

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:)
)
MARK BELZ,) **Supreme Court #SC88985**
)
Respondent.)

INFORMANT'S BRIEF

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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

FACTS

Mark Belz, Respondent, was the sole shareholder and “managing partner” of a Clayton, Missouri law firm, Belz and Jones, from the mid-1990’s through early 2003. **App. 9-10 (T. 23-25).** During that period, he maintained control over the financial records of the firm; it was his responsibility to transfer funds to and from the firm’s escrow and operating accounts. **App. 9-10 (T. 23-25), 14 (T. 42-43), 29 (T. 103-104), 114.** (Mr. Belz described himself as the sole shareholder, but referred to his colleagues as partners. He said the lawyers’ income was based on an “eat what you kill” apportionment. **App. 9-10 (T. 23-25).**)

In the mid-1980’s, Mr. Belz began representing Bert and Mildred Kaepfel. When the Kaepfels created revocable living trusts, Mr. Belz was named as successor trustee; he began serving as trustee after Mildred Kaepfel died in the late 1990’s. As trustee, he was authorized and obligated to use trust funds for Bert Kaepfel’s benefit. To that end, Mr. Belz paid Mr. Kaepfel’s living expenses from the trust’s money market fund. **App. 116-118.**

Beginning in December 1998 and continuing for more than two years, through January 2001, Mr. Belz also paid his personal mortgage from the Kaepfel assets. **App. 116-118.** He did so by taking periodic withdrawals from the firm’s trust account, which then contained client money, including funds from the Kaepfel Trust. **App. 15 (T. 45-48).** On eight occasions, Respondent made single mortgage payments of \$1,100.90. On

two other occasions, he apparently made double mortgage payments, having withdrawn \$2,201.80 (or twice the amount of the other eight withdrawals). The total amount taken from the Kaepfel Trust for Mr. Belz's mortgage payments was \$13,210. **App. 116-118.**

Respondent's records indicate that from 1998 through April 2000 he reimbursed the firm's trust account within a few weeks or months of his withdrawals for mortgage payments. **App. 15 (T. 46), 16-17 (T. 52-54), 115-119.** Later mortgage payments, made from client assets in November and December 2000 and in January 2001, were not reimbursed for almost two years, not until December 23, 2002. **App. 15 (T. 46), 116-117.** At that point, Respondent was in the hospital, believing he would die from complications resulting from surgery for treatment of Crohn's Disease. **App. 7 (T. 13-15).** Days earlier, he had confessed his use of the client funds to his son. Over the next several months, he borrowed more money from friends to reimburse other clients. **App. 7 (T. 13-15).**

During the Panel hearing in this case, Mr. Belz repeatedly acknowledged that he knew using client funds for his mortgage was wrong, but, as he told his psychiatrist, he had wanted to "make more money to nail down [his] retirement." **App. 13 (T. 37-39), 14 (T. 42), 21-22 (T. 72-73), 22-23 (T. 75-78), 28-29 (T. 99-101), 257, 381-382 (T. 13-15).**

Belz also used the Kaepfel Trust's money market fund to pay his firm's fees for services as Trustee and representing the trust. **App. 118.** From mid-1999 through December 2002, Belz intentionally overpaid his firm, taking over \$105,000 in fees despite earning only \$54,000. By that conduct, he took more than \$51,000 from the Kaepfel Trust that belonged not to him, but had been saved by the Kaepfels who had

entrusted Mr. Belz with their money. Those funds were reimbursed in March 2003, a little over two months after Mr. Belz's initial confession to his son. **App. 118.**

Beginning in January 2002, Mr. Belz also represented the estate of Anne Friedman. **App. 115-117.** Ms. Friedman's estate was substantial. As Ms. Friedman's stocks were sold to make payments to her beneficiaries, most of the funds were deposited into the Belz and Jones Trust Account, and not into a separate interest bearing estate account which had been established to hold the Friedman Estate funds. From January through October 2002, over \$700,000 (from the Friedman Estate) was deposited into the firm's trust account. During that same year, Respondent withdrew \$102,000 from the Friedman portion of the trust account for his own use. The withdrawals were made in even amounts, on eleven occasions, and ranged from \$5,000 (three withdrawals), \$7,000 (once), \$10,000 (five withdrawals) and \$15,000 (twice). **App. 17-18 (T. 55-57), 115-118.** In his later report of the misappropriations to the OCDC, Respondent explained that his purpose in taking those funds was to pay the operating expenses of the firm. **App. 118.** As noted, Belz also explained that he was the sole shareholder and managing partner of the firm. **App. 9-10 (T. 23-25).** He acknowledged that he knew his conduct was wrong at the times of the transfers. **App. 18 (T. 57).**

Belz reported that he borrowed money to reimburse those particular funds in March 2003, more than a year after his first withdrawal and more than two months after he confessed to his son in December 2002. **App. 26 (T. 89), 119.**

In addition to his estate and trust practice, Respondent maintained a plaintiff's civil litigation practice. During the years from July 1999 through 2002, Respondent

made it a practice to pay himself contingent fees before settling his clients' cases. **App. 18 (T. 59-60), 118.** He explained that his advances on not-yet-earned fees often lasted only a few days; although on one occasion, he paid himself from the trust account several months before a case settled. **App. 118.** And, on another occasion in August 2002, he took an advance fee from his trust account of almost \$17,000. In that instance, the case never settled. Respondent reported that he reimbursed those funds after confessing his misconduct to his son in December 2002. **App. 18 (T. 59-60), 118.**

Mr. Belz's method of taking client funds from trust account included directing his bookkeeper to show a credit owing the client on the trust account ledger. **App. 18 (T. 57), 22 (T. 73-74), 118-119.**

Like his admission that he used the Kaepfel Family's estate assets to pay his mortgages, and like his admission that he misappropriated funds owed to Anne Friedman's heirs and other beneficiaries, Mr. Belz acknowledged that he knew it was wrong at the time he transferred funds to himself. **App. 13 (T. 38), 18 (T. 57), 22 (T. 75), 28 (T. 99).** Mr. Belz explained that although he knew it was wrong, he did not appreciate the consequences when he was transferring client funds to his own account. **App. 22 (T. 75), 28-29 (T. 99-101).** He further explained that, although he didn't think of the consequences, he had the presence of mind - at the time of each improper transfer - to direct the firm bookkeeper to note that a credit was owed to the client account. **App. 21-22 (T. 72-73), 23 (T. 78).**

In December 2002, Mr. Belz was in the hospital. He was very sick and believed he would die. **App. 7 (T. 13-15).** He asked his adult son, who was then working at the Belz

and Jones firm as a bookkeeper, to come to the hospital. **App. 32 (T. 116)**. Mr. Belz told his son that he had improperly taken client money, as described above. **App. 7 (T. 15), 32-33 (T. 116-118)**. Belz assigned his son to talk to his friends to obtain a loan so that the funds could be replaced. **App. 32 (T. 116)**. Within a few days, at Respondent's request, his son also told his partner, Terry Jones, about the funds Respondent had taken. **App. 8 (T. 17)**. When Jones then met with Respondent, he described Belz's statement to him as a "religious confession" by a man who was near death. **App. 37 (T. 134), 39 (T. 143), 41(T. 151)**. Jones answered this question at the hearing: "And are you telling the panel that this came to light because Mark came forward while he was in the hospital?" Answer: "Oh, absolutely. Yeah. There's no – I don't know. No question in my mind. Never has been about that. It came forth because he thought he was going to die and he didn't want to die with this and leaving me finding out after." **App. 39 (T. 143)**. Mr. Belz, however, testified that his thoughts of death were not a factor in his decision to confess. **App. 7-8 (T. 16-17), 10 (T. 26-27)**.

Jones and Belz reported the misappropriations to the firm a few days or weeks later, by mid-January, 2003. **App. 37-38 (T. 136-137)**. At about that time, Belz, partially recovered and returned to the office. Upon returning, he studied the firm ledgers for two months; he realized that the \$100,000 restitution made after his son had acquired loans was \$75,000 to \$90,000 short of the actual amounts improperly taken from his client trust account. **App. 7-8 (T. 15-17), 26 (T. 89-90), 38 (T. 139)**. Belz admitted that his total misappropriation was between \$175,000 and \$190,000. **(I. 55)**.

After the firm learned of Belz's conduct, Belz and the firm retained separate counsel. Belz also began seeing a psychiatrist. **App. 247-309.** On May 1, 2003 Belz submitted a preliminary report to the OCDC. **App. 110.** Belz testified that he had planned to report to the OCDC; he said that he and the firm had discussed the matter and agreed that a complaint had to be filed. **App. 29 (T. 104), 38-39 (T. 140-141).** On May 19, Belz told his psychiatrist that the firm had voted to report the misconduct. **App. 258, 381 (T. 13).** The firm broke up soon after his report to the OCDC. **App. 9 (T. 21), 27 (T. 93-94).**

PROCEDURAL HISTORY

- March 31, 2004 Information filed with Advisory Committee.
- April 19, 2004 Respondent's Answer to Information filed with Advisory Committee (Respondent represented by R.C. Wuestling).
- May 5, 2004 Assigned to Disciplinary Hearing Panel (DHP): Luther Rollins, Thomas Singer and Michael Kennedy.
- January 25, 2005 Thomas Singer is excused by Advisory Committee. DHP: Luther Rollins, Professor Kimberly Norwood and Michael Kennedy.
- February 17, 2005 Notice of Hearing: Hearing set for April 6, 2005.
- March 21, 2005 Respondent's Motion for Continuance received by Advisory Committee.
- March 30, 2005 Letter from panel member, Michael Kennedy, requesting a replacement.
- March 31, 2005 Letter from presiding officer, Luther Rollins, providing notice of new hearing date of May 6, 2005.
- April 6, 2005 Michael Kennedy is excused by Advisory Committee. DHP: Luther Rollins, Professor Kimberly Norwood and R. Chad Engler.
- April 11, 2005 Notice of Hearing: Hearing set for May 6, 2005.
- April 20, 2005 Respondent's Motion for Continuance received by Advisory Committee.
- April 22, 2005 Notice of Cancellation of Hearing received by Advisory Committee.

December 13, 2005 Letter from Respondent's counsel requesting an earlier hearing time on January 20, 2006 received by Advisory Committee.

January 19, 2006 Notice of Postponement of Hearing dated January 19, 2006. Luther Rollins unable to attend hearing scheduled for January 20, 2006.

May 25, 2006 DHP Hearing held. (First Day)

June 6, 2006 DHP Hearing completed. (Second Day)

October 11, 2007 Findings of Fact, Conclusions of Law and Recommendation. (Recommendation: Disbarment.)

February 5, 2008 Court sustains Respondent's Motion to Supplement the Record (with updated testimony and report from his treating psychiatrist.)

POINT RELIED ON

THE COURT SHOULD DISBAR RESPONDENT BECAUSE:

A. HE VIOLATED RULES OF PROFESSIONAL CONDUCT INVOLVING DISHONESTY AND MISAPPROPRIATION OF CLIENT FUNDS.

B. DISBARMENT IS APPROPRIATE IN THAT:

1. THIS COURT HAS CONSISTENTLY DISBARRED LAWYERS FOR MISAPPROPRIATION OF CLIENT FUNDS, EVEN WHEN:

(A) THE LAWYER HAS PAID RESTITUTION,

(B) THE LAWYER HAS RECOVERED FROM A MENTAL CONDITION THAT CONTRIBUTED TO THE MISCONDUCT,

(C) RECURRENCE IS UNLIKELY;

2. ABA SANCTION STANDARDS INDICATE THAT DISBARMENT IS THE BASELINE SANCTION IN INTENTIONAL MISAPPROPRIATION CASES; AGGRAVATING FACTORS MUST BE BALANCED AGAINST MITIGATING FACTORS;

3. OTHER JURISDICTIONS' DECISIONS SUPPORT DISBARMENT AS THE APPROPRIATE SANCTION IN MISAPPROPRIATION CASES, EVEN WITH DIAGNOSIS OF ARRESTED BI-POLAR CONDITION; AND

4. THE DISCIPLINARY HEARING PANEL

RECOMMENDED DISBARMENT.

In re Adams, 737 S.W.2d 714 (Mo. banc 1987)

In re Mendell, 693 S.W.2d 76 (Mo. banc 1985)

In re Kazanas, 96 S.W.3d 803 (Mo. banc 2003)

In re Mentrup, 665 S.W.2d 325 (Mo. banc 1984)

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

ARGUMENT

THE COURT SHOULD DISBAR RESPONDENT BECAUSE:

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3. OTHER JURISDICTIONS' DECISIONS SUPPORT DISBARMENT AS THE APPROPRIATE SANCTION IN MISAPPROPRIATION CASES, EVEN WITH DIAGNOSIS OF ARRESTED BI-POLAR CONDITION; AND

**4. THE DISCIPLINARY HEARING PANEL
RECOMMENDED DISBARMENT.**

VIOLATIONS: ADMITTED

In Respondent's initial report to the OCDC, he suggested that his misconduct was "minor" or "less than 'minor'" and "did not involve dishonesty, deceit, fraud or misrepresentation." **App. 122-123.** He was equivocal as to whether his conduct constituted violations of the Rules of Professional Conduct. **App. 120-122.** In his Answer, Respondent requested a dismissal of the charges and denied that his conduct violated the Rules of Professional Conduct; although he admitted the misconduct, he stated that he had affirmative defenses to the charges. **App. 103-109.** During the hearing in this case, however, Respondent admitted that his conduct violated the Rules of Professional Conduct as alleged in the Information. **App. 19-20 (T. 63-67).**

He eventually acknowledged, at the disciplinary hearing, that his conduct was dishonest. **App. 19 (T. 64).** He also admitted that he knew it was wrong on the many occasions that he decided to transfer client funds to his own accounts. **App. 13 (T. 37-39), 21-22 (T. 72-73), 22-23 (T. 75-78), 28-29 (T. 99-101).** During the hearing, Mr. Belz testified that although his ability to process and appreciate the consequences of his behavior was limited by his bi-polar condition, the condition might explain but does not excuse his misappropriation of client funds. **App. 13 (T. 37).**

The Disciplinary Hearing Panel found violations as alleged in the Information. **App. 326-327.**

As a result of his eventual admissions, this brief will not further analyze whether violations occurred. Instead, the focus will be determining the sanction necessary to achieve the goals of the attorney discipline system, that is, to protect the public and to maintain the integrity of the profession. *In re Adams*, 737 S.W.2d 714, 717 (Mo. banc 1987).

SANCTION ANALYSIS

In determining a sanction for attorney misconduct, this Court historically relies on four sources. First and foremost, the Court applies its own standards to maintain consistency, fairness, and ultimately, to accomplish its oft stated goal of protecting the public and maintaining the integrity of the profession. Those standards are written into law, of course, when the Court issues opinions in attorney discipline cases. *In re Kazanas*, 96 S.W.3d 803, 808 (Mo. banc 2003).

For additional guidance, the Court frequently relies on the ABA's Standards for Imposing Lawyer Sanctions (1991 ed.). Those guidelines recommend baseline discipline for specific acts of misconduct, taking into consideration the duty violated, the lawyer's mental state (level of intent), and the extent of injury or potential injury, *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994). Once the baseline guideline is known, the ABA Standards allow consideration of aggravating and mitigating circumstances. ABA Standards for Imposing Lawyer Sanctions (1991 ed.).

The Court also considers the recommendation of the Disciplinary Hearing Panel who heard the case. In this instance, the Panel considered Mr. Belz's requests for

diversion, admonition and probation; the Panel recommended disbarment. **App. 320-331.**

Finally, the Court sometimes considers other jurisdictions' attorney discipline case law for sanction analysis.

The Missouri Standard

Since at least 1985, the Court has consistently disbarred attorneys who intentionally misappropriate client or third party funds. In those cases, disbarment has been the regular sanction in Missouri, even when attorneys had good reputations, paid restitution, and had recovered from a psychological condition that contributed to conversion of funds. That year, the Court disbarred an attorney for taking \$500 off the top of an \$8,000 settlement he had reached for his client. *In re Mendell*, 693 S.W.2d 76 (Mo. banc 1985). As in the instant case, Mr. Mendell offered evidence of good character, reputation, efficient handling of client business, as well as evidence of pro bono work. The Court recognized those virtues but disbarred the attorney and added, "Our conclusion is with the great weight of authority. Any earlier decisions indicating that a lesser sanction might be considered are no longer authoritative." *Mendell*, 693 S.W.2d at 78.

This Court has also specifically addressed the issue of restitution in misappropriation cases. That issue is important here because Mr. Belz has pled and argued that his eventual repayment of client funds is an affirmative defense to these charges. **App. 103-109.** In fact, Mr. Belz did reimburse those clients, with interest, after his "religious confession" and a meeting with his law partners. **App. 7-8 (T. 15-17), 26 (T. 89-90), 38 (T. 139), 39 (T. 143).** But, his argument that no injury occurred because

he repaid his clients years after stealing from them makes no more sense now than it did in 1987 – when this Court ruled: “That Respondent has made restitution of the converted funds is no defense to the charges”. *Adams*, 737 S.W.2d 717. See also: *In re Staab*, 785 S.W.2d 551 (Mo. banc 1990); *In re Schaeffer*, 824 S.W.2d 1 (Mo. banc 1992); *In re Fenlon*, 775 S.W.2d 134 (Mo. banc 1989).

Respondent Belz also argues that his diagnosed bi-polar condition should constitute an affirmative defense or provide mitigation. **App. 103-109, 120-124.** Assume, for the sake of Respondent’s argument, that he suffered from the condition, and that his condition caused him to steal over \$175,000 from multiple clients over a four-year period by repeatedly using client money to pay his mortgage and firm expenses, and that he has recovered from the condition, and that he is unlikely to repeat that conduct. Under Missouri law, even assuming Respondent’s claims as fact, he should be disbarred. The Court ruled in the *Adams* case that lawyers do not qualify for probation when they misappropriate client funds, even if they successfully recover from a disease that caused the misappropriation. Attorney Adams had been addicted to cocaine. In disbaring Adams, the Court announced:

“Respondent's success in his battle to defeat the scourge of cocaine may be an issue for consideration should he apply for readmission. Having harmed his client, and brought reproach to his profession, however, respondent cannot invoke Rule 16 to save him from the just fruits of his misdeeds.”

Adams, 737 S.W.2d at 717-718.

More recently, the Court addressed an argument similar to Mr. Belz's argument that a reduced sanction is appropriate because [as he contends] he is unlikely to steal from future clients. In that 2003 case, the Court was forced to decide an appropriate sanction for a lawyer who stole - not from his clients but from his law partners - and also was convicted of a tax offense. *In re Kazanas*, 96 S.W.3d 803 (Mo. banc 2003). The Court reiterated its long-standing policy of disbarring lawyers who steal:

Mr. Kazanas implores this Court to lessen the severity of discipline because of mitigating factors. Mr. Kazanas presented a number of witnesses testifying to his favorable character, reputation for integrity, honesty and loyalty, and skill and competency as a lawyer. In determining appropriate discipline we are indeed mindful of such mitigating factors. However, even when mitigating factors exist *and even where it is unlikely that the attorney will repeat the transgression*, "certain acts by attorneys so impugn the integrity of the legal system that disbarment is the only appropriate means to restore public confidence in it. Some acts ... may indicate such a lack of respect for the law ... that disbarment may be warranted."

In re Kazanas, 96 S.W.3d 803, 809 (Mo. banc 2003), citing *In re Frick*, 694 S.W.2d 473, 480 (Mo. banc 1985), emphasis added.

Stealing from clients, even more than stealing from law partners and the IRS, must be one of "the acts that so impugn the integrity of the legal system that disbarment is the

only means to restore public confidence,” despite evidence of a lawyer’s good reputation and that repeated misconduct is unlikely.

This Court also addressed the effect of mental illness in misappropriation cases in 1984. *In re Mentrup*, 665 S.W.2d 325 (Mo. banc 1984). In the *Mentrup* decision, the Court accepted the concept that mental illness “may suggest leniency,” but rejected the application of that concept because, as in the instant case, Mentrup converted client funds. *Mentrup*, 665 S.W.2d 325. Likewise, in 1990, the Court rejected prayers for mitigation from an attorney who engaged in numerous acts of misconduct but who had a long-standing practice and positive reputation. That lawyer’s depression and panic attacks led to his misconduct and he had since acquired competent legal help of three other attorneys. *In re Staab*, 785 S.W.2d 551 (Mo. banc 1990). The *Staab* Court explained that neither practice management improvements nor a better accounting system would alter the result of disbarment because deterrence is among the purposes of imposing sanctions in attorney discipline cases. *Staab*, 785 S.W.2d at 555.

In reaffirming the *Mentrup* analysis, this Court disbarred an attorney in 1986 for keeping \$1,292 that was payable to his clients’ medical provider, following a settlement of a personal injury case. *In re Lechner*, 715 S.W.2d 257 (Mo. banc 1986). Respondent Lechner admitted the charges, but argued that a reduced sanction was warranted because – as the Master appointed by the Court found – Lechner did not act with illegal or criminal intent because he suffered from a “severe mental illness of a psychological nature brought on by stress.” *Lechner* 715 S.W.2d at 759. Judge Blackmar’s concurring opinion in the Lechner case provides additional guidance:

At one time this Court imposed suspensions in disciplinary cases. More recently we have taken a firm position that misappropriation of funds calls for disbarment (citing *Mentrup*). A suspension for misappropriation does not make sense.”

Lechner, 715 S.W.2d at 259 (Blackmar concurring).

Respondent’s argument – that his bi-polar condition should mitigate – fails for another reason, at least in Missouri. This Court has held that even unintentional misappropriation of client funds should result in disbarment, *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994) and *In re Williams*, 711 S.W.2d 518 (Mo. banc 1986). If those lawyers’ repeated mistakes resulted in disbarment, it cannot follow that Mr. Belz’s repeated specific directions to his banker to transfer client funds to his operating account should result in a lesser sanction, especially when Mr. Belz was taking the money to “nail down his retirement” and he knew it was wrong when he did it. **App. 13 (T. 37-39), 21-22 (T. 72-73), 22-23 (T. 75-78), 28-29 (T. 99-101).**

ABA Guidelines

This Court has often relied on sanction guidelines developed by the ABA’s Center for Professional Responsibility. *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994). The guidelines, known as the ABA Standards for Imposing Lawyer Sanctions (1991 ed.), consider the following primary questions:

- (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)

- (2) What was the lawyer’s mental state? (Did the lawyer act intentionally, knowingly, or negligently?)
- (3) What was the extent of the actual or potential injury caused by the lawyer’s misconduct? (Was there a serious or potentially serious injury?) and
- (4) Are there any aggravating or mitigating circumstances?

ABA Standards: Theoretical Framework (p. 5).

The ABA Standards “assume that the most important ethical duties are those obligations which a lawyer owes to clients.” Application of the ABA Standards requires the user to first analyze the first three questions and then, only after a baseline sanction is apparent, to consider aggravating and mitigating circumstances. ABA Standards, Preface: Methodology (p. 3). The drafters intentionally rejected an approach, however, that focused only on a lawyer’s intent. Instead, they recognized that sanctioning courts must consider not only the attorney’s intent and damage to his client, but also the damage to “the public, the legal system and the profession.” ABA Standards Preface: Methodology (p.3).

ABA Baseline Sanction: Disbarment

Having considered that background, the application of these ABA Standards to the case at bar must start with Standard 4.11: **Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.** ABA Standard 4.11. That standard must be the starting point because mitigating and aggravating circumstances are only considered after a baseline standard is

determined. And, that standard must be the applicable baseline because the admitted and uncontroverted evidence is that, over a four year period, on many occasions, Mr. Belz made conscious choices and took specific action to transfer at least \$175,000 in client funds to his own account; he acknowledged that his conduct was intentional and that he knew it was wrong when he did it. Mr. Belz's claim that no harm was suffered because he eventually reimbursed his clients is misplaced. Missouri law has been consistent that harm results in misappropriation cases whether or not restitution has been made. Additionally, of course, the ABA Standard 4.11 makes no distinction between injury and potential injury. By using client money for four years, Belz caused at least potential injury, overriding his "no harm – no foul" theory that restitution eliminates the harm and provides an affirmative defense.

Suspension, which is discussed as a baseline sanction in ABA Standard 4.12, is not applicable here because Mr. Belz did not merely commingle his own money with client funds; instead, for four years, he intentionally and repeatedly took and spent his clients' money out of his trust account and used it to pay his own mortgage and office overhead, so that he would have more money of his own for retirement.

Under the ABA Standards, once a baseline is established, aggravating and mitigating circumstances should be considered. (By comparison, the Missouri standard has been that mitigating circumstances, such as restitution, mental conditions and even recovery from those conditions, have no mitigating effect in cases involving misappropriation of client funds.)

ABA Aggravating Factors

Under the ABA Guidelines, the sanctioning court is advised to weigh aggravating and mitigating circumstances against each other. The aggravating circumstances evident in the instant case include:

9.22(b) Dishonest or Selfish Motive

Mr. Belz eventually admitted that his conduct was dishonest and that he knew it was wrong. His motive was to “make more money to nail down [his] retirement.”

9.22 (c) Pattern of Misconduct

Mr. Belz continued, over four years, to take money from his clients and use it as his own.

9.22(d) Multiple Offenses

On ten occasions, Mr. Belz directed his banker to transfer over \$1,100 from the Kaepfel Trust to make his mortgage payments. **App. 116-119.** On eleven other occasions, he took large amounts (ranging from \$5,000 to \$15,000 and totaling \$102,000) from the Friedman Estate to pay his office overhead. He also repeatedly took excess fees (in excess of \$51,000) from the Kaepfel Trust, and not-yet-earned (and never-earned) fees from his trust account, which contained client funds. **App. 116-119.**

9.22(h) Vulnerability of Victim

As the Disciplinary Hearing Panel found, Mr. Belz took advantage of vulnerable clients. Those clients had no way to protect themselves and were not sophisticated business clients who might know to closely monitor their lawyer’s financial records.

9.22(j) Substantial Experience in the Practice of Law

In 2003, Mr. Belz had been practicing law for thirty-three years. **App. 112.**

ABA Mitigating Factors

Mr. Belz has suggested that several ABA mitigating factors might apply.

9.32(a) Absence of Prior Disciplinary Record

Mr. Belz accurately reports that he has no previous disciplinary history.

9.32(b) Absence of a Dishonest or Selfish Motive

In his initial report, **App. 110**, Mr. Belz asserted that his conduct did not involve deceit, fraud or misrepresentation because he made no misrepresentations to his clients. He explained those assertions in the hearing by saying that he never actually lied to his clients or his partners. **App. 19 (T. 64)**. His assertion is only true in the sense that Mr. Belz did not reveal to his clients – or his partners – that he was taking client money and using it as his own.

9.32(d) Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct

In the early days, when Mr. Belz was initially taking his mortgage payments from the Kaepfel Trust, he reimbursed the trust after a few weeks or months. Later, and upon taking Friedman Estate funds and intentionally billing the Kaepfel Trust in excess of actual earnings, he stopped repaying altogether. He eventually paid \$100,000 back into his trust account four years after he began taking his clients' money and after his confession. Three months later, after reviewing the firm's books and meeting with his

partners, he reimbursed the remaining \$69,000 to \$95,000 by borrowing from his friends. At that time, Mr. Belz planned to report his misconduct to the OCDC.

9.32(e) Full and Free Disclosure to Disciplinary Board

After meeting with his psychiatrist, and after his firm voted to report his misconduct, and after seeking legal advice, Mr. Belz disclosed his misconduct to the disciplinary authorities. Certainly, Respondent's restitution and self report are important, but the context of his restitution and report, and his initial minimalization of the conduct, should reduce the mitigating effect of those factors under the ABA Standards.

9.32(i) Mental Disability or Chemical Dependency Including Alcoholism or Drug Abuse when:

- (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;**
- (2) the chemical dependency or mental disability caused the misconduct;**
- (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and**
- (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.**

Respondent has pled that his mental condition should serve as an affirmative defense to these charges. As noted, this Court has routinely rejected that argument for Missouri lawyers who have misappropriated client funds. The ABA Standards, of

course, suggest that mental condition may serve as mitigation, but not as a defense, and only in certain listed circumstances.

Taking the ABA factors one-by-one, certainly Respondent's personal psychiatrist, but no independent evaluators, reported that Respondent is affected by a bi-polar (manic-depressive) condition. That psychiatrist, Dr. Holeman, testified that he first diagnosed and treated Respondent in the mid 1970's after Respondent had hallucinations and was psychotic. Dr. Holeman stopped treating Respondent in 1980; they visited again briefly in 1990. **App. 50 (T. 185)**. Respondent did not consult him again until March 31, 2003, as Respondent was considering his report to the OCDC for these misappropriations. **App. 47 (T. 173), 258**. At that time and since, Dr. Holeman's diagnosis has been based on Respondent's own explanations of his conduct occurring during a period when Dr. Holeman was not seeing him. **App. 49-50 (T. 183-185), 51-52 (T. 191-196), 391 (T. 51-52)**. Despite Dr. Holeman's belief that visits with a patient's family are very helpful and important in determining whether patients are telling the truth about their condition, he did not meet with Respondent's family to help diagnose the condition. **App. 391 (T. 51-52)**.

Assuming that Dr. Holeman was able to accurately diagnose the condition, three factors remain before the ABA Standards permit mitigation to be considered. The second prong of the ABA Standard 9.32(i) is less well established by the evidence. That factor – *Did the condition cause him to steal from his clients for four years?* – is supported only by Respondent's explanations of his condition to Dr. Holeman. Those explanations came

one, two, and three years after he took his clients' money, but simultaneously with the time he and his firm decided to report his misconduct.

Dr. Holeman opined that Respondent's bi-polar condition caused Respondent to use his client's money to pay mortgage and overhead. His testimony should be contrasted with the opinion of the Respondent's other treating professional (Darwin White, a Licensed Counselor – described by Respondent as his “psychologist,” **App. 30 (T. 106-107)**), who agreed with the Hearing Panel that bi-polar is associated with excessive spending, as for trips to Acapulco, and not for spending on necessities like mortgages and electric bills. **App. 80-81 (T. 64-65)**. The therapist was asked by the Panel: “Spending a lot could be paying your electric bill, you would define that as spending a lot or paying your mortgage or paying the every day expenses of life?” He answered: “Well, I don't know necessarily again that the individual who would be that kind of out of control is doing that kind of thinking along the lines of I need to handle my affairs things.” **App. 81 (T. 65)**. Mr. White, the therapist, also agreed that it would be problematic to entrust other people's money with a bi-polar person who has been proven to take money that didn't belong to him. **App. 75 (T. 43)**.

Dr. Holeman also testified that the condition, when active, should reveal itself pretty quickly to those around the afflicted. **App. 55 (T. 206-208)**. Respondent's therapist, Mr. White, was regularly treating him throughout 2002 for marriage counseling, during the same period he was taking funds from the Kaepfel Trust and Friedman Estate, but the therapist did not recognize any bi-polar symptoms. At that time, Mr. White was not only Respondent's therapist, he was also a longtime friend who was

active with Respondent at their church. **App. 67-68 (T. 11-13)**. He first learned of the bi-polar diagnosis in 2004. **App. 78-79 (T. 55-59)**. Finally, Dr. Holeman explained that bi-polar patients typically deny that they are doing anything wrong, until after their misconduct. **App. 45 (T. 165), 53 (T. 197-198)**. Respondent, however, repeatedly acknowledged that he knew his conduct was wrong at the time he did it, but said that his condition rendered him incapable of appreciating the consequences of his actions.

In addition to his report to the OCDC, Mr. Belz also submitted to censure by his church. In that venue, he did not raise the issue of his bi-polar condition in defense or mitigation. **App. 24 (T. 84, 30 (T. 105-106), 68-69 (T. 15-17), 71 (T. 26)**. He explained that distinction by saying that in the church venue, “at that point, it’s not like we’re fighting.” **App. 30 (T. 106-107)**.

It seems that Mr. Belz’s burden of establishing that his condition caused him to take his clients’ money over a four year period is refuted by his treating professionals’ explanations and by his own explanation that he knew his conduct was wrong when he did it.

The third ABA requirement for mitigation of a mental condition is a “meaningful and sustained period of recovery.” At the time of the hearing in this case, May and June 2006, the Disciplinary Hearing Panel considered Dr. Holeman’s testimony that although he was then “significantly better,” Respondent had not much insight into his own feelings and that he “still had concerns.” **App. 48 (T. 177-180), 54 (T. 202)**.

The Panel issued its decision in October 2007, some 16 months after the hearings were concluded in early June 2006. In an effort to update the record, the Court has

received Dr. Holeman's December 2007 report and his January 2008 deposition. Dr. Holeman's new report is clearly more positive for Respondent's likelihood for recovery. For example, he reported that Mr. Belz's mood was more stable and that if he continued care and treatment as prescribed it is very unlikely that he will ever again misappropriate. **App. 390 (T. 48-49)**. But, Dr. Holeman also explained the current condition as follows: "He runs the risk of it remaining active, but we can't..., we can't predict, we can't say," about Respondent's continued difficulties. **App. 390 (T. 46-47)**. Dr. Holeman also testified in January 2008 that it is "a better arrangement" for Respondent's younger partner to now have "shared responsibility" of the office finances, **App. 384 (T. 22)**, than for Respondent to handle the firm's finances alone.

The final factor in ABA Sanction Standard 9.32(i) addresses the likelihood of recurrence. As noted, Respondent's treating psychiatrist, Dr. Holeman, hedged his opinion in 2006 but was more confident recently. Even in the recent testimony, Dr. Holeman acknowledged that the condition would last a lifetime and is not predictable. Likewise, in his 2006 testimony, Dr. Holeman agreed with the following statements:

"Every patient is different."

"Some respond to treatment, some don't."

"Some have intervals, some don't."

"Some have episodes, even when on treatment."

App. 49 (T. 181-184). With those risks, it does not seem prudent to deviate from this Court's historical position in Missouri lawyer discipline cases: mental conditions and

recovery can mitigate in some circumstances, but the interests of public protection do not permit it in misappropriation cases.

9.32(l) Remorse

As the Panel found, Mr. Belz’s testimony appeared remorseful. The Court may consider whether his initial assertion that his conduct should be viewed as “minor” or “less than minor” and that it “did not involve deceit or fraud” reflects a perspective that supports his claim of sincere remorse.

Guidance From Other Jurisdictions

In attorney discipline cases, this Court occasionally considers the analyses and decisions of other jurisdictions. Importantly to the case at bar, several states are in agreement with the Missouri standard for mitigation in attorney discipline cases, to wit, that neither restitution, mental conditions with recovery, nor the unlikely recurrence of misconduct mitigate in misappropriation cases.

The Florida Supreme Court recently disbarred an attorney in an intentional misappropriation case, despite: (a) the hearing referee’s recommendation of a lesser sanction; (b) evidence that the lawyer suffered from depression and cocaine addiction at the time of her misconduct; (c) remorse; and (d) three years of “admirable progress towards rehabilitation.” *Florida Bar v. Martinez-Genova*, 959 So.2d 241, 249 (Fla. 2007). Florida has established a presumption for disbarment in misappropriation cases. *Martinez-Genova*, 959 So.2d at 249. More on point, but a little earlier in time, the Florida Court disbarred a bi-polar attorney in 1995 for misappropriation, *Florida Bar v. Clement*, 662 So.2d 690 (Fla. 1995). As the Florida Court explained when applying the

Clement decision to the later *Martinez-Genova* analysis, Attorney Clement’s “psychological disorder did not outweigh the seriousness of his misconduct because the referee found that Clement could distinguish right from wrong at the time of his misconduct,” *Martinez-Genova*, 959 So.2d at 249.

Delaware has not adopted a per se rule that misappropriation cases always result in disbarment. But the Delaware Supreme Court explained in a 1996 case involving a lawyer with a bi-polar condition that they had consistently disbarred attorneys “where conversion of clients’ funds has been established.” *Matter of Dorsey*, 683 A.2d 1046, 1048 (Del. Supr. 1996). Dorsey was found guilty of felony theft for withdrawing client funds from several trust accounts over a three year period. The Delaware Supreme Court disbarred him, despite a lack of prior discipline and an unchallenged record of public service. Although Dorsey’s bi-polar diagnosis was unrebutted and was given great weight, the Delaware court found it inconsistent with his guilty plea. The Court decided that his “...mental state may serve to mitigate the degree of culpability, it does not reduce the seriousness of the criminal misconduct present here. Any sanction short of disbarment would not provide the necessary protection for the public or serve as a deterrent to the profession.” *Dorsey*, 683 A.2d at 1049. Putting it another way, the Delaware Court accepted his “confused thinking at this time as mitigating” but “the pattern of taking mortgage payoff funds” was “strong evidence of deliberate wrong-doing during an extended period of time in which, to all outward appearances, he was a functioning practitioner.” *Dorsey*, 683 A.2d at 1048. That analysis is reminiscent of Mr. Belz’s therapist’s testimony, when he explained that bi-polar episodes are more often

indicated by trips to Acapulco than by paying mortgages. And, as Belz's psychiatrist, Dr. Holeman, explained when discussing how bi-polar conditions might affect surgeons, people around them would quickly identify the situation. Mr. Belz, on the other hand, was able to prevent his own therapist and friend from identifying the situation. Respondent's own clean disciplinary history during the four years that he was misappropriating client funds does not support the diagnosis as described by those specialists. Additionally, Respondent told the Panel that while he was misappropriating client funds, he was not shoplifting or stealing from others. **(I 101-102)**.

The New Jersey Supreme Court provided a helpful analysis in a 2000 opinion involving a lawyer convicted of theft and forgery who suffered from bi-polar disorder. *In re Tonzola*, 744 A.2d 162 (N.J. 2000). Although mitigation is frequently considered in New Jersey discipline cases, "when the offense, however, involves misappropriation of client funds, disbarment is 'almost invariable.'" *Tonzola*, 744 A.2d at 304. Exceptions to that New Jersey rule are limited to a "demonstration by competent medical proofs that Respondent suffered a loss of competency, comprehension or will of a magnitude that could excuse egregious conduct that was knowing, volitional and purposeful." *Tonzola* 744 A.2d at 304. The New Jersey court conducted an independent review of competing psychiatric reports, and found that Mr. Tonzola had not met his burden, in part because he could "differentiate right from wrong," and he was able, during his condition to "function properly and well in other settings and in respect of other client matters." *Tonzola*, 744 A.2d at 307-308. The New Jersey standard for the effect of bi-polar

mitigation in misappropriation cases can be distinguished from the ABA Standards, but using that analysis, a similar result was reached.

A very recent Louisiana decision provides assistance in analyzing the value of psychiatric testimony in theft cases. In that case, the attorney had misappropriated approximately \$50,000 from two law firms over fifteen years. *In re Bernstein*, 966 So.2d 537 (La. 2007). Bernstein's treating psychiatrist diagnosed him as suffering from an "impulse control disorder" and major depression. That diagnosis, though not countered by any other expert witness, was found to be "at odds with many of the objective facts in this case," including: (a) he appeared to be living beyond his means; (b) his "methods of misappropriation evolved over time to better enable him to avoid detection;" and (c) "Bernstein himself admitted that he knew his actions were wrong." *Bernstein*, 966 So.2d at 541. He was disbarred despite the Hearing Board's recommendation for a three year suspension and a recommendation for an even shorter suspension by a Hearing Committee. *Bernstein*, 966 So.2d at 542 and 545.

Last year, in 2007, the Minnesota Supreme Court disciplined a lawyer for misappropriating six clients' funds, forgery, and failing to cooperate with disciplinary authorities. *In re Berg*, 741 N.W.2d 600 (Minn. 2007). Attorney Berg and the Minnesota disciplinary authorities had stipulated to a five year suspension, upon considering his severe cardiac condition and resultant depression and anxiety. The Minnesota Court allowed Respondent's condition to mitigate his *unintentional* misconduct, but not his *intentional* misconduct. *Berg*, 741 N.W.2d at 605.

CONCLUSION

A.

Mr. Belz's primary argument appears to be that although he knew it was wrong to take his clients' money, a reduced sanction is appropriate because he didn't fully appreciate the consequences of his behavior. That argument was directly contradicted when he told his psychiatrist his motive for taking his clients' money. In that session, he explained that he did think about the long-term consequences of his actions, and that they were: to "make more money to nail down his retirement." It appears the only consequences he failed to recognize were the consequences of this disciplinary action.

B.

In choosing an appropriate sanction, the Court may first consider the guidance provided by the ABA Standards for Imposing Lawyer Sanctions (1991 ed.). Even giving Respondent's argument concerning the mitigating nature of his mental condition due regard, application of these Standards requires disbarment. That result is most fitting because the baseline ABA sanction is disbarment and the many aggravating circumstances in this case are not outweighed by his proffered evidence of mitigation. Those aggravating circumstances include, of course, Respondent's four year pattern of stealing over \$175,000 from vulnerable clients and the repeated dishonest decisions he made to take client funds, knowing at the time that it was wrong, with a long-term goal of providing additional retirement income for himself.

C.

The Court should also consider the guidance provided by other courts who have dealt with lawyers claiming to suffer from bi-polar disorder when misappropriating client funds. The most telling cases in that realm support the Missouri standard that disbarment is always appropriate in misappropriation cases, even where there is evidence that the disorder caused the misconduct. The other jurisdictions also help the Court analyze the value of the psychiatric evidence, explaining that even uncontested psychiatric opinions are often at odds with the evidence. In the instant case, the most striking contrary evidence is that despite his treating psychiatrist's doubt, Mr. Belz acknowledged that he knew - at the time of his conduct - that it was wrong for him to repeatedly direct his banker to transfer thousands of client dollars to his own account.

D.

In addition to guidance from the ABA and other jurisdictions, the Court should follow the reasoned recommendation of the Disciplinary Hearing Panel to disbar Mr. Belz.

E.

Finally, and most importantly, this Court should not deviate from its own longstanding policy of disbarring lawyers who misappropriate client funds. That policy does not simply establish disbarment as a baseline sanction. It stands as law, even when restitution has been made, even when a mental condition has contributed to the misconduct, and even when the lawyer has recovered from the condition that caused his misconduct. In Missouri, even when all those factors are established in a

misappropriation case, and, taking it a step further, even when recurrence is unlikely, disbarment is the only sanction adequate to protect the public and maintain the integrity of the legal profession.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2008, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First

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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 8,153 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

Sam S. Phillips

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