**IN THE SUPREME COURT**
**STATE OF MISSOURI**

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| **IN RE:** | ) | |
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| **SCOTT C. HINOTE,** | ) | **Supreme Court No. SC95567** |
| | ) | |
| **Respondent.** | ) | |

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# INFORMANT'S BRIEF

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES



## OTHER AUTHORITIES



## RULES

## 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.

## STATEMENT OF FACTS

### Background

Scott C. Hinote ("Respondent") was licensed to practice law in Missouri in July 2001. **App. 358 (Tr. 4, L. 12-13).** Respondent maintains a solo practice in Ozark, Christian County, Missouri. **App. 359 (Tr. 6, L. 16-19 and Tr. 7, L. 12-18).** Respondent was first licensed to practice law in Michigan in 1994. **App. 358 (Tr. 4, L. 14-18).**

Respondent has two instances of previous discipline. On March 3, 2010, Respondent was admonished for a violation of Rule 4-1.3 (Diligence). **App. 102-03.** The admonition noted that Respondent waited until three weeks before trial to answer or serve discovery. **App. 102.** On May 1, 2014, Respondent was admonished for violations of Rule 4-1.5 (Fees), former Rule 4-1.15(f) (Safekeeping Property) and Rule 4-1.16(d) (Improper Withdrawal). **App. 104-05.** This admonition is discussed in more detail below.

On October 7, 2014, the Office of Chief Disciplinary Counsel ("OCDC"), Informant herein, received a notice from Commerce Bank that Respondent's trust account was overdrawn. **App. 202-04.** On October 8, 2014, the OCDC opened an investigation file and contacted Respondent, requesting information including bank records. **App. 205-06.** On or about October 23, 2014, the OCDC received a second overdraft notice from Commerce Bank concerning Respondent's trust account. **App. 236-38.**

During the relevant time period, Respondent also had two pending disciplinary complaints unrelated to his trust account overdrafts filed by Complainants N.F. and J.H.[1] ***See, e.g.,*** **N.F. Complaint File (Hearing Exhibit 11) at App. 272-302 and J.H. Complaint File (Hearing Exhibit 12) at App. 303-343.** On June 29, 2015, the OCDC filed a three count Information against Respondent. **App. 3-12.** Count I charged Respondent with violations of safekeeping property related to his trust account overdrafts. **App. 4-10.** Counts II and III, respectively, charged Respondent with rule violations related to his representation of N.F. and J.H. **App. 10-12.** On July 24, 2015 Respondent filed his Answer. **App. 17-27.**

On November 19, 2015, this matter was heard by the duly appointed Disciplinary Hearing Panel ("DHP"). The DHP unanimously found that, with respect to Count I of the Information, that Respondent committed multiple violations of Rule 4-1.15. **App. 443-445.** The panel recommended that Respondent be suspended from the practice of law for at least six months, with a condition of reinstatement that Respondent complete an OCDC approved course in the handling of client trust funds and unearned fees. **App. 446-447.** The Panel recommended that Counts II and III of the Information be dismissed. **App. 446.** On January 7, 2016, Informant provided notice pursuant to Rule 5.19 that it accepted the DHP's decision. **App. 448.** On February 4, 2016, Respondent provided notice that he rejected the DHP's decision. **App. 449.**

[1] Informant will refer to the Complainants by their initials only in this brief to protect their privacy.

Respondent's 2010 Trust Account Overdraft Guidance

In March 2010, the OCDC received notification that Respondent had overdrafted his trust account, prompting an OCDC investigation. **App. 107-108.** Following the investigation, Respondent received a March 29, 2010 guidance letter from the OCDC. ***Id.*** Therein, Respondent was advised by the OCDC that:

> Rule 4-1.15 requires you to maintain separation and adequate record-keeping of all client funds. After review of the documents you provided and further discussion with you, it was discovered that you are not keeping client ledgers. Additionally, you should have a system in place to determine your earned fees prior to removing them from your trust account. Adjusting these recordkeeping practices will aid you in avoiding future overdrafts. **App. 107-108.**

Respondent was also advised to study the Missouri Bar/IOLTA Trust Accounting Manual and to attend an upcoming continuing legal education ("CLE") course entitled Lawyer Trust Accounts: Understanding What You Must Know. ***Id.*** Respondent was further advised that his attendance and participation at said CLE "would be considered favorably should you be the subject of a similar disciplinary investigation by this office in the future." ***Id.***

At the disciplinary hearing, Respondent testified that the 2010 guidance letter advised him that earned fees should be placed in his trust account. **App. 76-77 (Tr. 152, L. 20 – Tr. 153, L. 4).** Respondent further testified that he did not attend the recommended trust account CLE, but rather, after speaking with an OCDC attorney, was advised to attend

"any ethical" CLE. **App. 77 (Tr. 154, L. 11-22).** Respondent stated that he then attended a non-trust account specific CLE in Kansas City. ***Id.*** However, other than his testimony, Respondent produced no evidence of his communication with OCDC or attendance at the CLE in Kansas City **App. 77 (Tr. 154, L. 23 – Tr. 155, L13).**

Respondent's 2014 Admonition

In 2014, Respondent appeared before the Regional XV Disciplinary Committee, Division II ("Committee") in connection with a Complaint filed by client J.F. **App. 78 (Tr. 157, L. 5-18) and App. 104-105.** Respondent informed the Committee that the fee he charged J.F. was "not refundable." **App. 104.** Respondent further told the Committee that he had charged other clients "non-refundable" fees. ***Id.*** Also present at the Committee meeting was Alan Pratzel, Chief Disciplinary Counsel, who provided Respondent with a copy of Missouri Supreme Court Formal Advisory Opinion 128 (Nonrefundable Fees). **App. 78 (Tr. 157, L. 19 – Tr. 158, L. 11).**

Following the Committee meeting, on May 1, 2014, Respondent was admonished for violations of Rules 4-1.5, former rule 4-1.15(f)[2] (in effect at time of violation), and Rule 4-1.16(d). **App. 104.** The Admonition noted Respondent's receipt of Formal Opinion 128 and that "[t]he Committee appreciated your openness to reviewing Formal Opinion 128 and changing your billing practices accordingly." **App. 104.**

[2] The language of former Rule 4-1.15(f) now appears verbatim at Rule 4-1.15(c).

OCDC Investigation of Respondent's October 2014 Overdrafts

On or about October 7, 2014, the OCDC received a notice from Commerce Bank that Respondent had presented an item to his trust account in the amount of $1,900.00 for payment that resulted in insufficient funds. **App. 202-204.** Thereafter, on or about October 23, 2014, OCDC received a second notice from Commerce 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. 236-238.** Said notices were provided pursuant to Commerce Bank's mandatory reporting obligation pursuant to Missouri Supreme Court Rule ("Rule") 4-1.15.

Following receipt of the initial overdraft notice, the OCDC commenced an investigation of Respondent's trust account, which included correspondence to Respondent and requests that Respondent produce certain information. ***See, e.g.,*** **Overdraft Communication (Hearing Exhibit 9) App. 202-269 and Communication Timeline (Hearing Exhibit 10) App. 270.**

Ultimately, in January 2015, OCDC subpoenaed Respondent's trust account records from Commerce Bank and his firm operating account records from Ozark Bank. ***See, e.g.,*** **App. 255-258.** OCDC subsequently subpoenaed Respondent's trust account records from Empire Bank after it learned that Respondent opened a new trust account there in late February 2015.

On March 26, 2015, Respondent testified as to his trust account overdrafts, the complaint of N.F. and the complaint of J.H. in a sworn statement. ***See, e.g.,*** **Hinote Sworn Statement at App. (Exhibit 13) App. 358-390.**

Information and Answer

After examining the bank records, Respondent's sworn statement and the complaints of clients N.F. and J.H., the OCDC found probable cause that Respondent had committed a number of ethical violations. The OCDC filed a three Count Information against Respondent on June 29, 2015. **App. 3-12.** In Count I the OCDC specifically charged Respondent with the following violations:

* Rule 4-1.15 generally, for failing to safe keep client funds, ultimately resulting in overdrafts of both his operating and trust accounts; **App. 8 (Paragraph ("Para.") 23)**

* Rule 4-1.15(a) by depositing and commingling unearned client fees (including, but not limited to, fees paid by N.F. and J.H.) for legal services directly into his operating account alongside his personal funds instead of his trust account; **App. 7 (Para. 20)**

* Rule 4-1.15(b) by depositing personal funds into his Trust Account to pay expenses other than bank serviced charges, namely, client refunds; **App. 8 (Para. 26)**

* Rule 4-1.15(c) by depositing unearned client fees (including, but not limited to, fees paid by N.F. and J.H.) into his operating account instead of his trust account and quickly withdrawing said fees before they were earned; **App. 8 (Para. 22)**

* Rule 4-1.15(f) by failing to keep adequate ledgers or records of his Trust Account for at least five years, resulting in both his operating and trust accounts being overdrawn; **App. 9 (Para. 28-29)**

* Rule 4-1.15(g) by actively engaging in the practice of law without a trust account for several months after his trust account was closed by the bank. **App. 9-10 (Para. 31).**

The OCDC further alleged that the Respondent misappropriated client funds, which constituted attorney misconduct under Rule 4-8.4(c). **App. 8 (Para. 24).**

In Count II the OCDC charged Respondent with violations of Rules 4-1.5(a) and 4-1.16(d) relating to his representation of N.F. **App. 10-11.** In Count III the OCDC charged Respondent with violations of Rules 4-1.2(c) and 4-1.16(d) relating to his representation of J.H. **App. 11-12.**

On July 24, 2015, Respondent filed his Answer. **App. 17-27.** With respect to Count I, Respondent denied the alleged rule violations in paragraphs 20, 24, 28, 29 and 31. **App. 21-23.** Respondent admitted, in part, the alleged rule violations in paragraphs 22 and 23, but denied wrongdoing or harm to the client. **App. 22.** Respondent neither admitted nor denied the alleged rule violations of paragraph 26, responding instead that he was "unaware of any violation." **App. 22.** With respect to Counts II and III, Respondent denied any Rule violations. **App. 23-27.**

Disciplinary Hearing

On November 19, 2015, this matter proceeded to a hearing on the record before the DHP. ***See e.g.*, Hearing Transcript App. 39-100.** Informant, the OCDC, testified

through its employee and investigative examiner, Kelly Dillon. Respondent testified on his behalf. Prior to the hearing, Complainants N.F. and J.H. informed counsel for Informant that they were unwilling to appear voluntarily or through the use of a subpoena at the disciplinary hearing. **App. 42 (Tr. 13, L. 6-10 and L. 21-25).** Both Complainants, however, indicated that they wished for the OCDC to proceed on their complaints at the hearing. ***Id.*** The OCDC complaint files of both N.F. and J.H. were admitted into evidence. ***See e.g.*****, N.F. Complaint File (Exhibit 11) App. 272-302 and J.H. Complaint File (Exhibit 12) App. 303-343.** Respondent was also cross-examined by counsel for Informant about his representation of both N.F. and J.H. at the hearing.

Ms. Dillon first testified as to what financial records attorneys are required to retain under Rule 4-1.15(f). **App. 50 (Tr. 47, L. 13 – Tr. 48, L. 7).** She testified that in this case, Respondent did not produce to OCDC information that he was required to maintain under Rule 4-1.15(f), including cash receipts, credit card records, client ledgers or billing statements. **App. 50-51 (Tr. 48, L. 19 – Tr. 49, L. 9).** During his testimony, Respondent admitted that he did not maintain proper recordkeeping as required by the Rule. **App. 81 (Tr. 170, L. 25 – Tr. 171, L. 3).** Specifically, Respondent admitted that he does not keep cancelled checks, credit card receipts/records, or time slips/statements. **App. 81 (Tr. 171, L. 7-24) and App. 93 (Tr. 217, L. 7 – Tr. 218, L. 6).** Respondent offered no evidence establishing how he documents work performed for any client or establishing benchmarks for earning fees.

Using the bank records and information provided by Respondent, Ms. Dillon prepared a series of spreadsheets detailing Respondent's bank accounting practices in both

his operating and trust accounts covering a time period of December 27, 2012 to April 6, 2015. ***See, e.g.*, Hearing Exhibits 5, 6, and 7 at App. 113-199. *See also* App. 51 (Tr. 50, L. 18-25).**

Using the spreadsheets, Ms. Dillon testified that but for two exceptions, nearly all client funds paid to Respondent during this time period were deposited directly into Respondent's operating account instead of his trust account. **App. 51 (Tr. 52, L. 19-23).** Ms. Dillon further testified that client funds in Respondent's operating account were often depleted before Respondent earned the fees by performing any meaningful work for the client and that Respondent frequently used client funds to pay personal or business expenses of Respondent. **App. 59-60 (Tr. 84, L. 16 – Tr. 85, L. 7) and App. 61 (Tr. 90, L. 9-19).**

Specifically, with respect to Complainant N.F., a deposit of $6,000 was made into Respondent's operating account on July 25, 2013. **App. 54-55 (Tr. 62, L. 11 – Tr. 68, L. 10).** Within five days, the operating account was overdrawn. **App. 55 (Tr. 68, L. 11-15).** N.F.'s case was not filed until August 15, 2013, at which time no client funds remained. According to the bank records, N.F.'s funds were used to pay Respondent's personal expenses, including bills, credit cards and a mortgage payment. **App. 56 (Tr. 70, L. 17 – Tr. 71, L. 13).**

With respect to Complainant J.H., a credit card payment of $2,894.85[3] was deposited into Respondent's operating account on March 1, 2013. **App. 57 (Tr. 73, L. 21-22).** Within three days, only $102.77 remained in Respondent's operating account. **App. 57 (Tr. 74, L. 13-17).** The bank records show that J.H.'s funds were used to pay credit card bills and filing fees for other clients. **App. 57 (Tr. 74, L. 20 – Tr. 75, L. 11).** No client funds remained when J.H.'s case was filed on May 1, 2013. **App. 57 (Tr. 75, L. 20-25).**

Ms. Dillon testified that Respondent's use of client funds before they were earned to pay personal or business expenses constituted misappropriation and violations of Rules 4-1.15 and 4-8.4. **App. 57-58 (Tr. 76, L. 8 – Tr. 77, L. 10) and App. 61 (Tr. 91, L. 4-21).**

Throughout the case, Respondent represented this practice as permissible. Respondent explained that the reason client funds were deposited into his operating account instead of his trust account is that he primarily uses "flat fees" for legal services. ***See* App. 45 (Tr. 25, L. 25 – Tr. 26, L. 23).** ***See also* Answer, Para. 18(e)(i-vi) at App. 19-20**. With Respect to Complainant N.F., Respondent stated that the case was "very difficult" requiring an extreme amount of legal research and travel to a different county. **App. 65, (Tr. 105, L. 3-7)**. ***See also* Answer, Para. 39 at App. 24-25.** However, as found by the DHP, Respondent "gave no specific or plausible explanation or details as to what

[3] Based on information and belief, J.H. paid Respondent $3,000, but because of credit card processing fees the actual amount deposited to Respondent's account was $2,894.85. **App. 57 (Tr. 74, L. 4-9).**

work was done within the five day period before the funds were depleted." **App. 439 (Finding No. 15).** With Respect to Complainant J.H., the DHP again found that Respondent gave no specific or plausible explanation of any work performed during the three day period before J.H.'s funds were depleted. **App. 439 (Finding No. 16).**

Generally, Respondent argued that his flat fees are "earned upon receipt" and become his funds. **Answer, Para. 18(e)(i-vi) at App. 19-20.** Respondent stated that he explains this practice to clients up front and the clients agree to it. ***Id. See also* App. 79 (Tr. 162, L. 1-11).** Respondent, conceded, however, that he does not use written fee agreements or contracts and that all discussions and agreements with clients are oral. ***See* App. 83 (Tr. 177, L. 25 – Tr. 178, L. 22) and App. 439 (Finding No. 17).**

In both his Answer and at the hearing, Respondent defended his billing practice as permissible based on his review and understanding of a passage allegedly contained in a version of the "Lawyer Trust Account Handbook" that allows a lawyer to deposit flat fees directly into a lawyer's operating account.[4] **App. 21-22 (Para. 20). *See also* Answer, Para. 20 at App. 21-22.** At the hearing, however, Respondent could not produce a version

[4] The entirety of the passage cited by Respondent cited is as follows:

Although "flat fees" may be deposited into the operating account upon receipt, it is recommended that the unearned portion of the fee be deposited into the trust account and then transferred from the trust account to the operating account as it is earned. There are no "nonrefundable" fees in Missouri.

**App. 21-22 (Para. 20).**

of the "Lawyer Trust Account Handbook" allegedly containing the passage cited by Respondent. ***See e.g.*, App. 65 (Tr. 106, L. 6 – Tr. 108, L. 21) and App. 79 (Tr. 162, L. 24 – Tr. 163, L. 23).** In response, the OCDC placed a copy of "Lawyer Trust Account Handbook" (dated June 10, 2013) into evidence. ***See, e.g.*, Hearing Exhibit 14 at App. 404-430**. This version of the Lawyer Trust Account Handbook contains the following passage:

> Historically, "flat fees" were considered earned upon receipt but this is no longer true. Therefore, "flat fees" must be deposited into the trust account and then transferred from the trust account to the operating account as the fees are earned . . . Every attorney should carefully review Formal Opinion 128 to ensure his or her fees are reasonable and deposited properly . . .
>
> **App. 406**

A copy of Formal Opinion 128 (Nonrefundable Fees) was also placed into evidence by the OCDC. ***See, e.g.*, Hearing Exhibit 17 at App. 432-434.** Respondent admitted that he had previously been provided with a copy of Formal Opinion 128 by Alan Pratzel, Chief Disciplinary Counsel, during his appearance before the regional disciplinary committee in connection with his May 2014 Admonition. **App. 78 (Tr. 157, L. 19 – Tr. 158, L. 14).** When questioned during cross examination at the hearing as to whether he had read Formal Opinion 128, Respondent first testified that he did not have a "direct recollection" of reading it. **App. 78 (Tr. 158, L. 20 – Tr. 159, L. 9).** When questioned further by the DHP Presiding Member, Judge Holstein, Respondent testified that he only read "part of it." **App. 91-92 (Tr. 212, L. 16 – Tr. 213, L. 4).**

Ms. Dillon further testified that on occasions when Respondent's clients received refunds and/or returns of unused retainers from Respondent, said funds were made from Respondent's trust account using Respondent's personal funds or funds from other clients because the original client's funds were usually exhausted. **App. 52-53 (Tr. 55, L. 22 – Tr. 57, L. 6) and App. 54. (Tr. 62, L. 17 – Tr. 63, L. 23).** Ms. Dillon testified that this conduct constituted impermissible commingling of attorney and client funds. **App. 54 (Tr. 62, L. 17 – Tr. 63, L. 23).** Ms. Dillon stated that such conduct eliminates the protective veils of the operating and trust accounts, and puts client funds at risk of garnishment by Respondent's creditors. **App. 54-55 (Tr. 63, L. 24 – Tr. 65, L.9).**

In response, Respondent testified that he thought the correct process was to use his trust account to return or refund client monies, because at the time the funds are returned, they "become" client funds again. **App. 74 (Tr. 142, L. 14-23).** He testified that such refunds and/or returns were not made with any ill intent. ***Id.***

The OCDC further introduced evidence that Respondent's trust account remained overdrawn until it was closed by the bank on November 25, 2014. **App. 60 (Tr. 85, L. 8-22).** Respondent testified that he was unaware that his trust account had been closed until shortly before a meeting with the regional disciplinary committee in January 2015. **App. 82 (Tr. 175, L. 18-23).** Respondent did not open a new trust account at Empire Bank until February 28, 2015. **App. 60 (Tr. 86, L. 17 – Tr. 87, L. 4).** Respondent admitted to engaging in the practice of law between November 25, 2014 and February 27, 2015 without a trust account. **App. 82 (Tr. 177, L. 21-24).**

Following the hearing, the Disciplinary Hearing Panel entered a unanimous decision on December 28, 2015, setting forth both findings of fact and conclusions of law. **App. 435-447.** With respect to Counts II and III, the Panel found that the OCDC had failed to carry its burden of proof and recommended that those Counts be dismissed. **App. 446.**

With Respect to Count I of the Information, however, the Panel found that Respondent violated:

- Rule 4-1.15(a) by routinely commingling personal and client funds in both his operating and trust accounts;
- Rule 4-1.15(b) by depositing personal funds into his trust account for a purpose other than paying bank services charges; namely paying "refunds" or "unused retainers" to clients;
- Rule 4-1.15(c) by depositing almost all client funds directly into his operating account and in many cases (including, but not limited to, the cases of Complainants N.F. and J.H.) using said funds for personal or business expenses before any meaningful work was performed for the client. The Panel further found that said conduct constituted misappropriation;
- Rule 4-1.15(f) by failing to maintain accounting information required by the Rule; and
- Rule 4-1.15(g) by practicing law between November 2014 and February 2015 without a trust account.

**App. 443-445 (Conclusions of Law 1-5).**

The Panel further found that Respondent's multiple violations of Rule 4-1.15 constitutes misconduct under Rules 4-8.4(a) and 4-8.4(c). **App. 445 (Conclusion of Law 6).** The DHP concluded as follows:

> Considering his past admonitions on nearly the same subject, his experience as an attorney for more than fifteen (15) years, the seriousness of [the] failure to comply with Rule of Professional Conduct 4-1.15, the risks inherent in not safekeeping client funds separate from his own operating account, and all other aggravating and mitigating circumstances . . . the DHP Respectfully recommends as follows: That Respondent be suspended from the practice of law for the reasons set forth in Count I of the Information with leave to seek readmission after six months, and as a condition of readmission, [Respondent] Mr. Hinote complete a course approved by OCDC in handling of client trust funds and unearned fees. **App. 447.**

On January 7, 2016, Informant provided notice pursuant to Rule 5.19 that it accepted the DHP's decision. **App. 448.** On February 4, 2016, Respondent provided notice that he rejected the panel's decision. **App. 449.**

## POINTS RELIED ON

### I.

**RESPONDENT VIOLATED RULE 4-1.15 BY DEPOSITING CLIENT FUNDS DIRECTLY INTO HIS OPERATING ACCOUNT BEFORE THEY WERE EARNED; COMMINGLING PERSONAL AND CLIENT FUNDS IN BOTH HIS OPERATING AND TRUST ACCOUNTS; MISAPPROPRIATING CLIENT FUNDS TO PAY PERSONAL AND BUSINESS EXPENSES BEFORE THEY WERE EARNED; FAILING TO KEEP ADEQUATE TRUST ACCOUNT RECORDS; AND PRACTICING LAW FOR THREE MONTHS WITHOUT A TRUST ACCOUNT.**

*In re Farris*, 472 S.W.3d 549 (Mo. banc 2015)

Missouri Supreme Court Advisory Committee Formal Opinion 128 (Nonrefundable Fees) (May 18, 2010)

Missouri Supreme Court Rule 4-1.15

## 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 FOR A PERIOD OF NOT LESS THAN SIX MONTHS.**

*In re Bizar*, 454 N.E.2d 271 (Ill. 1983)

*In re Farris*, 472 S.W.3d 549 (Mo. banc 2015)

Missouri Supreme Court Rule 4-1.15

ABA Standard for Imposing Lawyer Sanctions 4.1

## ARGUMENT

### I.

**RESPONDENT VIOLATED RULE 4-1.15 BY DEPOSITING CLIENT FUNDS DIRECTLY INTO HIS OPERATING ACCOUNT BEFORE THEY WERE EARNED; COMMINGLING PERSONAL AND CLIENT FUNDS IN BOTH HIS OPERATING AND TRUST ACCOUNTS; MISAPPROPRIATING CLIENT FUNDS TO PAY PERSONAL AND BUSINESS EXPENSES BEFORE THEY WERE EARNED; FAILING TO KEEP ADEQUATE TRUST ACCOUNT RECORDS; AND PRACTICING LAW FOR THREE MONTHS WITHOUT A TRUST ACCOUNT.**

Rule 4-1.15[5] provides the framework by which Missouri lawyers are required to preserve and safe keep client property, including client funds, in their role as a fiduciary. The Rule requires that client funds first be deposited into the attorney's trust account and kept there until they are earned, and prohibits commingling of attorney funds with client funds in the trust account. Rule 4-1.15(a) and (b). Only after the attorney performs work for the client and earns the fees may the attorney transfer the funds to her operating account and use the funds for the attorney's personal or business purposes. Rule 4-1.15(c). The Rule further requires that attorneys maintain sufficient documentation of all trust account

[5] Unless otherwise stated, all references to Rule 4-1.15 refer to the version of the Rule effective July 1, 2013.

activity. Rule 4-1.15(f). Finally, lawyers are required by the Rule to maintain a separate trust account at all times while actively engaged in the practice of law. Rule 4-1.15(g).

In this case, the DHP correctly found that Respondent committed multiple Rule 4-1.15 violations in the handling of client funds in both his operating and trust accounts. The DHP also correctly found that Respondent's conduct in misappropriating and commingling client funds constituted misconduct under Rule 4-8.4.

Violation of Rule 4-1.15(a)

Rule 4-1.15(a) provides in relevant part that "[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Client or third party funds shall be kept in a separate account designated as a 'Client Trust Account' . . . ."

Here, in all but a few cases, Respondent violated this rule by directly depositing client funds into his operating account instead of his trust account, thereby mixing said funds with Respondent's own funds. **App. 51.** ***See also*** **Bank Account Spreadsheets (Hearing Exhibits 5, 6, 7) at App. 113-199.** 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.** The evidence establishes that Respondent routinely commingled personal and client funds in both his operating and trust accounts. Respondent repeatedly used client funds to pay personal expenses or legal expenses for other clients. **App. 59-61.** Such actions put client funds at risk of garnishment by Respondent's creditors. **App. 54.**

Violation of Rule 4-1.15(b)

Rule 4-1.15(b) 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, the evidence establishes that Respondent violated this Rule by depositing personal funds into his trust account for a purpose other than paying bank service charges, namely paying "refunds" or "unused retainers" to clients. **App. 52-54.**

Violation of Rule 4-1.15(c)

Rule 4-1.15(c) provides that: "[a] lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." Formal Opinion 128 further clarifies this rule to mean that "all flat fees must be deposited into a lawyer trust account and promptly removed when actually earned, similar to prompt removal of earned hourly fees."[6] **App. 434.** Formal opinions are binding on attorneys. *Burgess v. State*, 342 S.W.3d 325, 330 (Mo. banc 2011) (J. Wolff concurring).

As discussed above, Respondent violated this Rule by depositing almost all client funds directly into his operating account. **App. 51.** In many cases (including, but not limited to, clients N.F. and J.H.) Respondent spent all of the client funds on personal or business expenses before any meaningful work was performed. ***See, e.g.,* App. 55-61.** In

[6] Formal Opinion 128 discusses former Rule 4-1.15(f). As mentioned above, the language of former Rule 4-1.15(f) is verbatim to current Rule 4-1.15(c).

many cases, no client funds were held for payment of case expenses, such as filing or service fees. ***Id.*** Instead, the evidence shows that case expenses were paid by using other clients' funds or Respondent's personal funds. ***Id.*** As found by the DHP, Respondent's violations of Rule 4-1.15(c) constitute misappropriation. **App. 444.** *See also In re Farris,* 472 S.W.3d 549, 560 (Mo. banc 2015) (citing *In re Schaeffer,* 824 S.W.2d 1, 5 (Mo. banc 1992)) ("When an attorney deposits the client's funds into an account used by the attorney for his own purposes, any disbursements from the account for purposes other than those of the client's interests has all the characteristics of misappropriation, particularly when the disbursement reduces the balance of the account to an amount less than the amount of the funds being held by the attorney for the client.")

Violation of Rule 4-1.15(f)

Rule 4-1.15(f) provides that: "[c]omplete records of client trust accounts shall be maintained and preserved for a period of at least five years after termination of the representation or after the date of the last disbursement of funds, whichever is later." The Rule further defines "complete records" to consist of eleven categories of documents including, but not limited to: records of deposits and withdrawals from client trust accounts; fee agreements; bills for legal fees and expenses; checkbook registers; bank records; cancelled checks; and records of credit card transactions. ***See, e.g.***, Rule 4-1.15(f)(1)-(11).

Here, with the exception of bank records, Respondent does not maintain the information required by Rule 4-1.15(f). **App. 50-51.** Respondent admitted that his account recordkeeping does not comply with the rule and testified that he does not maintain

cancelled checks, credit card receipts/records or time slips/statements. **App. 81 and 93.** While Respondent did state that he maintained billing information for each client, he produced no documentary evidence at the hearing supporting this claim, including evidence of billing information for clients N.F. and J.H.

Violation of Rule 4-1.15(g)

Rule 4-1.15(g) provides that "[u]nless exempt as provided in Rule 4-1.145(a)(6) or all of the lawyer's trust accounts are non-IOLTA trust accounts, a lawyer or law firm shall establish and maintain one or more IOLTA accounts into which shall be deposited all funds of clients or third persons in compliance with the provisions in Rules 4-1.145 to 4-1.155."

In this case, Respondent made no argument and offered no evidence that he qualified for one of the limited exemptions from the requirement of Rule 4-1.15(g) to maintain a trust account. Respondent's trust account at Commerce Bank was closed on or about November 25, 2014. **App. 60.** Respondent did not open a new trust account at Empire Bank until February 28, 2015. ***Id.*** During this three month time period, Respondent admitted to practicing law in violation of the Rule. **App. 82.**

Misconduct under Rule 4-8.4(a) and (c)

Rule 4-8.4 provides in relevant part that:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . .

> (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation . . .

In this case, Respondent's multiple violations of Rule 4-1.15 as discussed above constitute misconduct under Rule 4-8.4(a). Additionally, the OCDC respectfully submits that Respondent's actions in commingling and misappropriating client funds for his own purposes establishes that Respondent was engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. ***See, e.g.*, 57-58 and 61.**

## 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 FOR A PERIOD OF NOT LESS THAN SIX MONTHS.**

As discussed herein, the evidence introduced at the November 19, 2015 hearing established multiple violations of Rule 4-1.15 and accompanying misconduct under Rule 8.4 by Respondent. For all the reasons set forth below, the OCDC believes that Respondent's conduct warrants a suspension from the practice of law for a period of at least six months.

### 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 consider all of these sources, whether they are reaching a stipulation or whether in more adversarial settings. 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) causing injury or potential injury to clients warranting disbarment. The evidence does show, however, that Respondent's misappropriation and commingling of client property (funds) was not merely negligent, making a reprimand and admonition inappropriate. Rather, the evidence establishes that Respondent knowingly dealt improperly with client funds and that his actions caused injury or had the potential to cause injury to clients, justifying suspension as the appropriate level of discipline.

Specifically, Respondent knew or should have known that he was dealing improperly with client property. Respondent is an attorney with over 20 years of experience. **App. 358.** Yet, Respondent professed ignorance of the Rule 4-1.15 and the handling of client fees. However, the record shows that Respondent previously overdrafted his trust account in 2010 and was cautioned by the OCDC. **App. 107-108.** At the hearing, he admitted that the 2010 caution letter advised him that client fees should be placed in his trust account. **App. 76-77.** Included as part of his caution was advice to review the "Lawyer Trust Accounting Handbook" and attend a trust account CLE. **App. 107.** Respondent was advised that his attendance at the CLE would be "considered favorably" if he were the subject of future disciplinary investigations. ***Id.*** Despite this guidance, Respondent did not attend the trust account CLE and apparently made no changes to his billing practices. **App. 77.**

In 2014, Respondent was admonished by the OCDC and was provided a copy of Formal Opinion 128, which provided Respondent with further guidance that flat fees should be deposited in his trust account and only withdrawn as fees are earned. **App. 78.**

At the hearing, however, Respondent was ambivalent about whether he read Formal Opinion 128 after it was provided to him. **App. 78, 91-92.**

Respectfully, this evidence shows that even though Respondent was repeatedly provided guidance from the OCDC about the proper handling of client funds and trust accounts, he knowingly chose to ignore such guidance and continue his practices. Accordingly, Respondent knew or should have known that he was dealing improperly with client property (funds).

Further, Respondent's conduct caused or had the potential to cause injury to a client. With respect to actual 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 when requested, albeit by way of depositing personal funds into his trust account and not from client funds as those funds were never held in trust and no longer available. 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 (Ill. 1983).

Here, the risk of loss of client funds was ever present. Both Respondent's trust and operating accounts were overdrawn. As previously noted, Respondent's practice in almost all cases was to deposit client funds into his operating account. In many cases, those funds were misappropriated and spent by Respondent before he performed any meaningful work for the clients. Respondent's commingling of personal and client funds in both his trust and

operating further pierced the protective veil of said accounts, potentially making the funds subject to garnishment by Respondent's creditors.

Further, when clients requested a refund, no client funds were available and Respondent had to deposit personal funds into his trust account to provide refunds. By way of example, what if a client demanded a significant refund of her "flat fee" and Respondent did not have sufficient personal funds to pay the refund? These are all risks that are inherent in the manner in which Respondent manages his client funds and bank accounts.

For all these reasons, Respondent's conduct warrants a suspension under ABA Standard 4.12.

Aggravating Circumstances

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

**(a) Prior Disciplinary Offenses**

Respondent was admonished in 2005 for violation of Rule 4-1.3. **App. 102-103.**

Respondent received a second admonishment in 2014 for violations for Rule 4-1.5, former Rule 4-1.15(f) and Rule 4-1.16(d). **App. 104-105.**

**(b) Dishonest or Selfish Motive**

The evidence establishes that Respondent selfishly used client funds before they were earned to pay for personal and business expenses.

**(d) Multiple Offenses**

Respondent's Rule 4-1.15 violations do not derive from a single isolated incident. Rather, the entire analyzed time period was replete with constant transfers of client funds directly into Respondent's operating account and multiple withdrawals of client funds to pay personal or business expenses before Respondent performed any meaningful work for the client. On two occasions, Respondent commingled personal funds into his trust account to provide refunds to clients. Respondent's account continued to be overdrawn even after OCDC involvement, resulting in the bank closing the account. Respondent then practiced law without a trust account for three months. Respondent admitted that he did not maintain required trust account records.

**(i) Substantial experience in the practice of law**

At the time of these violations, Respondent had been practicing law for twenty years.

Mitigating Circumstances

ABA Standard 9.32 sets forth factors which may be considered mitigating circumstances. Respectfully, there is no substantial evidence of mitigating circumstances in this case.

Suspension

Suspension is the removal of a lawyer from the practice of law for a specified period of time. ABA Standard 2.3. "Generally, suspension should be for a period of time equal

to or greater than six months, but in no event should the time period prior to application for reinstatement be more than three years." ***Id.***

As previously discussed, ABA Standard 4.1 addresses situations in which an attorney had failed to preserve a client's property, including client funds. Standard 4.12 provides that "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." The record in this case establishes that Respondent knowingly misappropriated and commingled client funds, and that his actions caused or could cause injury to a client, justifying suspension as the appropriate level of discipline. Additionally, Respondent has several aggravating factors, including prior discipline for Rule 4-1.15 violations. Respondent's conduct was not merely negligent warranting a lesser sanction, nor does his conduct rise to the level of disbarment. The OCDC agrees with the recommendation of the DHP and respectfully submits that Respondent be suspended from the practice of law indefinitely, with no leave to seek readmission for a period of six months. The OCDC further agrees with the recommendation of the DHP that, as a condition of readmission, Respondent be required to complete an OCDC approved course regarding the handling of client trust funds and unearned fees.

Probation Is Not Appropriate In This Case

Missouri Supreme Court Rule 5.225 sets 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. Rule 5.225.

Informant does not believe that probation is appropriate in this case. Respondent has evidenced a long standing practice of misappropriating and commingling client funds, routinely putting those funds at risk. He has several aggravating factors and no mitigating factors. Respondent's conduct, as described herein, harms both the public and the reputation of the profession.

Moreover, Informant does not believe that Respondent can be supervised. Since 2010, Respondent has twice received guidance from the OCDC about the proper handling of client funds and trust accounting procedures, including recommendations to attend a specific trust accounting CLE; to review the "Lawyer Trust Account Handbook"; and to review Formal Opinion 128. This guidance—which includes discipline in the form of a 2014 admonition—has failed to dissuade Respondent from continuing his improper handling of client funds and trust accounting practices. Based on this history, Informant has serious concerns about Respondent's ability or desire to participate in and complete a period of probation.

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

## CONCLUSION

Informant respectfully recommends that Respondent's license be suspended. Said suspension should be indefinite, but continue for at least six months. Further, Respondent should be requires to complete an approved course regarding the handling of client trust funds and unearned fees.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2016, a true and correct copy of the foregoing was served via the electronic filing system pursuant to Rule 103.08 on:

Scott C. Hinote
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P.O. Box 1360
Ozark, MO 65721
**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 7,260 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Kevin J. Rapp