IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
SAMUEL E. TRAPP,	)	**Supreme Court #SC94172**
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF
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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.

STATEMENT OF FACTS

Procedural Background

The Chief Disciplinary Counsel filed an Information on June 19, 2012. Respondent answered on September 11, 2012. An Amended Information and stipulated disposition was filed on April 30, 2013. The Panel announced that it would reject the stipulated disposition on May 2, 2013. In November 2013, before Respondent filed an Answer to the Amended Information, Informant filed a Notice of Default. The Panel allowed Respondent to submit an Answer out of time (on November 20, 2013) and declined to find him in default under Rule 5.13. Respondent filed a Motion to Disqualify the Panel on November 19, 2013. Informant opposed that Motion and the Chair of the Advisory Committee denied it on November 20, 2013. Media requested and was granted access to the hearing, and photography was permitted by the Panel in accordance with Rule 5.31. This attorney discipline case was heard by the duly appointed hearing panel on November 22, 2013

At the November 22, 2013, hearing, Respondent agreed to the admission of Informant's Exhibits 1-10, 21-53, 54-67, and 75-90. By agreement, Exhibit 82 was accepted by the Panel Chair under a Protective Order, pursuant to Rule 5.31. Exhibit 82 contains confidential financial records of Respondent and his clients, which are summarized in Exhibit 81. Exhibit 81 is not subject to the protective order.

Counts I and VI were dismissed by Informant at the hearing. After hearing and review, the DHP found no violation related to Count III (Burris), explaining simply that DB was not Respondent's client and that therefore he owed no duty to her under Rule 4-

1.8. But, as to all other allegations, the Panel found that Respondent violated the Rules of Professional Conduct as alleged in the Amended Information. (See Amended Disciplinary Hearing Panel Decision). **App. 20–32**. The Panel recommended that Respondent's license be suspended indefinitely, with no leave to apply for reinstatement for one year, but that the suspension be stayed and that Respondent be placed on probation under Rule 5.225.

Both Informant and Respondent rejected the Panel's recommended findings and sanction.

Count I

Count I was dismissed by Informant.

Count II (MD)

In 2010, MD retained Respondent to represent her in a divorce. **App. 103**. In September 2010, MD paid Respondent $1,200 when they thought the divorce might be uncontested. **App. 62-63 (T. 109-110); 70 (T. 141); 99-102**. Of that $1,200, Respondent explained that $200 was probably intended to cover MD's filing fee. **App.71 (T. 144-145)**. Respondent explained that he typically charged $1,000 for uncontested divorces and collected $200 for the filing fee. He deposited all $1,200 into his operating account before paying for her filing fee or completing the tasks required under their fee agreement. **App. 99-102**. He agreed, "in hindsight," $200 of MD's initial payment probably should have been deposited into his trust account, but he did not concede the point. **App. 71 (T. 145)**.

When they both realized the dissolution action would be contested, Respondent collected another $2,300 from MD. **App. 63 (T. 110); 70 (T. 141); 106**. That payment was also deposited directly into his operating account. **App. 71 (T. 142)**. At the time of those deposits, Respondent acknowledged, his operating account also contained funds for general office expenses such as payroll. **App. 71 (T. 145)**.

In November 2010, Respondent's office sent MD an invoice for another $200. **App. 63 (T. 111); 104-105**. When she tried to communicate with Respondent about the invoice, he did not accurately explain it to her satisfaction. **App. 96-106**. Respondent and MD offered different versions of their communication about the $200 invoice. MD testified about her repeated efforts to obtain an explanation. **App. 63-64 (T. 113-116)**. She described her efforts to talk to Respondent, and his staff's failure to explain the purpose of the invoice; from her perspective, the $3,500 advance payment could not have been depleted. **App. 69 (T. 134)**. Though his initial written responses asserted that $3,500 was depleted and the extra $200 earned, he later explained that he owed MD a $700 refund. **App. 128-135**. MD also described her efforts to resolve the matter through the Missouri Bar Fee Dispute Program and her Small Claims suit to recover unearned fees. **App. 64 (T. 115)**. For his part, Respondent reported that he never knew what had frustrated MD and that she had not answered his telephone calls about the issue. **App. 73-74 (T. 153-154)**. In a Camden County small claims action, MD sought a refund of part of her $3,500 fee because the only invoice she had received was for $200. **App. 122-123**.

Respondent offered no notes of conversations with MD. MD eventually fired Respondent and asked for a refund; **App. 96-106;** he refused that request by letter. **App. 139**. Neither that letter, nor any other correspondence provided by Respondent, indicated that any billing statement was provided to MD - other than the $200 invoice. By letter, Respondent initially suggested that MD utilize the Missouri Bar Fee Dispute process, but when she tried to resolve the matter in that program, Respondent refused to participate. **App. 139-140**. Although he wrote to the Fee Dispute program coordinator that he was not interested in either mediation or arbitration, he told the DHP he refused because he didn't want to be bound by the program's arbitration process; he said he would have agreed to mediation. **App. 140**. Without his participation, the program determined that he should refund $2,900. **App. 141-143**. MD eventually sued Respondent in Small Claims Court; she accepted a $1,750 refund on the date set for trial, several months after she requested a refund. **App. 144-147; 152**.

In responding to MD and OCDC inquiries about her complaint, Respondent offered several explanations for the $200 invoice sent to MD. Initially, as noted, he responded to her by saying that all payments ($3,500) (including the initial $200 apparently intended for a filing fee and the later $200 invoiced) were earned by work completed on her case. **App. 139**. Later, on May 13, 2011, he told the OCDC the invoice was sent to her because the work exceeded her $3,500 payment by $200. In that letter, he also claimed "a detailed billing statement was provided to the client, and will be provided to your office upon request" **App. 107-111**. Still later, on May 25, 2011, Respondent explained to the OCDC that he worked many more hours for MD and

included an itemized document that he referred to as a "bill" to establish that work. **App. 112-115**. On May 26, 2011, Respondent's lawyer (an employee of his firm) labeled the same document as a "billing statement," and explained: "The bill for September 29, 2010 through January18, 2011, *my client and his firm billed Complainant 15.75 hours* at a rate of $75.00 per hour paralegal work and $200.00 per hour for attorney work," (*emphasis added*). **App. 116-121**. Included within those 15.75 hours are several hours expended responding to MD's requests for explanation, the Missouri Bar fee dispute process, her complaint to the OCDC, and her lawsuit against him to seek a refund.

Respondent also argued in that letter that a bold print "non-refundable retainer" clause established that his fee was earned "even if the Firm expends less hours on the case than expected." Two months later, on August 31, 2011, Respondent again offered the billing statement as proof of work performed for MD. **App. 116-121; 133**. At that time, after receiving a copy of Missouri Supreme Court Advisory Opinion 128, he acknowledged that he should refund $700 to MD. **App. 124-135**.

Still later, Respondent offered another explanation for the $200 invoice: On January 27, 2012, he wrote to the OCDC that the $200 invoice was incorrectly sent by Respondent's clerk, who believed that MD owed $200 to the firm for a filing fee. **App. 150**. As noted above, Respondent testified that MD's initial $1,200 payment was probably intended to cover a $1,000 legal fee and $200 for a filing fee.

At the hearing in November 2013, Respondent testified about the document he had labeled a "bill" and a "billing statement" in his earlier responses to the OCDC. He said: "These are not billing records." **App. 89 (T. 215)**. He further explained that the

document was a "time record of her file to the extent that it was used, and they may be used to create a bill, but I didn't do it that way." **App. 89 (T. 215)**. But, as noted above, in an earlier letter explaining the bill to the OCDC, he said that "his firm billed Complainant" for the 15.75 hours; those hours included his responses to the fee dispute and discipline process.

MD reported in her complaints that she never received the itemized billing statement. **App. 122-123** Respondent testified that it was not sent to her, despite his contrary claim in his May 13, 2011 letter to the OCDC. **App. 89 (T. 216); 107-111**. The DHP made no specific findings as to the credibility of Respondent or MD, though Respondent argued that MD was not credible in his trial brief. But, the Panel did make a specific finding that "Respondent violated Rule 4-1.4 by failing to adequately communicate with [MD] in that he did not respond to her attempts to discuss his legal work and the invoice he sent for $200.00." The Panel also made these additional findings as to Count II:

> Respondent violated Rule 4-1.16(d) by failing to promptly return unearned advance fees in that he resisted her demands for a refund of the advance fees throughout a fee dispute process and until a hearing date was scheduled in a lawsuit against him that was filed to force his refund of unearned fees.
>
> Respondent violated Rule 4-1.15(c) by failing to keep [MD's] funds separate from his own in that he deposited unearned fees into his operating account and spent those unearned fees as his own.

> Respondent violated Rule 4-1.15(j) by failing to segregate disputed funds from his own, in that [MD] demanded a refund of unearned fees by request, by an attempt to use the Missouri Bar Fee Dispute Resolution Process and by lawsuit. Respondent failed to keep funds subject to her demand separate from his own, even after he acknowledged owing a partial refund.

Count III (JB)

In November 2007, JB was assaulted while incarcerated in a county jail. Soon after his release he was arrested and charged with Class B felonies for a home invasion and a related assault. **App. 51-52(T. 65-67)**. A public defender represented him and, in 2009, worked out a plea agreement. **App. 52 (T. 66); 60 (T. 99)**. Before sentencing, JB's mother, DB, contacted Respondent about representing JB in a possible claim against the jail and to set aside JB's guilty plea. **App. 52 (T. 66-67)**. Respondent agreed to try to set aside the plea for $5,000 and to defend him for $30,000. **App. 52 (T. 67-69)**. Although DB paid Respondent the $5,000, neither JB nor his mother, DB, had adequate means to pay Respondent the $30,000. **App. 52 (T. 69)**. DB suggested that she owned the home where she lived with JB, and that she would try to sell it so she would have adequate funds to pay Respondent. **App. 52 (T. 69)**. Respondent provided DB with a Promissory Note and a Deed of Trust, which, if executed, would give Respondent a security and ownership interest in her property. Respondent had no discussions with JB about how he was to get paid other than to explain that JB's mother was taking care of it. Respondent provided no written explanation to either JB or DB about (a) whether he was

charging interest, (b) whether either JB or DB should consult with independent counsel before executing the documents, or (c) whether, in preparing the documents, he was representing his own interests or those of his clients. **App. 54 (T. 74-75); 60 (T. 99); 75 (T. 158-161)**.

The Deed of Trust prepared by Respondent named Respondent as both the Trustee and the Beneficiary of the trust. **App. 76 (T. 163-164); 86 (T. 203-204); 161-165**. Under that arrangement, as trustee, he alone could decide whether and when he, as beneficiary, should take ownership of DB's property. **App. 161-165**.

While Respondent was representing JB, DB tried to sell the property to have liquid assets to pay his attorney fee. A realtor suggested that she list it for $52,000. **App. 156**. The price was later dropped to $45,000, and some arrangements were discussed to list it for $35,000. **App. 157**. It was not sold. **App. 53 (T. 71-72)**.

When Respondent prepared the deed of trust for DB, another deed of trust was already in place, as she had recently borrowed $12,376 against the property, in part to begin paying Respondent's earlier fee. **App. 52-53 (T. 69-70); 158-160**.

Respondent took no steps to determine the property's value. He looked at pictures and "knew it wasn't worth much." **App. 75 (T. 161)**. But, he also acknowledged: "It may be worth what she's asking for, not likely." **App. 75 (T. 161)**.

DB paid Respondent $1,000, but could not make additional payments. **App. 54 (T. 75); 257-258**. With Respondent's representation, JB eventually entered another plea agreement, with a lighter sentence than JB had earlier accepted. **App. 231-234**. JB was satisfied with Respondent's representation. **App. 62 (T. 106-107)**.

When JB pled guilty and after DB signed the quit claim deed, DB asked Respondent to provide $3,000 for her expenses. **App. 54 (T. 75-77)**. Per DB, Respondent agreed but did not provide that money. **App. 54 (T. 76-77)**. She eventually retained independent counsel, Greg Williams. With Williams' assistance, DB eventually entered into an agreement with Respondent whereby she would make $500 monthly payments for two years. Under that agreement Respondent signed a quit claim deed, giving the property back to DB after the two year payments were complete; Greg Williams agreed to hold the deed in escrow until those payments were complete. As of the hearing on November 22, 2013, DB had just one payment remaining before getting her house back and completing her obligations to Respondent. **App. 55 (T. 79-80); 57 (T. 87); 272-273**.

The Panel recommended dismissal of Count III.

Count IV (CB)

CB submitted a disciplinary complaint in 2012 indicating that he asked Respondent to represent him in a matter related to an apparent assault of CB while incarcerated.

Respondent attempted to gather evidentiary records to determine whether to represent CB. When CB became frustrated with the case progress, he complained to Informant.

Informant directed Respondent to provide certain information in response to the complaint. After being granted an extension, Respondent responded to the complaint. But, when asked for additional records on November 2, 2012, Respondent reported that

he could not meet the timeline set and that he would not be able to respond until the end of November. **App. 279-280**.

Another extension was granted until December 5, 2012. Respondent did not provide the additional material until March 2013, after retaining counsel in late January 2013. No other extensions had been requested. **App. 281-290**.

The Panel found the correspondence establishes Respondent's failure to promptly respond to lawful requests for information related to CB's complaint.

Count V (TJ)

In 2012, Respondent represented TJ in a business licensing matter. TJ submitted a complaint to Informant about that representation.

Respondent responded to Informant's initial inquiry in September 2012. But, when asked for additional records on November 2, 2012, Respondent reported that he could not meet the November 17, 2012, timeline set and that he would not be able to respond until the end of November. **App. 294-299**.

Another extension was granted until December 5, 2012. Respondent did not provide the additional material until March 2013, after retaining counsel in late January 2013. No other extensions had been requested. **App. 300-316**.

The panel found that correspondence establishes Respondent's failure to promptly respond to lawful requests for information related to TJ's complaint.

Count VI

Count VI was dismissed by Informant.

Count VII (OCDC)

In June 2012, Central Bank notified the OCDC that Respondent's client trust account was overdrawn by $425. **App. 317-319**. That notice, sent pursuant to Rule 4-1.15, was immediately forwarded to Respondent, with a request to provide certain bank records. **App. 320**. Within weeks, Respondent's lawyer (his associate) provided a written response, reporting that Respondent was "perplexed by the letter as his trust account had not overdrawn" and that Central Bank had determined it made a "coding error," and that the notice had been sent by mistake. **App. 39 (T. 15-16); 321-322**. The response also indicated the error occurred when Respondent was paying out garnishment funds that had been received on behalf of a client and deposited into his trust account.

The OCDC continued its investigation upon checking further with the bank. **App. 39-40 (T. 17-18)**. The OCDC investigator again asked Respondent to produce bank records. **App. 323**. Respondent responded by writing: "My account was never in any jeopardy of overdraft and I object to your office's selective harassment of me, …". **App. 324**. He further reported that a mistake occurred when "my assistant sent a drawn check on the trust account when I thought she was going to send one from my operating account and I was deducting the amount held in trust. I caught the mistake before the check was refused and there was no issue with the check." **App. 324**.

In response to the investigator's request for records relating to the overdraft, Respondent wrote: "I have no supporting documents. But we know what this really is anyway. This is not an effort for you to resolve any perceived issue with this check, because there is no issue." Adding that the continued investigation was "improper and

harassing," he suggested the OCDC should trust him because he "maintained a top secret US Government clearance for many years." **App. 324**. Respondent soon provided some, but not all the documents requested. **App. 40 (T. 18-21); 325**. Per the investigator, many of the deposited items were not produced. **App. 40 (T. 20-21)**.

The OCDC investigator testified to her concern about Respondent's explanation that he intended to pay a garnishment from his operating account, but his assistant instead paid the check from his trust account. The investigator noted the garnishment should not have been paid from his operating account (as Respondent said he intended), because the garnishment funds should have been held in his trust account.

She analyzed the produced records and prepared a spreadsheet reflecting all bank transactions in Respondent's trust account between July 1, 2011, and July 18, 2012. **App. 41 (T. 21-23); 326-332**.

The investigator then asked Respondent to provide trust account bank statements for the period from June 2011 through December 2011, and copies of checks and deposit slips for that period. **App. 333**. After missing one deadline and missing another agreed extension of time to respond, Respondent was asked again for the documentation. **App. 42 (T. 27-28); 334-337**. Another letter was sent when Respondent did not meet the requested timeline and was asked again to produce the documents. **App. 338**.

After those delays Respondent provided some, but not all, of the requested documents. Upon analyzing the bank records provided by Respondent, the OCDC investigator sent a final request to Respondent. **App. 42 (T. 29); 341-342**. In that letter, dated December 18, 2012, the OCDC requested Respondent's own records for thirteen

specified clients whose funds had been in his trust account. **App. 42 (T. 29)**. And, the OCDC demanded "client settlement sheets, billing records, client ledgers or other supporting documentation" to determine the purpose of transfers to or from Respondent's three bank accounts and four specific trust account checks. Finally, the letter requested copies of dated records for ten particular deposits into Respondent's trust account during that time period. **App. 341-342**.

That last letter from the OCDC asked Respondent to provide those records by January 17, 2013. **App. 43 (T. 30); 341-342**. No response was provided until January 31, 2013. At that time, Respondent provided a few copies of checks but no other records. He offered two explanations. First, he said he could not provide the requested "settlement sheets" because "these do not exist as Mr. Trapp has not prepared any relating to the matters about which you require." **App. 343-356**. He wrote "none were prepared or sent to the clients in question and we have not been able to discover any such sheets in our attempt to locate the information you requested."

Respondent further explained, "Our task was complicated considerably by a fire at Mr. Trapp's Columbia office which destroyed the computers and most of the records housed at that location." **App. 343-356**.

At the hearing Respondent explained the fire occurred on January 28, 2013, (eleven days after the deadline for the records to have been provided). Respondent reported he was in the process of setting up a new office in Columbia, which was to be his primary office; he said it already housed his computer servers. At that time, he said,

he also had his main office in Lake Ozark as well as other offices in Jefferson City and Kansas City.

Among the concerns reflected in the spreadsheet, listing Respondent's trust account transactions during 2011 and 2012, were the following:

a. There were multiple large transfers from Respondent's personal or business accounts into the client trust account. (Note the transfers on August 17, 2011 ($5,274), September 6, 2011 ($2,000), September 12, 2011 ($1,500 twice), June 21, 2012($1,000), June 28, 2012($1,500), and July 5,2012 ($1,500).) **App. 43 (T. 32)**. **App. 326-332**

b. On September 8, 2011, Respondent issued a $6,000 check written to BA. The memo line on the trust account check states "[BA] Settlement." The bank records indicate no contemporaneous deposits to the client trust account which might be payable to BA. Considering the possibility that the related deposit might have predated the July 1, 2011 record search, the investigator tracked the balance in the trust account. In the months prior to that $6,000 distribution, the account balance fell to $4,351.18 in early July, more than $1,500 less than the $6,000 payment to BA. **App. 43 (T. 32-33)**.

c. On September 20, 2011, Respondent deposited two checks to his client trust account from the Missouri State Treasurer. One check was payable to AE in the amount of $7,058.52 and the other was payable to LD in the amount of $54,377.51. Two disbursements are indicated on September 27, 2011: one to LD in the amount of $20,836.03 and one to AE in the amount

of $10,000. For whatever reason (not explained in the record), AE received more than the total amount of his settlement; also unexplained was that LD received less than half of the amount of her settlement. **App. 44 (T. 34)**. The investigator noted that a review of settlement sheets might have clarified the apparent discrepancy.

d. On October 27, 2011, a check from Progressive Insurance payable to SA and the Trapp Law Firm was deposited to the client trust account. The records, as shown on the investigator's spreadsheet, indicate a disbursement to SA on November 4, 2011 in the amount of $14,980.57, less than 30% of the total settlement. **App. 44 (T. 34)**. The OCDC investigator made specific demand for records relating to SA's case. **App. 341-342**. Respondent admitted he did not maintain settlement sheets for that case. **App. 343-356**.

e. On November 18, 2011, a check from Barton Mutual Insurance was deposited to Respondent's trust account. The check was payable only to Trapp and Associates. **App. 44 (T. 35)**. No records were available that could establish why Respondent received funds payable to only him – but requiring deposit into his trust account as if it was held in a fiduciary capacity for another person. And, no records were available to determine any other explanation for depositing his personal funds, in the event they were attorney fees, into his trust account.

f. On January 20, 2012, a check made payable to the Cole County Circuit Court was presented against the client trust account. The memo line referenced "[C] filing fee." **App. 44 (T. 35-36)**. The records offer no indication that funds from client C were ever deposited to the trust account. As the investigator explained, it could be assumed that the $115 transfer from a personal account the same day the disbursement was made pertained to C, but that would indicate the funds C advanced to Respondent were deposited to an operating or personal account, which would constitute commingling.

g. On February 15, 2012, a settlement check from Cameron Mutual payable to JB and MB was deposited to the client trust account. The amount of the check was $7,628.44. On February 21, 2012, that same amount, $7,628.44 was transferred from the client trust account to Respondent's personal or business account. No other disbursements from the client trust account were made to or on behalf of JB and MB. The investigator explained: Logically, this means that either the JB and MB were never paid, or JB and MB were paid from Respondent's personal or operating account. If the JB and MB were paid from Respondent's operating account, then those funds, belonging to them, were being held in an operating account – and not in trust. **App. 44 (T. 36)**. The OCDC investigator made specific inquiry for information related to JB and MB. **App. 341-342**. As noted, Respondent

reported that he did not maintain settlement sheets for cases in which he received client funds. **App. 343-356**.

h. On April 11, 2012, two checks were deposited to the client trust account and each of those deposited items included memos indicating "payment on bill." The investigator explained: If the client is paying a bill submitted to them by the attorney for services rendered, then those would be earned fees and should not be deposited to the client trust account; doing so would constitute commingling, she said. **App. 44 (T. 37)**.

i. On May 4, 2012, a check from Geico made payable to both HS and Respondent was deposited to his client trust account. The amount of the check was $10,815.81. The records indicate no disbursements from the client trust account to HS or a third party on HS's behalf. Despite an explicit demand from the OCDC investigator, Respondent provided no documentary (or other) explanation. Respondent stated, however, that no disbursements were made from other accounts on behalf of any clients listed in the OCDC's December correspondence. **App. 341-356**. No settlement sheet was produced by Respondent.

j. On May 7, 2012, a check from the Bank of Macks Creek was deposited to the client trust account in the amount of $51,790.90. The check was only made payable to Respondent, but it referenced his clients DE and LE. Those two people had given Respondent a check for $1,800 earlier that month for a Chapter 13 debt reduction. The investigator could not

determine if the check from the Bank of Macks Creek was to be held in trust for the DE and LE (or their creditors) or if the fact that it was payable to Mr. Trapp was indication that he held a lien on his client's property for which he was being paid during his representation of them. In her letter dated December 18, 2012, the OCDC investigator asked Respondent to document the transaction related to DE and LE; he reported that he could not. **App. 341-356**.

k. A check was disbursed from Respondent's client trust account on June 28, 2012, to client MH in the amount of $1,433.19. No corresponding funds related to MH were deposited into the client trust account. Respondent could not provide records to suggest why MH was owed $1,433.19. And, he had no records indicating whose funds were used to pay her.

During cross-examination of the OCDC investigator, Respondent's Counsel announced that "these are matters which will ultimately have some evidence presented. My client will obviously have an explanation." During the hearing, neither testimony nor documentary evidence was offered in explanation. In that same comment/question, Respondent's Counsel asked the investigator why she had not asked Respondent to address specific concerns. In fact, the investigator's last letter, **App. 341-342**, asked him to provide settlement sheets for those named clients. In his written response to that letter, he said: "As for the requested 'settlement sheets,' these do not exist. Mr. Trapp has not prepared any relating to the matters about which you inquire. We do not believe any

were prepared or sent to the clients in question and we have not been able to discover any such sheets in our attempts to locate the information you requested." **App. 343-356**.

In his last written response to the OCDC, Respondent also implied that he couldn't produce the requested specific records because they burned in the January 2013 fire: "Our task has been complicated considerably by a fire at Mr. Trapp's Columbia office which destroyed the computers and most of the records housed at that location." At the hearing, his questions of the OCDC investigator reinforced that implication. **App. 45-46 (T. 41-42)**. Eventually, under questioning, Respondent acknowledged that none of the burned records would have been responsive to the OCDC investigative requests. **App. 89 (T. 214)**. And, despite responding in writing to her specific demands by reporting he didn't have settlement sheets and other records, he testified a little differently at the hearing: "I think if she had ever posed the question, 'Can you explain the transaction that occurred on … August 17th, can you explain that,' I would have had the opportunity to do so. She didn't. And, I had no idea what she was looking for." Respondent also testified that he "gave [the investigator] everything." In fact, the investigator's last letter not only demanded settlement sheets for several named clients (including AE, LD, SA, JB & MB, HS, and LE & DE – the clients described above), it demanded documentation for ten listed transactions, four specific checks, and all transfers to and from three bank accounts. **App. 79 (T. 174); 341-342**. Despite that detailed request, Respondent denied the investigator's questions gave an indication that she was looking for information that would have answered the issues she addressed in the spreadsheet and her testimony. **App. 78 (T. 172-173)**.

Before sending her detailed December 18 letter, the OCDC investigator already had: (a) asked for documentation to explain the initial overdraft, **App. 320**, (b) sent a second letter for documentation when Respondent's explanation raised new concerns, **App. 323**, (c) requested one year's worth of client trust account statements, checks and deposit slips with an explanation that once those items were received, more information related to specific transactions would be required, **App. 333**, (d) sent a follow-up letter indicating that client ledgers, billing statements and settlement sheets would be required, **App. 337**, and (e) sent a fifth letter because Respondent had not met his agreed timeline to produce documents. **App. 338**.

Respondent admitted that he understood, in 2011 and 2012, that only client funds should be in his trust account. **App. 78 (T. 171)**. At the hearing, Respondent was asked whether he had explanations, supported by documentation, for the concerns addressed by the OCDC investigator and reflected in her spreadsheet. **App. 326-332**. He answered: "I have explanation for some, but whether or not I have documentation, I don't know. I certainly don't, but whether there is some that is attainable, I don't know." **App. 78 (T. 171)**. He added that none was available for the hearing. **App. 78 (T. 172); 79 (T. 174)**.

POINTS RELIED ON

I.

COUNT I: DISMISSED

COUNT II: RESPONDENT VIOLATED:

A. RULE 4-1.4 BY FAILING TO ADEQUATELY COMMUNICATE WITH HIS CLIENT, MD, ABOUT AN INVOICE HE SENT TO HER;

B. RULE 4-1.16(d) BY FAILING TO PROMPTLY RETURN UNEARNED FEES TO MD;

C. RULE 4-1.15(c) BY FAILING TO KEEP MD'S FUNDS SEPARATE FROM HIS OWN IN THAT HE DEPOSITED UNEARNED FEES INTO HIS OPERATING ACCOUNT; AND

D. RULE 4-1.15(j) BY FAILING TO SEGREGATE DISPUTED FUNDS FROM HIS OWN IN THAT WHEN MD DISPUTED FEES AND A NEW INVOICE, RESPONDENT DID NOT PLACE THE DISPUTED AMOUNT INTO HIS TRUST ACCOUNT, EVEN AFTER HE ACKNOWLEDGED OWING A REFUND.

COUNT III: RESPONDENT VIOLATED RULE 4-1.8(a) BY TAKING AN OWNERSHIP AND SECURITY INTEREST IN HIS CLIENT'S RESIDENCE WHICH WAS ADVERSE TO HIS CLIENT, WITHOUT ADVISING EITHER HIS CLIENT OR THE PROPERTY

OWNER (HIS CLIENT'S MOTHER) TO SEEK INDEPENDENT COUNSEL.

COUNT IV: RESPONDENT VIOLATED RULE 4-8.1 BY FAILING TO PROMPTLY RESPOND TO AN OCDC INVESTIGATION INTO HIS REPRESENTATION OF CB.

COUNT V: RESPONDENT VIOLATED RULE 4-8.1 BY FAILING TO PROMPTLY RESPOND TO AN OCDC INVESTIGATION INTO HIS REPRESENTATION OF TJ.

COUNT VI: DISMISSED

COUNT VII: RESPONDENT VIOLATED:

A. RULE 4-1.15 BY COMMINGLING CLIENT FUNDS WITH HIS OWN, IN THAT HE PLACED PERSONAL FUNDS IN HIS TRUST ACCOUNT AND PLACED CLIENT FUNDS IN HIS OPERATING ACCOUNT; AND

B. RULE 4-1.15 BY FAILING TO MAINTAIN ADEQUATE RECORDS OF FUNDS RECEIVED, HELD, DEPOSITED AND DISBURSED ON BEHALF OF HIS CLIENTS.

In re Snyder, 35 S.W.3d 380 (Mo banc 2000)

State ex rel. Henderson v. Blauer, 723 S.W. 2d 589 (Mo. App. W.D. 1987)

Kansas City Area Transportation Authority v. 4550 Main Associates, 893 S.W.2d 861 (Mo. App. WD 1995)

25Am.Jur.2d *Domicile*, Sec. 41 (1966)

28C.J.S. *Domicile* Sec. 12g(7) (1941)

Rule 4-1.4 (2011)

Rule 4-1.8 (2011)

Rule 4-1.15 (2011)

Rule 4-1.16 (2011)

Rule 4-8.1 (2011)

POINTS RELIED ON

II.

A. 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 INDEFINITELY, WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR AT LEAST SIX MONTHS.

B. PROBATION SHOULD NOT BE GRANTED UNDER RULE 5.225 BECAUSE:

1. RESPONDENT'S UNWILLINGNESS TO ACCEPT THE COURT'S AUTHORITY TO REGULATE HIS TRUST ACCOUNTING PRACTICES MAKES IT UNLIKELY THAT THE PUBLIC CAN BE PROTECTED; AND

2. RESPONDENT'S DEFIANT REACTIONS TO THE OCDC'S INVESTIGATIONS MAKE IT UNLIKELY THAT HE CAN BE ADEQUATELY SUPERVISED.

In re Stricker, 808 S.W.2d 356 (Mo. banc 1991)

In re Tessler, 763 S.W.2d 906 (Mo. banc1990)

In re Vails, 768 S.W.2d 78 (Mo. banc 1989)

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

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

Rule 5.225

ARGUMENT

I.

COUNT I: DISMISSED

COUNT II: RESPONDENT VIOLATED:

A. RULE 4-1.4 BY FAILING TO ADEQUATELY COMMUNICATE WITH HIS CLIENT, MD, ABOUT AN INVOICE HE SENT TO HER;

B. RULE 4-1.16(d) BY FAILING TO PROMPTLY RETURN UNEARNED FEES TO MD;

C. RULE 4-1.15(c) BY FAILING TO KEEP MD'S FUNDS SEPARATE FROM HIS OWN IN THAT HE DEPOSITED UNEARNED FEES INTO HIS OPERATING ACCOUNT; AND

D. RULE 4-1.15(j) BY FAILING TO SEGREGATE DISPUTED FUNDS FROM HIS OWN IN THAT WHEN MD DISPUTED FEES AND A NEW INVOICE, RESPONDENT DID NOT PLACE THE DISPUTED AMOUNT INTO HIS TRUST ACCOUNT, EVEN AFTER HE ACKNOWLEDGED OWING A REFUND.

COUNT III: RESPONDENT VIOLATED RULE 4-1.8(a) BY TAKING AN OWNERSHIP AND SECURITY INTEREST IN HIS CLIENT'S RESIDENCE WHICH WAS ADVERSE TO HIS CLIENT,

WITHOUT ADVISING HIS CLIENT TO SEEK INDEPENDENT COUNSEL.

COUNT IV: RESPONDENT VIOLATED RULE 4-8.1 BY FAILING TO PROMPTLY RESPOND TO AN OCDC INVESTIGATION INTO HIS REPRESENTATION OF CB.

COUNT V: RESPONDENT VIOLATED RULE 4-8.1 BY FAILING TO PROMPTLY RESPOND TO AN OCDC INVESTIGATION INTO HIS REPRESENTATION OF TJ.

COUNT VI: DISMISSED

COUNT VII: RESPONDENT VIOLATED:

A. RULE 4-1.15 BY COMMINGLING CLIENT FUNDS WITH HIS OWN, BY PLACING PERSONAL FUNDS IN HIS TRUST ACCOUNT AND BY PLACING CLIENT FUNDS IN HIS OPERATING ACCOUNT; AND

B. RULE 4-1.15 BY FAILING TO MAINTAIN ADEQUATE RECORDS OF FUNDS RECEIVED, HELD, DEPOSITED AND DISBURSED ON BEHALF OF HIS CLIENTS.

Count II (MD)

Respondent violated Rule 4-1.4 (communication) by failing to adequately communicate with MD in that he did not answer her attempts to discuss his legal work and the invoice he sent for $200. She testified at length about her failed attempts to find out why the $200 invoice was sent to her soon after she had already paid $3,500.

Although Respondent testified that he did not know why she was frustrated, she explained that he never spoke directly to her about that invoice, despite her many efforts to talk to him.

Respondent had neither correspondence nor notes of conversations about his reported efforts to communicate with MD about the $200 bill. Despite having no notes, he offered several inconsistent explanations to the OCDC. He first referred to MD's claim as fraudulent; he said the $3,500 payment had been depleted and that the $200 invoice was for work beyond the $3,500. He also reported to the OCDC that he would have agreed to mediate – but not arbitrate – the dispute in the Missouri Bar Fee Dispute Program; in an earlier letter to MD, however, he refused either mediation or arbitration. He specifically rejected her request for a refund, on the basis that he had earned the entire $3,500 by legal work, including several hours defending against the fee dispute and discipline claim. At one point, he argued against a refund by relying on a "non-refundable retainer" provision in his contract. At another point, he agreed that he should refund $700, but neither made the payment nor deposited any disputed amount into his trust account. In another letter to the OCDC, he claimed that the $200 invoice was a mistaken effort by an employee to seek a filing fee from MD. Eventually, on the trial date after MD sued him for a refund, he refunded $1,750 of her $3,500 initial payment.

At the DHP hearing, Respondent agreed, in hindsight, that $200 of the initial $1,200 probably should have been in the trust account, but, he added: "am I willing to concede that based on what I know from this? No." **App. 71 (T. 144-145)**. He also admitted it was "doubtful" he had completed six hours of legal work – at $200 per hour –

before putting the $1,200 into his operating account; that account also covered payroll for himself and his staff. **App. 71 (T. 144)**.

Respondent violated Rule 4-1.16(d) (failure to return client property) by failing to promptly return unearned advance fees in that he resisted MD's demands for a refund of the advance fees throughout a fee dispute process and until a hearing date was scheduled in a lawsuit against him that was filed to force his refund of unearned fees. His reliance on his "billing statement" to establish that he had earned all $3,500 assumes that he should receive credit for working to defend himself against MD's fee dispute, lawsuit and disciplinary complaint. That reliance is counter to Missouri law: Effort spent for an attorney's personal benefit and not for his client's benefit should not be chargeable as fees, *Kansas City Area Transportation Authority v. 4550 Main Associates*, 893 S.W.2d 861 (Mo. App. WD 1995). In the Kansas City ATA case, the Appellate Court refused an attorney fee for work done by the attorney intended only to assert a lien or recover fees, *Kansas City Area Transportation Authority v. 4550 Main Associates*, 893 S.W.2d at 871.

Respondent violated Rule 4-1.15(c) by failing to keep MD's funds separate from his own. He acknowledged that he placed MD's initial $1,200 payment into his operating account, despite that $200 of that amount was probably intended as a filing fee. Under any colorable theory, that $200 of her initial $1,200 payment belonged to MD until spent for a filing fee because Rule 4-1.15 required him to keep her funds in his trust account. His reliance on his non-refundable retainer clause for placing his entire fee into the operating account is misguided. The Supreme Court Advisory Committee issued Formal Opinion 128 on May 18, 2010, explicitly rejecting the propriety of "non-refundable

retainers." MD paid Respondent $1,200 in September 2010 and another $2,300 in October 2010. As authority for its position, Formal Opinion 128 restated a provision of Rule 4-1.15(f): "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," Missouri Supreme Court Rule 4-1.15(f). Although Formal Opinion 128 was new in 2010, that Rule (Rule 4-1.15(f)) was initially adopted as Rule 4-1.15(e) significantly before the opinion; it became effective January 1, 2008, almost three years before Respondent deposited all of MD's advance payment into his operating account.

Respondent's deposit of the entirety of MD's funds into his operating account and spending them as his own before earning that amount violated Rule 4-1.15(f). His "billing statement" indicates the dates, hours and tasks he reportedly worked to earn the fee. Per his billing statement, he did not, of course, complete $3,500 of work before depositing the payments into his operating account; many of the tasks completed occurred more than a month after he deposited MD's advance fees into his operating account on September 10, 2010 and October 20, 2010. Several tasks weren't completed until January, April and May 2011. **App. 112-115**.

Respondent also violated Rule 4-1.15(j) by failing to place disputed funds into his trust account. At the least, once Respondent acknowledged that he might owe a refund of $700, he was obligated to place those funds in trust.

As to Count II, the Panel found that Respondent violated the Rules as set out in the Amended Information.

Count III (JB)

Respondent acknowledged that he represented JB and that he and his firm prepared the documents giving him an interest in DB's home. And, he admitted that he did not obtain written, informed consent from either JB or DB (Answer to Amended Information). He argued that Rule 4-1.8 was not applicable because DB (the person whose property he took) was not his client. He also argued that the documents he prepared for DB's signature had no legal impact on DB's son, JB (who was Respondent's client).

Respondent is clearly correct that DB was not his client. Rule 4-1.8, however, requires attorneys to obtain informed consent before knowingly acquiring "an ownership, possessory, security or other pecuniary interest adverse to the client." DB and JB testified that JB lived with DB in the house that Respondent took as security and then ownership, as part of the fee arrangement whereby DB agreed to pay Respondent for representing JB. And, JB testified he was residing in that house when he was arrested. In defending JB, Respondent filed a Motion to Suppress Evidence stating JB resided at the house and had possessory interest in items found in the house. **App. 260-271**.

As to Count III, the Panel found Respondent did not violate Rule 4-1.8; the panel's explanation was simply that because DB was not Respondent's client, he owed no duty to her. **App. 20-32**. The Panel did not address the provision of the rule charged in the Information, that is, whether the security and ownership interests taken by Respondent were adverse to JB's interests.

The Court should conclude that JB, a person living in a house owned by his mother, had an interest in living in the house. He had grown up in the house; he lived there when he was arrested. And, as Respondent wrote in his Motion to Suppress, JB kept his things at that house. Other than the Department of Corrections, it was where JB lived from 2002 through 2013. Respondent's security interest was, therefore, adverse to JB's interests.

It may be helpful to recognize that JB's incarceration did not change his residency from his home in Camden County to the institution where he was incarcerated. In 1987, the Western District Court of Appeals ruled that an inmate in a correctional center in Randolph County maintained a residence in St. Louis City, where he last resided before his incarceration, and not Randolph County, *State ex rel. Henderson v. Blauer*, 723 S.W. 2d 589 (Mo. App. W.D. 1987). Like Informant, that court did not discover other Missouri court opinions on the issue. But, in deciding the point, the Western District relied on the following guidance from 25Am.Jur.2d *Domicile*, Sec. 41 (1966): "A person does not ordinarily gain or lose a domicile by becoming an inmate or patient in a public institution, but retains the domicile he had at the time of his entry into the institution … One incarcerated in a prison has no domicile at that place, the requisite intent or desire to make a home there being absent." The Western District further relied on similar language in 28C.J.S. *Domicile* Sec. 12g(7) (1941), *State ex rel. Henderson v. Blauer*, 723 S.W. 2d at 590.

Respondent owed a duty to JB and DB to encourage them to seek independent legal advice before executing documents prepared by Respondent that allowed

Respondent to take ownership of the house adverse to JB's interest. Rule 4-1.8 does not require that JB had a "legally recognizable interest in the property" – as argued in Respondent's Answer. A violation occurs if the client's interest is adverse to the attorney's security or ownership interests and the attorney does not take the steps set out in Rule 4-1.8(a). Respondent admitted that he did not take those steps – with either JB or JB's mother, DB. The documents speak for themselves as to whether Respondent's documents gave him security or ownership interests in the property.

Taking a security interest in a client's property is not, per se, a violation of an attorney's ethical obligations. An attorney may accept property other than cash in payment of a fee, but the acquisition by the lawyer of a proprietary interest in the client's property is subject to "heightened scrutiny" as well as the additional safeguards provided by the notice provisions of Rule 4-1.8(a). *In re Snyder*, 35 S.W.3d 380, 383 (Mo banc 2000).

Respondent violated Rule 4-1.8(a) by knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to his client in that he prepared a Promissory Note and Deed of Trust for DB to sign giving himself those interests in the home where she and his client, JB, resided, without advising either DB or JB as to the desirability of seeking the advice of independent legal counsel.

Respondent violated Rule 4-1.8(a) by knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to his client in that he prepared a Promissory Note and Deed of Trust for DB to sign that gave himself those interests in the home where she and his client, JB, resided without obtaining informed, written and

signed consent from either DB or JB as to whether Respondent was representing either JB or DB in the transaction.

Respondent violated Rule 4-1.8(a) by knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to his client in that he prepared a Quit Claim Deed transferring the house where DB resided with his client, JB, to himself, without obtaining informed, written and signed consent from either DB or JB as to whether Respondent was representing either JB or DB in the transaction.

Respondent violated Rule 4-1.8(a) by knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to his client in that he prepared a Quit Claim Deed transferring the house where DB resided with his client, JB, to himself, without advising either DB or JB as to the desirability of seeking the advice of independent legal counsel.

Count IV (CB)

As the Panel found, the correspondence establishes Respondent's failure to promptly respond to lawful requests for information related to CB's complaint. That misconduct constitutes a violation of Rule 4-8.1.

Count V (TJ)

As the Panel found, the correspondence establishes Respondent's failure to promptly respond to lawful requests for information related to TJ's complaint. That misconduct constitutes a violation of Rule 4-8.1.

Count VII (OCDC)

In 2011 and 2012 Respondent violated Rule 4-1.15 by failing to keep client funds separate from his own, in that he deposited non-trust funds into his client trust account and deposited client funds (including funds payable to clients and not-yet-earned fees) into his operating account. By example, Respondent repeatedly made large transfers of funds from his operating account into his trust account – with no annotation. **App. 326-332**. 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 funds should never be held in a trust account. With that in mind, maybe two possible explanations exist for those six large transfers from Respondent's operating account to his trust account: Perhaps, until the transfers, he had been receiving or holding funds in his operating account that should have been in his trust account (because they didn't belong to him); or, perhaps he was replenishing the trust account with his own money because he had withdrawn client funds for other clients or himself; or, perhaps he was depositing his own funds into the trust account for some personal reason. Regardless of the explanation, if fiduciary funds were in his operating account, he had commingled client and his own funds in that account and violated Rule 4.1.15. Conversely, if the funds he transferred into the trust account were his own, he then commingled funds in his trust account and violated Rule 4-1.15. The records provided by Respondent don't explain those transfers. Respondent has not otherwise explained the transfers.

As to Respondent's $6,000 trust account check to BA, written without supporting documentation, the records establish the funds were owed to BA; but, no corresponding

deposit had been recently made. If BA's funds had already been in trust when the OCDC examination period began, then BA's monies were used - at least for a while - for someone else. That conclusion is evident because Respondent's trust account balance dropped below $5,000 in the months before Respondent paid BA. If, on the other hand, the funds paid to BA belonged to Respondent until paid out, then Respondent was holding his own funds in the trust account. In either event, the funds were improperly commingled.

On November 18, 2011, a check payable only to Respondent from Barton Mutual Insurance was deposited into Respondent's trust account. If that check solely represented funds owed to Respondent, he commingled his own funds with client funds by placing it into his trust account. If, on the other hand, some or all of those funds were owed to another, a corresponding distribution to himself and the other party should appear. No such transactions were apparent in the bank records. Other corresponding records were not available because, as he admitted, Respondent had none.

On February 15, 2012, a settlement check from Cameron Mutual payable to JB and MB was deposited to the client trust account. The amount of the check was $7,628.44. Six days later, February 21, 2012, that same amount, $7,628.44 was transferred from the client trust account to Respondent's personal or business account. No other disbursements from the client trust account were made to or on behalf of JB or MB. Logically, this means either that JB and MB were not paid, or they were paid from Respondent's personal or operating account. If JB and MB were paid from Respondent's

operating account, then those funds, belonging to them, were then being held in that account – and not in trust.

As to the April 2012 deposit into Respondent's trust account indicating "payment on bill," if the notation accurately reflects an earned attorney fee, Respondent then commingled his own earned funds with any client funds also held in his trust account.

In 2011 and 2012, Respondent violated Rule 4-1.15 by failing to maintain adequate records of funds received, held, deposited, and disbursed on behalf of his clients. Examples of missing records include an absolute failure to maintain accountings and settlement sheets of funds received, held, and paid out from his trust account. He admitted that he did not keep those records. Although he initially implied that a fire prevented his production of certain records to the OCDC, he eventually acknowledged that none of the records requested by the OCDC investigator were lost in the fire.

In 2011 and 2012, Rule 4-1.15 required Respondent to maintain the following trust accounting records for at least five years: "checkbooks, cancelled checks, check stubs, vouchers, ledgers, journals, closing statements, accountings or other statements of disbursements rendered to clients or other parties with regard to trust funds or similar equivalent records clearly and expressly reflecting the date, amount, source, and explanation for all receipts, withdrawals, deliveries and disbursements of the funds or other property of a client or other parties." Rule 4-1.15(d) (eff. Jan. 1, 2010). Those record requirements are not intended to simply burden attorneys; they establish fundamental procedures for one of the few professions authorized to hold funds in a fiduciary capacity. When attorneys hold property for others, it must be segregated from

the attorneys' own property; and, attorneys must keep records to assure that it is protected. Without enforcement of those rules, the profession could lose the public trust and lose the authority to serve as fiduciaries.

ARGUMENT

II.

A. 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 INDEFINITELY, WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR AT LEAST SIX MONTHS.

B. PROBATION SHOULD NOT BE GRANTED UNDER RULE 5.225 BECAUSE:

1. RESPONDENT'S UNWILLINGNESS TO ACCEPT THE COURT'S AUTHORITY TO REGULATE HIS TRUST ACCOUNTING PRACTICES MAKES IT UNLIKELY THAT THE PUBLIC CAN BE PROTECTED; AND

2. RESPONDENT'S DEFIANT REACTIONS TO THE OCDC'S INVESTIGATIONS MAKE IT UNLIKELY THAT HE CAN BE ADEQUATELY SUPERVISED.

Sanction

Respondent's license should be suspended. Probation is not appropriate.

If Respondent was merely sloppy in his compliance with the rules intended to protect clients and if he was simply confused about his fiduciary obligations to preserve, record, and segregate client funds, perhaps a stayed suspension with extensive probation

conditions would offer hope for improvement. But, Respondent's multiple explanations about a likely mistaken invoice sent to MD (Count II) and his multiple and inherently inconsistent explanations about his failure to provide documentary response to the many detailed items of concern in his trust accounting procedures (Count VII), and his denial of commingling funds after confronted with evidence that he held client funds in his operating account and personal funds in his trust account, provide great concern about this court's ability to protect the public. His refusal to keep simple and mandatory fiduciary records and his denial of accountability establish, at best, an ignorance of the rules that is defiant.

Several prior decisions of the Court support the imposition of a suspension in the instant case. In 1989, the Court suspended an attorney who engaged in a "persistent failure to appear when requested;" the Court noted that his "procrastination in refunding the fee (after promising discipline authorities that he would) constitutes trifling with the disciplinary process," warranting a suspension, despite "trying personal circumstances" and other mitigating circumstances. *In re Vails*, 768 S.W.2d 78 (Mo. banc 1989).

In 1991, the Court suspended a lawyer who displayed a pattern of failing to communicate with his clients and then failed to cooperate with disciplinary investigations. Although a Special Master recommended dismissal of a count involving non-cooperation because the underlying count was dismissed, the Court disciplined him under Rule 4-8.1, noting, "Had Mr. Stricker responded to the bar committee's letter and provided the evidence that he later presented at the disciplinary hearing, the matter could have been resolved promptly. The duty to cooperate with the committee is not dependent

upon the merits of the complaint. Mr. Stricker's failure to cooperate constitutes a violation of Rule 8.1." *In re Stricker*, 808 S.W.2d 356, 357-358 (Mo. banc 1991).

Finally, in 1990, the Court suspended a lawyer for neglecting two clients' matters, failing to keep a sufficient balance in his trust account to pay his obligations (with no finding of misappropriation), and failure to cooperate with the investigation in that he, like Respondent, failed to refund funds as agreed and failed to provide requested documents to the disciplinary authorities. Evidence of prior discipline was not apparent in the decision. Despite that and mitigation in the form of emotional and mental issues, the Court suspended this lawyer indefinitely, with no leave to apply for reinstatement for at least six months. *In re Tessler*, 763 S.W.2d 906 (Mo. banc1990).

The following ABA Sanction Standards apply:

II. Theoretical Framework

> The standards do not account for multiple charges of misconduct. The ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct.

Standard 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.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.).

Respondent's trust accounting practices are concerning. They result in the most serious charges in this case. He appears to ignore the basic precepts of his fiduciary obligations. The few records he maintains are a shambles; he routinely transfers funds from his operating account to his trust account without documentation; and he acknowledged that he does not prepare settlement sheets or accountings to provide clients with a record of trust account transactions with their funds. Attorneys who fail to maintain complete records and reconcile their trust accounts put client funds at risk of misallocation.

Without further records, Informant cannot establish whether clients actually lost funds during 2011 – 2012, but the clients whose funds were at issue have not submitted complaints to the OCDC. In any event, Standard 4.12, on its face, does not 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 (Il. 1983); ABA Standard 4.12, Commentary.

From another perspective, it is important to consider that every trust accounting violation creates at least the potential for harm. Commingling client and personal funds inherently creates injury or potential injury to a client; at the very least, client funds become subject to attorneys' creditors' attachment efforts when they are commingled. Suspension is the proper sanction for commingling client funds.

Standard 4.33

> Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

Although DB came to Respondent with the idea of using her house for collateral so that she could pay him for representing her son (JB), Respondent should have obtained written informed consent before asking her to sign over her house to him – in the form of a promissory note, a deed of trust, and later, a quit claim deed. Respondent's failure to suggest, in writing, that JB and DB get independent counsel before signing the documents effectively prevented them from getting another attorney's advice. Even if they had decided to proceed after independent legal consultation, it is difficult to imagine that an independent attorney would have recommended that DB sign a deed of trust allowing Respondent to serve as trustee while also waiting for forfeiture as the beneficiary. It is difficult to imagine that, had JB or DB obtained independent legal advice, that advisor would have agreed to collateralize and then quit claim real property without an appraisal of the property.

Standard 4.63

> Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.

Respondent failed to respond accurately to MD's reasonable requests for information about his $200 invoice (Count II). His later confusing explanations exacerbate, rather than mitigate, that failure.

Aggravating Circumstances

Standard 9.22

Factors which may be considered in aggravation. Aggravating factors include:

(d) Multiple offenses

Respondent's trust accounting violations (Rule 4-1.15) don't derive from a single – or even a few – isolated mistakes. Instead, the entire analyzed year was replete with improper transfers from personal accounts to his trust account and numerous other instances of commingling client and third party funds – including those of MD discussed in Count II. From 2011-2012, Respondent's records of client property held as a fiduciary were mostly non-existent. It does not appear that his records had been any better before that time, because the concept of maintaining any settlement or other documents establishing the breakdown of client and attorney settlements seemed novel to him. Although Rule 4-1.15 has required settlement sheets at least since 1990, Respondent, who was admitted to practice in 2001, seemed to believe that the recent 2013 amendment added that requirement. **App. 86 (T. 205)**. He is correct that the Court added more detail to trust accounting obligations in 2013, but Missouri lawyers

have been required to provide complete records and produce accountings of client funds for their clients since before Respondent first studied or practiced law. See Rule 4-1.15(a) (Eff. 1990), requiring that "complete records" be maintained for five years, and Rule 4-1.15(b) (Eff. 1990), requiring "accountings" to be provided to clients whose funds were held in trust.

His violation of Rule 4-1.8 by failing to advise JB and DB to seek independent counsel contributed to his collection of violations. And, he failed to communicate with MD and then told the OCDC a variety of inconsistent stories about an event that was probably a simple mistake by him or his assistant. Respondent's future clients are at risk when his minor mistakes turn into bigger problems because he refuses to look into the problem and refuses to speak directly to his client, then spends inordinate effort denying the mistake, and then offers inconsistent and impossible explanations in the resultant disciplinary complaint.

(e) Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency

Respondent repeatedly delayed responding to the OCDC; he didn't meet his own timelines for responding; at times, he refused to respond; and, he complained bitterly upon being asked to provide documentation of his handling of client funds. After that, he complained to the hearing panel that

he wasn't asked the questions that would have allowed him to explain many evident discrepancies in his trust account, despite being reminded of an OCDC letter that demanded specific documents related to specified transactions in his trust account.

(f) Submission of false evidence, false statements, or other deceptive practices during the disciplinary process

Respondent's claim that a bank 'coding error' caused his initial overdraft notice, and his failure to meet his agreed timelines and his multiple inconsistent explanations in Count III (MD) indicate an effort to mislead the disciplinary investigators.

(i) Substantial experience in the practice of law.

At the time of these violations, Respondent had been practicing for ten years. He managed offices in several cities.

Mitigating Circumstances

Standard 9.32

Factors which may be considered in mitigation. Mitigating factors include:

(a) Absence of a prior disciplinary record.

Probation

Missouri Supreme Court Rule 5.225 sets the minimum standards for the use of probation in Missouri discipline cases. Briefly, 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 doesn't

warrant disbarment, Rule 5.225. Respondent's continued denials raise concerns about his willingness to comply with fundamental fiduciary obligations when he holds client funds; Informant has concerns that the public cannot be protected. His frequent refusals to respond to disciplinary investigations provide concerns about whether he can be supervised. If the Court does not accept those positions, the Court might determine Respondent is eligible for probation under Rule 5.225; the Rule, however, doesn't require the Court to grant probation to all eligible violators. Respondent's defiance in the face of numerous established trust accounting violations weighs against probation. Also weighing against probation is Respondent's history of failing to respond to his client's and OCDC's inquiries (as established in Counts II, IV, V and VII - the overdraft and trust accounting questions). This Court has addressed the effect of unapologetic attorneys in the past: In the *Stricker* case, discussed above, the Court suspended a lawyer, at least in part, because: "Mr. Stricker appears not to confront his difficulties but rather to use them to avoid the consequences of his inattentiveness and untruthfulness." *In re Stricker*, 808 S.W.2d 356, 361 (Mo. banc 1991).

Respondent's unwillingness to adopt basic safekeeping procedures not only aggravates; it also distinguishes this case from a 2009 discipline case in which probation was granted. In that case, the lawyer settled a case without his client's permission, engaged in a conflict of interest by using a fee agreement giving him sole authority to settle, failed to notify a client that he had withdrawn, and "he regularly paid personal obligations out of his portion of settlement proceeds that remained in his IOLTA account," after the settlement checks had cleared. The Court further explained: "While it

may be true that Mr. Coleman did not misuse funds by using client funds to pay personal bills or convert any client funds, he did use his IOLTA account for personal use." There were no allegations of misappropriation. Significantly, the Court also found: "Mr. Coleman's actions arose 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." *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009).

In considering whether to grant probation in this case, the Court should consider two questions drawn from Rule 5.225(a)(2)(A): First, can Respondent's clients be protected if he does not acknowledge his past failures to protect them? And, second, is it reasonable to expect that he can be adequately supervised - given his record of defiance, refusing to provide prompt and complete information and documentation to the OCDC about his practice?

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

CONCLUSION

Informant recommends that Respondent's license be suspended indefinitely. Aggravating circumstances weigh against staying the suspension because Respondent's inconsistent explanations and his delayed and incomplete responses indicate a troublesome lack of respect for the Court's authority to regulate the profession. The suspension should be indefinite, and continue for at least six months. If stayed, Respondent should be placed on probation under the terms and conditions recommended by Informant.

Respectfully submitted,

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ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2014, a true and correct copy of the foregoing was served via the electronic filing system pursuant to Rule 103.08 on:

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CERTIFICATION: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 11,514 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Sam S. Phillips