

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

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)

Supreme Court #SC93781

DANIEL LEE SAYLE,

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)

Respondent.

)

RESPONDENT’S BRIEF

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STATEMENT OF FACTS

In the course of the investigation Respondent sent various requested documents to Informant. Respondent was attempting to make ecologically friendly (and inexpensive) copies for himself of the banking records he was sending to Informant by reusing paper that had previously been used on one side. While doing so some of Respondent's copies on used paper were placed in the Informant's pile of originals, and the documents in question were sent to the Informant accidentally. **App. 110.**¹

Respondent does not believe that all of the two-sided copied documents sent to Informant necessarily contained confidential information and some may qualify as public records.

SRP1 documents SRP177a-179a, SRP181a-193a, and SRP198a-208a, are police reports from a municipal police department pertaining to a single client who was charged with more than one offense in municipal court arising out of a single incident.

Respondent believes he has identified documents SRP215a and SRP216a, which are described by Informant as a Petition. They are, in fact, documents comprising a motion asking for a change in an existing court date.

¹ Respondent is following the Informant's citation style for the records denoted by the appropriate Appendix page (for example "App. __"). In regards to the documents in the Supplemental Record Part 1, which Informant cites as "SRP1__", Respondent will cite them as "SRP_."

I.

POINTS RELIED ON

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

- (A) FAILING TO MAINTAIN AND PRESERVE COMPLETE RECORDS OF
THE TRUST ACCOUNT FOR A PERIOD OF 5 YEARS, IN VIOLATION OF
RULE 4-1.15(d), EFFECTIVE JANUARY 2010;**
- (B) COMMINGLING PERSONAL AND CLIENT FUNDS IN HIS TRUST
ACCOUNT AND PAYING PERSONAL EXPENSES FROM HIS TRUST
ACCOUNT IN VIOLATION OF RULE 4-1.15(c), EFFECTIVE JANUARY 1,
2010;**
- (C) DEPOSITING ADVANCED LEGAL FEES INTO HIS OPERATING
ACCOUNT IN VIOLATION OF ADVISORY COMMITTEE FORMAL
OPPIOION 128 AND RULE 4-1.15(f);**
- (D) REVEALING INFORMATION RELATING TO THE REPRESENTATION
OF A CLIENT WITHOUT THE CLIENT GIVING INFORMED CONSENT IN
VIOLATION OF RULE 4-1.6(a); AND**
- (E) ENGAGING IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF
JUSTICE IN VIOLATION OF RULE 4-8.4(d).**

Guyer v. City of Kirkwood, 38 S.W.3d 412 (Mo. banc 2001).

State ex rel. Goodman v. St Louis Board of Police Commissioners,

181 S.W.3d 156 (Mo.App. 2005).

The News-Press & Gazette Co. v Cathcart, 974 S.W.2d 576 (Mo.App. 1998).

Section 610.022, RSMo.

Section 610.100, RSMo.

II.

THIS COURT SHOULD SUSPEND RESPONDENT'S LICENSE INDEFINITELY, WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR AT LEAST SIX MONTHS, WITH THE SUSPENSION STAYED AND IN LIEU OF ENFORCEMENT THEREOF, PLACE RESPONDENT ON PROBATION FOR ONE YEAR FROM THE EFFECTIVE DATE OF ANY DISCIPLINARY ORDER ISSUED BY THIS COURT IMPOSING DISCIPLINE.

Section 610.100, RSMo.

ABA Rules, Comment to Rule 4.4.

ABA Standards for Imposing Attorney Sanctions, Rule 10.

ARUGMENT

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

**(D) REVEALING INFORMATION RELATING TO THE REPRESENTATION
OF A CLIENT WITHOUT THE CLIENT GIVING INFORMED CONSENT IN
VIOLATION OF RULE 4-1.6(a).**

D. Respondent revealed information relating to the representation of a client without informed consent in violation of Rule 4-1.6(a).

While Respondent stipulated to this allegation (**App. 109.**), Respondent believes that not all of the documents mistakenly sent to the Informant are necessarily confidential in nature. Respondent will discuss various documents below.

1. Unidentified Documents

SPR1 documents SPR195a-197a are described by Informant as being “unidentified.” They should not be considered confidential if Respondent can’t determine what they are.

2. Miscellaneous Documents

The following documents are identified as:

- 1.) SRP180a and SRP217a, MapQuest directions;
- 2.) SRP214a, a draft of a motion seeking to have a client’s driving privilege reinstated;
- 3.) SRP215a and SRP216a, an Indictment with witness list;
- 4.) SRP171a, an entry of appearance in Municipal Court.

MapQuest directions would not seem to be confidential records under any definition of the term. The draft of the motion to have a client's driving privilege reinstated does not contain any identifying information for the client, the name of the petitioner is *misspelled*, and nor does it contain the case number. The draft, therefore, contains no confidential information and provides no means by which the client can be identified. An Indictment (unless sealed) and an entry of appearance would also seem to be a public records.

3.) Municipal Police Reports

SRP1 documents SRP177a-179a, SRP181a-193a, and SRP198a-208a, are police reports from a municipal police department pertaining to a single client who was charged with more than one offense in municipal court arising out of a single incident. Under certain circumstances police report qualify as public records.

"Missouri's public policy provides that...records...be open to the public unless otherwise provided by law. Section 610.011. Missouri's Sunshine Law, Chapter 610, reflects the state's commitment to openness in government. (citation omitted) The Sunshine Law is to be liberally construed and exceptions strictly construed to promote open government. (citations omitted)" The News-Press and Gazette Company v. Cathcart, 974 S.W.2d 576, 578 (Mo.App. 1998).

Section 610.100.1, RSMo, states in part that:

(2) "Arrest report", a record of a law enforcement agency of an arrest and of any detention or confinement incident thereto together with the charge

therefor;

(3) "Inactive", an investigation in which no further action will be taken by a law enforcement agency or officer for any of the following reasons....

(c) Finality of the convictions of all persons convicted on the basis of the information contained in the investigative report, by exhaustion of or expiration of all rights of appeal of such persons.

(4) "Incident report", a record of a law enforcement agency consisting of the date, time, specific location, name of the victim and immediate facts and circumstances surrounding the initial report of a crime or incident, including any logs of reported crimes, accidents and complaints maintained by that agency;

(5) "Investigative report", a record, other than an arrest or incident report, prepared by personnel of a law enforcement agency, inquiring into a crime or suspected crime, either in response to an incident report or in response to evidence developed by law enforcement officers in the course of their duties.

Section 610.100.2, RSMo, states in part that:

Each law enforcement agency of this state, of any county, and of any municipality shall maintain records of all incidents reported to the agency, investigations and arrests made by such law enforcement agency. All incident reports and arrest reports shall be open records. Notwithstanding

any other provision of law...investigative reports of all law enforcement agencies are closed records until the investigation becomes inactive....

This Court has held that: “Under this statute [Section 610.100.2, RSMo], ‘incident reports’ are open records, and by implication, once the ensuing investigation becomes inactive, ‘investigative reports’ become open records as well.” Guyer v. City of Kirkwood, 38 S.W.3d 412, 413 (Mo. banc 2001).

The Court of Appeals has held that: “Section 610.011.2 provides in pertinent part that ‘[e]xcept as otherwise provided by law ... all public records of public governmental bodies shall be open to the public for inspection and copying. . . .’ Section 610.011.2. In other words, public records are open to the public unless a statute protects their disclosure. Oregon County R-IV School Dist. v. LeMon, [739 S.W.2d 553](#), 557 (Mo.App. S.D.1987).” State ex rel. Goodman v. St. Louis Board of Police Commissioners, 181 S.W.3d 156, 159 (Mo.App. 2005). Section 610.022.5, RSMo, states that: “Public records shall be presumed to be open unless otherwise exempt pursuant to the provisions of this chapter.”

It is believed that the client in question pled guilty to the charges on November 10, 2010, or more than a year before the documents were mistakenly sent to Informant. It would appear, therefore, that Section 610.100.1(3)(c), RSMo, would cause the investigation to be “inactive” and as the time for appeal had lapsed the convictions have achieved “finality” and those particular documents would seem to be public records.

II.

THIS COURT SHOULD SUSPEND RESPONDENT'S LICENSE INDEFINITELY, WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR AT LEAST SIX MONTHS, WITH THE SUSPENSION STAYED AND IN LIEU OF ENFORCEMENT THEREOF, PLACE RESPONDENT ON PROBATION FOR ONE YEAR FROM THE EFFECTIVE DATE OF ANY DISCIPLINARY ORDER ISSUED BY THIS COURT IMPOSING DISCIPLINE.

The ABA Standards for Imposing Attorney Sanctions at Rule 10 provides that mitigating circumstances may be considered in determining an appropriate sanction. The mitigating factors present in the instant case include:

1. Respondent, who was admitted to the Bar in 1984, has no disciplinary history.
2. Respondent is remorseful.
3. Respondent cooperated with Informant and Ms. Kelly Dillon, Informant's paralegal investigator, and even drove to Jefferson City for a meeting with Ms. Dillon.
4. There was no evidence of willful misappropriation or conduct involving dishonesty, fraud, deceit or misrepresentation.
5. Respondent's conduct did not result in any actual harm to any client and no client lost money and no money is owed to clients.

The ABA's Rule 10 also provides that the Court may consider "the amount of actual or potential injury caused by the lawyer's misconduct." The majority of Respondent's actions would seem to fall into the "potential injury" class.

A. Respondent failure to maintain and preserve complete trust account records.

Respondent stipulated to the fact that he did not maintain a complete set of trust account records for a period of 5 years. **App. 109.** Respondent was able, however, to comply with the document requests made by Informant by asking his bank to supply him with copies of the records requested.

B. Commingling Funds

While Respondent did commingle personal funds and client funds in his trust account, it should be noted that this happened once and involved a total of \$54.00 of client funds. **App. 109.** It should also be noted that no client funds were lost or are owed or that the trust account balance ever fell below the amount belonging to a client. **App. 172-174.**

C. Depositing advanced legal fees into his operating account in.

While Respondent did deposit advanced legal fees into his operating account, none of Respondent's clients were harmed financially and no clients are owed any money as a result. **App. 172-174.** There is no evidence that Respondent later failed later to earn these fees.

D. Respondent revealed information relating to the representation of a client without informed consent.

Leniency or mitigation may also be granted in this matter as the potential for harm to some clients was limited given that some of the documents mistakenly sent to the Informant may not have contained confidential information (see above). Section 610.100, RSMo.

As the records disclosed in this case were sent to another attorney in the context of a legal matter this may be a violation with no harm and which had little potential to harm the client. The Comment to the American Bar Association's Rule 4.4 states in part that:

[2] Paragraph (b) [of Rule 4.4] recognizes that lawyers sometimes receive a document...that was mistakenly sent....A document...is inadvertently sent when it is accidentally transmitted, such as when [a]...letter is misaddressed or a document...is accidently included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document...was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document..., is a matter of law beyond the scope of these Rules....

[3] Some lawyers may choose to return a document...unread, for example, when the lawyer learns before receiving it that it was inadvertently sent....

In our case the Informant would not seem to be a party hostile to the interests of the client and would not be given to using mistakenly provided information to embarrass or harm people. In a context where an attorney mistakenly sends confidential information to another attorney, wouldn't the receiving attorney be obligated to keep the information confidential or return it to the sending attorney?

If there was a Rule in effect in Missouri requiring the return or destruction of mistakenly sent messages, information or documents between lawyers this danger would be eliminated in cases such as this. Given the widespread use of emails and faxes (not to mention the regular mail) there must be a considerable amount of documents being misdirected between attorneys

Respondent knows that the client documents should not have been sent and realizes if they had been sent to someone whose interests are opposed to the client's that very real harm could have been done. Respondent's arguments in this section are solely for purposes of mitigation.

The majority of the documents mistakenly sent were municipal police reports pertaining to a single client. Respondent believes that the police department in question will sell a copy of this report to the public. Respondent also believes that the practice of the Municipal Court in question is to staple police reports into their respective court files and they are considered to be a permanent part of the file; which the Municipal Court considers to be an open record.

CONCLUSION

Given the facts of this case, including the mitigating factors and the lack in injury to any clients, it would not be unjust to grant Respondent probation. Respondent has been practicing law for almost thirty years with no prior complaints or ethics investigations. Respondent was in public service in the Office of the Missouri State Public Defender for over eighteen years. Respondent respectfully requests that this Court place Respondent on probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June 2014 the Respondent's Brief was sent the Missouri Supreme Court e-filing system to Informant's attorneys.

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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 2421 words, according to Microsoft Word, which is the word processing system used to prepare this brief;
4. This document was composed using Microsoft Office Word.

/s/ Cesar A. Millan
Cesar A. Millan