing Lawyer Sanctions 4.1

ARGUMENT

I.

RESPONDENT VIOLATED RULE 4-1.15 BY DEPOSITING PERSONAL FUNDS INTO HIS TRUST ACCOUNT; USING HIS TRUST ACCOUNT TO PAY PERSONAL EXPENSES; COMMINGLING PERSONAL FUNDS WITH CLIENT FUNDS IN HIS TRUST ACCOUNT; FAILING TO KEEP ADEQUATE TRUST ACCOUNT RECORDS; AND MAKING WITHDRAWALS FROM HIS TRUST ACCOUNT TO CASH.

Rule 4-1.15 provides the framework by which Missouri lawyers are required to preserve and safekeep client property, including, but not limited to client funds.

Because Rule 4-1.15 requires deposit of client funds into a trust account and because it also mandates segregation of funds, an attorney's personal funds should never be held in a trust account, with one minor exception for bank fees.

At issue in this case are two versions of Rule 4-1.15, one effective January 1, 2010, and the other July 1, 2013. Here, the evidence establishes that Respondent's conduct in this case overlapped and violated both the 2010 and 2013 versions of Rule 4-1.15.

Violation of Rule 4-1.15(b), effective July 1, 2013

Rule 4-1.15(b), effective July 1, 2013, provides that: "[a] lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose."

In this case, there can be no doubt that Respondent violated Rule 4-1.15(b). Respondent admitted in a letter to OCDC during the course of the investigation that he "put personal funds into the account for the purpose of paying my bills in that I had run out of operating account checks." **App. 164**. In the Information, the OCDC charged that Respondent violated this rule by making three separate deposits of personal funds into his trust account in excess of paying bank service charges. **App. 4, Para. 11.** All of these deposits occurred after July 1, 2013. Respondent admitted the violation in his Answer. **App. 16, Para. 11.** The OCDC further charged that Respondent violated Rule 4-1.15(b) by using funds in the trust account to pay personal expenses other than bank service charges. **App. 16, Para. 12.** Respondent also admitted this violation. **App. 16, Para. 12.**

At the disciplinary hearing, the OCDC presented evidence, including a detailed spreadsheet (Hearing Exhibit # 3), establishing that Respondent deposited personal funds into his account and used said funds to pay personal expenses. **App. 87-88, 140-141.** Respondent admitted that he deposited personal funds into his trust account and used them to pay personal expenses because he was out of checks for his operating account. ***See* App. 95.** He admitted specific instances of depositing personal funds into the account. **App. 98.** Respondent attempted to explain his conduct by professing ignorance of the rule and arguing that he thought such conduct was permissible because no client funds were in the account. **App. 95.** However, both Rule 4-1.15(b) and accompanying Comment [6] clearly provide that the only exception to depositing personal funds into a trust account is for paying bank service charges. *See also In re Coleman,* 295 S.W.3d 857, 866 (Mo. banc 2009) (finding that use of trust account for personal use is "strictly prohibited.") By his

own admissions, Respondent's conduct does not fall into this limited exception, and his use of his trust account to pay personal expenses was improper.

Violation of Rule 4-1.15(c), effective January 1, 2010 and Rule 4-1.15(a), effective July 1, 2013

The version of Rule 4-1.15(c) in effect until July 1, 2013, previously provided: "[a] lawyer shall hold property of clients or third persons or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." Identical language now appears at Rule 4-1.15(a), effective July 1, 2013.

When a lawyer mixes his own funds with those of his client, it is generally referred to as "commingling." Commingling of attorney funds with client funds is impermissible, subject to the very limited exception of paying bank service charges as discussed above. *See* Comment [6] to Rule 4-1.15, effective July 1, 2013**.** Here, the OCDC charged in the Information that Respondent commingled personal funds with funds belonging to his clients. **App. 4, Para. 13.** Respondent denied commingling in his Answer. **App. 16, Para. 13.**

Respondent's own testimony, along with other evidence at the hearing described below, established that client funds remained in the trust account when Respondent began making payments from his trust account using personal funds. That is the essence of commingling. The OCDC inquiry into Respondent's trust account (as set forth on the spreadsheet, Hearing Exhibit # 3) showed a starting balance of $124. 62 on January 31, 2013. **App. 140.** At the hearing, Respondent testified that at the time he started depositing personal funds into his trust account and making payments there were no client funds in the account. **App.**

95. Respondent explained that he knew that there was no client money in the account because he had only made two deposits of client funds into his client trust account. ***Id.*** The first deposit was from client J.B. in 2012 in the amount of $1,500.00. ***Id.*** Respondent testified that he had earned or spent $1,375.00 of this fee, but ultimately decided to return the entire $1,500.00 balance to the client. **App. 95-96.** Critically, this refund to client J.B. was made not from Respondent's trust account where the $1,500.00 had been initially deposited, but rather from his operating account. **App. 96, 161.** Assuming, *arguendo*, that Respondent is correct, this should have left a balance of $125.00, very close to the starting balance of $124.62 in his trust account.

However, during cross examination it was shown that Respondent did not earn or spend $1,375.00 of J.B.'s $1,500.00 deposit. Rather, there were two checks noted in Respondent's own ledgers – one for Respondent's $1,000.00 fee and one for investigation and service fees in the amount of $307.50. **App 99.** These checks total $1,307.50, which should have left a trust balance of $192.50, and not the $124.62 amount that OCDC calculated after an audit of Respondent's bank records. **App 99.** ***See also*** **Spreadsheet (Hearing Exhibit 3) at App. 140-141.** Respondent offered no explanation for this nearly $70.00 difference other than referring counsel to the bank records. **App. 100.**

Respondent also offered no evidence via ledgers, deposit slips, bank records, etc., that the $124.62 were personal funds, other than his unsupported testimony. The evident conclusion is that the starting balance of $124.62 in Respondent's trust account contains at least some of client J.B.'s funds. This $124.62 then became commingled when Respondent began depositing his personal funds into the trust account in 2013. The situation here is

similar to a previous attorney disciplinary case decided by this Court, *In re Coleman*, 295 S.W.3d. 857 (Mo. banc 2009). There, like here, the attorney argued that there were never client funds in his trust account when he used the trust account to pay personal expenses. *Id.* at 866. There, like here, the evidence established that there were client funds in the trust account when the attorney paid personal expenses out of the account. *Id.* As the *Coleman* Court concluded, "this is a classic example of prohibited commingling of attorney and client funds." *Id.* As explained by the trust examiner, "the appropriate transaction would have been to refund the client the balance of what was in the client trust account and, if [Respondent] wished to refund the client beyond what was available in the trust account balance, then he would do that from his personal account . . .". **App. 109.** Since Respondent did not do this, he commingled his personal funds with client funds in violation of Rule 4-1.15.

Violation of Rule 4-1.15(d), effective January 1, 2010 and Rule 4-1.15(f), effective July 1, 2013.

The version of Rule 4-1.15(d) in effect until July 1, 2013, previously provided that "[c]omplete records of client trust accounts shall be maintained and preserved for a period of at least five years: (1) after termination of the representation, or (2) after the date of the last disbursement of funds, whichever is later." Nearly identical language now appears in Rule 4-1.15(f), effective July 1, 2013. A more specific list of records that are required to be maintained and preserved is set forth in subparts (1) through (11) of the revised rule.

The evidence establishes that Respondent violated both versions of this Rule. Here again, the OCDC charged in the Information that Respondent failed to maintain and

preserve a complete record of his trust account in violation of said rules. **App. 5 Para 14.** Respondent admitted the violation in his Answer. **App. 17 Para 14.** At trial, Respondent could produce no evidence - even from his own trust account ledgers - that indicated that the $124.62 amount was not constituted of client funds. As discussed above, Respondent also produced no evidence explaining why there was not $192.50 in trust instead of $124.62 when only $1,307.50 of client J.B.'s $1,500.00 had been spent for the client's benefit

Violation of Rule 4-1.15(a)(5), effective July 1, 2013

Rule 4-1.15(a)(5) provides in relevant part that withdrawals from trust accounts "shall be made only by check to a named payee, and not to cash . . .".

Although not pled in the Information, at the hearing the OCDC established that Respondent violated this Rule by writing multiple checks to Cash from his client trust account after July 1, 2013. **App. 90, 141.** An oral motion for the pleadings to conform to the evidence was made. **App. 94-95.** Respondent did not object and the motion was sustained. **App. 94-95, 174.**

ARGUMENT

II.

UPON APPLICATION OF THE ABA SANCTION STANDARDS, INCLUDING AGGRAVATING AND MITIGATING FACTORS, AND PRIOR DECISIONS OF THIS COURT, THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE, WITH SAID SUSPENSION BEING STAYED AND RESPONDENT PLACED ON PROBATION FOR A PERIOD OF NOT LESS THAN TWO YEARS.

Respondent James Burt has admitted, and the evidence adduced at the December 2, 2014 hearing established, multiple violations of Rule 4-1.15. The admitted violations include that Respondent: deposited personal funds into his client trust account; used his trust client trust account to pay personal expenses other than bank account expenses; and failed to maintain adequate trust account records. The evidence at the hearing further established that Respondent violated Rule 4-1.15 by commingling personal funds with client funds and impermissibly writing checks to cash from his trust account. For all the reasons set forth below, the OCDC believes that Respondent's conduct warrants a suspension from the practice of law, with said suspension to be stayed and Respondent placed on probation for a period of not less than two years.

Standard

Sanction analysis commonly derives from several sources: parties' recommendations or stipulations; hearing panel recommendations; applicable rules, e.g. Rule 5.225 (the

probation rule); application of the ABA Standards for Imposing Lawyer Sanctions (1991 ed.), consideration of previous Missouri Supreme Court decisions - for consistency; and, other jurisdictions' decisions. In deciding what sanctions to recommend, the OCDC routinely considers all of these sources. As importantly, the OCDC attempts to consider the Court's many unreported decisions made in stipulated and contested cases. Recognizing the uniqueness of each case, patterns and trends are nevertheless apparent. As with reported decisions, the OCDC attempts to analyze each unreported decision, considering the particular facts, the level of harm, the level of intent, and the nature of the violations, as well as both mitigating and aggravating circumstances. Using all sources, the analysis is then applied to each new case. The recommended sanction is made with an assumption that consistent sanctions in common cases have, over time, become *de facto* standards, even without reported decisions. It is the goal of the OCDC to recommend sanctions in accord with those apparent standards and to justify or explain any deviations from the standards.

The ABA Standards Support Suspension

ABA Standard 4.1 addresses situations in which an attorney had failed to preserve a client's property. It provides that:

> 4.11 **Disbarment** is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.
>
> 4.12 **Suspension** is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

4.13 **Reprimand** is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

4.14 **Admonition** is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

In this case, there is no evidence that Respondent knowingly converted client property (funds) warranting disbarment. The evidence does show, however, that Respondent was not merely negligent in his handling of client property, making a reprimand and admonition inappropriate. Respondent claims ignorance of the rules governing proper use of his trust account. In a similar situation, this Court found an attorney who improperly used commingled personal and client funds in his trust account and used said commingled funds to pay personal expenses justified a one year suspension. *In re Coleman,* 295 S.W.3d 857, 870-871 (Mo. banc 2009). Since Respondent knew or should have known that he was dealing improperly with client property and his conduct had the potential to cause injury to a client, suspension is the appropriate level of discipline that should be imposed. *See id.* at 870 (finding that attorney's violation of Rule 4-1.15 under similar circumstances was "knowing" conduct).

Respondent is an attorney with thirty years of experience. A significant portion of that time was spent in practice with the Strong Law Firm, a prominent Springfield plaintiff's firm. Additionally, Respondent has a doctorate in economics and has provided expert economic testimony in legal cases. Respondent clearly has the ability to understand

basic accounting principles necessary to properly utilize, maintain, balance, and audit a client trust account.

Respondent's testimony that there were no client funds in his trust account when he began using the trust account as a *de facto* operating account is unavailing, as is his professed ignorance of the trust account rules. The only evidence for Respondent's position is his own testimony. He presented no evidence that he made any attempts to audit or review his trust account for client funds before using it for his own purposes. He admitted that he did not keep proper trust account records. Respondent's own checking ledger, however, clearly showed that Respondent only withdrew $1,307.50 from a $1,500.00 dollar client deposit into trust. Approximately $192.50 of client funds in trust was unaccounted for. Further, the OCDC audit showed a starting balance of $124.62. Both of these amounts contradict Respondent's testimony that no client funds remained in the trust account. These facts were brought to Respondent's attention during the hearing. Respondent had no explanation other than instructing counsel for Informant to review the bank records.

With respect to actual or potential injuries to clients, it does not appear that any of Respondent's clients actually lost funds during the time period in question. Respondent did appear to return client monies, albeit by way of personal funds from his operating account and not from client funds held in trust. ABA Standard 4.12, however, does not—on its face—distinguish between actual and potential injury. That approach is appropriate, per the ABA Commentary to Standard 4.12, because "It is the risk of the loss of the funds while

they are in the attorney's possession, and not the actual loss, which the rule is designed to eliminate." *In re Bizar*, 454 N.E.2d 271, 273 (Ill. 1983).

Here, the risk of loss of client funds was ever present. As previously noted, client funds remained in the trust account and were commingled with personal funds. Accordingly, Respondent had pierced the protective veil of his trust account, potentially making the funds subject to garnishment by Respondent's creditors. This risk was substantial because Respondent was, in fact, using his trust account to pay creditors or putative creditors, including his credit card company and the Internal Revenue Service.

Aggravating Circumstances

ABA Standard 9.22 sets forth factors which may be considered aggravating circumstances. Respondent's Aggravating factors include:

(d) **Multiple offenses**

Respondent's Rule 4-1.15 violations do not derive from a single isolated incident. Rather, the entire analyzed year was replete with multiple transfers of personal funds into Respondent's trust account and multiple withdrawals to cash and/or to pay personal expenses. Respondent's account continued to be overdrawn even after OCDC involvement. Respondent himself admitted that he used his trust account to pay personal expenses because he had run out of checks from his operating account. He admitted he failed to keep adequate records. He wrote checks from his trust account to cash. Further, although denied by Respondent, the evidence established that he commingled at least one client's funds with his personal funds.

(i) Substantial experience in the practice of law.

At the time of these violations, Respondent had been practicing law for thirty years. Respondent also has a doctorate in economics and has testified as an economic expert in legal cases.

Mitigating Circumstances

ABA Standard 9.32 sets forth factors which may be considered mitigating circumstances. Respondent's mitigating factors include**:**

(a) Absence of a prior disciplinary record

Respondent has no previous discipline.

Probation

ABA Standard 2.7 and the accompanying comments suggest that probation is the appropriate punishment when the conduct can be corrected and the attorney's right to practice law needs to be monitored or limited rather than revoked. *In re Coleman*, 295 S.W.3d 857, 871 (Mo. banc 2009). This concept is also recognized by Supreme Court Rule 5.225 which sets forth the minimum standards for the use of probation in Missouri discipline cases. A lawyer is eligible for probation if (a) the lawyer is unlikely to harm the public and can be supervised; (b) continued practice by the lawyer would not harm the profession's reputation; and (c) the misconduct does not warrant disbarment. *See* Rule 5.225(a)(2). *See also Coleman*, 295 S.W.3d at 871 and *In re Wiles*, 107 S.W.3d 228, 229-230 (Mo. banc 2003).

Informant believes that probation is appropriate sanction in this case. Respondent satisfies the first prong for probation in that Respondent is "unlikely to harm the public during the period of probation" and can be "adequately supervised." Prior to the instant

disciplinary action, Respondent practiced law for nearly thirty years without incident. Here, as in *Coleman*, Respondent's conduct appears to have arisen out of ignorance of the rules of professional conduct instead of an intention to violate the rules and it is likely that his misconduct can be remedied by education and supervision. *Coleman*, 295 S.W. 3d at 871. The issues raised in this disciplinary matter stem solely from Respondent's misuse of his trust account. If Respondent is placed on probation, this account can be easily audited by the OCDC. Additionally, any bank maintaining a trust account for Respondent will be required to report overdrafts to the OCDC.

Respondent meets the second prong in that continued practice by Respondent would not harm the legal profession's reputation or "cause the profession to fall into disrepute." *Wiles*, 107 S.W.3d at 230. As mentioned above, Respondent has three decades of legal experience and only the instant disciplinary action. Respondent, by his own admission, has retired from the practice of law; however, he intends to keep his license active and complete his CLE requirements. Based on the record reviewed, Respondent has closed his practice and any additional legal work that Respondent would engage in would appear to be limited.

Lastly, Respondent satisfies the third prong in that his misconduct, while serious, does not rise to the level of disbarment.

If the Court elects to impose a stayed suspension with probation, Informant would welcome the opportunity to recommend probation terms and conditions.

CONCLUSION

Respondent committed multiple violations of Rule 4-1.15.He knew or should have known that he was misusing his trust account and that his actions had the potential to cause injury to clients. Accordingly, Informant respectfully recommends that Respondent's license be suspended. Said suspension should be indefinite, but continue for at least one year. Further, Informant believes that Respondent is a good candidate for probation and respectfully recommends that Respondent's suspension be stayed and Respondent placed on probation for a period of at least two years under terms and conditions recommended by Informant.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2015, a true and correct copy of the foregoing was served via U.S. first class mail, postage prepaid, and via the Missouri Supreme Court e-filing system pursuant to Rule 103.08 on:

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Nixa, MO 65714-9448

Respondent

Kevin J. Rapp

RULE 84.06(c) CERTIFICATION

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 6,180 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Kevin J. Rapp