IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
MICHAEL WAYNE BLUM,	)	**Supreme Court #SC95595**
	)	
Respondent.	)	

RESPONDENT'S BRIEF

Respectfully submitted,

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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.

RESPONDENT'S STATEMENT OF FACTS

Except as otherwise indicated, expressly or impliedly, by this Statement of Facts, Respondent accepts Informant's Statement of Facts.

Although Respondent's Answer denied the paragraphs alleging that Respondent had violated various rules, contrary to Informant's Statement of Facts Respondent did not ultimately deny all allegations of rule violations. For those he continued to deny, he asserted good faith arguments based on the facts. In Respondent's Proposed Findings of Fact, Conclusions of Law, and Recommendation, Respondent acknowledges deficiencies in handling funds related to the following clients: Edwards, Miller, Finn, Pennington, Nichols, McCarthy, Nash, Mathenia, Timm, Arnold, Beasley, and Lack. (Record 2980-2981). Respondent also acknowledges he has responsibility for these violations. Respondent also notes that the record does not establish the extent to which Lawrence Ray is responsible for the trust account problems in light of the fact that Lawrence Ray did not transfer over $60,000 to the Blum & Ray trust account that he should have transferred. (App. 51, Tr. 200).

Discovery

On July 21, 2015, Respondent served a request for production of documents on Informant. (Record 87). The request asked for:

1. A complete copy of all documents obtained or prepared in the course of the investigation, preparation, or both, of the above-referenced case, that have not been previously provided to Respondent.
2. A complete copy of all documents related to statements or interviews Informant has conducted related to the law firm of Blum and Ray, regardless of the case or investigation in which the documents were prepared or obtained.
3. On July 24, 2015, Informant objected (Record 92):

1 A complete copy of all documents obtained or prepared in the course of the investigation of the above styled case, less privileged communication and work product, has previously been provided to the Respondent.

2. All documents relating to statements or interviews Informant has conducted in this case have previously been provided as stated in paragraph one above. Any documents involving any other lawyer or investigation, if conducted and/or in existence, have not been provided. Informant objects and states that any such documents (if even in

existence) are not discoverable pursuant to the provisions of Missouri Supreme Court Rule 5.31, which in part states as follows:

(a) Confidential records and proceedings.

(1) All proceedings and the records of all proceedings under this Rule 5 shall be confidential except as otherwise provided in this Rule 5.31.

(d) Permissible disclosure of confidential records.

(1) Confidential records may be inspected only by the advisory committee, chief disciplinary counsel, members of the regional disciplinary committee conducting an investigation, the person complained against or that person's duly authorized representative, unless otherwise ordered by this Court. A complainant may be provided with copies of those materials the complainant submitted.

On July 30, 2015, Respondent filed a Motion to Compel (Record 103). On August 4, 2015, Informant filed a response to the Motion to Compel. (Record 107). On August 10, 2015, the Disciplinary Hearing Panel issued an Order denying Respondent's Motion to Compel. (Record 115).

Lack of Diligence Allegations

In the cases in which Informant alleges Respondent violated Rule 4-1.3, Informant produced no evidence that any of the clients complained.

Fraud and Deceit Allegations

In the counts in which Informant alleges Respondent violated Rule 4-8.4(c), Informant produced no evidence that Respondent made any representations about where funds would be deposited or held.

Count XVIII Knehans

The lien check that Respondent retained was related to treatment by various healthcare providers for which Medicare had paid. Medicare claimed a lien for reimbursement for care that had been provided to Ms. Knehans related to the accident. (App. 498-503). Respondent negotiated a lien reduction from $13, 542.51 to $8958.37. (App. 497, Exhibit DD pg. 1). In addition to that negotiated reduction, Ms. Knehans disputed that the lien applied to some charges for which Medicare claimed it should be reimbursed because she said these charges were for regular medical treatment and not related to the accident. (App. 58, Tr. 226-227; App. 427-428, Exh. 54, pgs. 28-29).

Ms. Knehans and Respondent documented their agreement that this amount would be disputed on the settlement statement. (App. 448, Exh. 54C).

Respondent kept the physical check that had been issued for payment of the lien and still had that check as of the date of the hearing. (App. 58, Tr. 227). He notified MSPRC (Medicare Secondary Payer Recover Contractor) in writing that Ms. Knehans disputed certain charges. (App. 58, Tr. 227)

Respondent followed up in writing and by telephone. He testified about his multiple efforts to follow up and how it was frustrating due to the onerous bureaucratic

requirements this federal contractor requires. (App. 59, Tr. 229-231; App. 66, 259-260). MSPRC eventually consented to remove the disputed charges. As of the date of the hearing, Ms. Knehans was receiving piecemeal refunds of the amounts withheld from her Social Security checks and was expected, based on representations made to Respondent, to receive a lump sum for the balance. (App. 59, Tr. 231).

Respondent had not sent the Medicare medical lien check of $8,958.37 because Ms. Knehans instructed Respondent to dispute the amount of the lien. Ms. Knehans testified that she does not know how long it takes to resolve such issues with the federal government. (Record 2744-2747, Tr. 28-31, App. 448, Exh. 54C). Informant mistakenly states that the withholdings from Ms. Knehans' social security payments continued to the trial date. Informant bases this statement on Ms. Knehans' testimony at her deposition, which occurred on August 7, 2015. (App. 398). The hearing was held on November 16, 2015. (App. 2). As noted above, by the hearing date, Ms. Knehans was starting to receive refunds of the amounts withheld.

Allegations Related to Failure to Respond to OCDC

Informant filed the Information in this matter on December 30, 2014. (App. 2). Informant filed the First Amended Information on March 5, 2015, adding Counts X – XX. (App. 75-107).

Respondent admitted: On December 24, 2014, Informant wrote to Respondent asking for a response to a complaint filed by Serena Hendrickson on November 24, 2014. On February 10, 2015, Informant wrote to Respondent asking for a response to a

complaint filed by Matthew Rossignol on January 7, 2015. Ms. Knehans filed a complaint with the OCDC in October of 2014. On December 24, 2014 the OCDC sent a letter to Respondent directing him to file a response to the complaint by January 9, 2015.

These complaints were subsequently included in the First Amended Information as Count XVIII (Knehans), Count XIX (Serena Hendrickson), and Count XX (Rossignol).

Respondent was late in responding to one or more of these complaints and called counsel for Informant to request more time. Respondent understood counsel for Informant to say that Respondent would respond to these complaints as a part of responding to the amended Information that counsel for Informant intended to file. (App. 66, Tr. 260). There is no evidence to the contrary.

Rossignol

On September 15, 2014, Respondent sent Mr. Rossignol a letter and enclosed a check for a $300 refund. (App. 45-46, Tr. 175, 180, App. 588 Exh. EE). Mr. Rossignol did not receive the letter but came by Respondent's office and picked up a copy of the letter and his file. Respondent's staff did not issue another check to Mr. Rossignol, at that time. (App. 22, 45, Tr. 83, 175).

After time passed and Mr. Rossignol did not receive the original refund check, Respondent stopped payment on the original check. (App. 9, Tr. 231; App. 590, Exh. EE). Respondent issued another refund check for Mr. Rossignol in November 2014 and it was mailed to Mr. Rossignol in January 2015. (App. 23, 59, Tr. 85, 232). Respondent

does not know why the check was not mailed to Mr. Rossignol before January. (App. 59, Tr. 232).

Trust Account

When Respondent went to work for Lawrence Ray as an employee in June 2013, he found that the staff were essentially running the firm. The paralegals were making decisions that should be made by a lawyer and many cases were not being handled in a timely manner. (App. 48, Tr. 186).

As an employee, Respondent was not a signatory on the trust account and did not have access to that account but he learned that there were problems with how the trust account was handled. (App. 48, Tr. 187).

Lawrence Ray had a "21 day rule" related to when the fee was earned so it could be withdrawn from the trust account. That rule was incorporated in client contracts: "The client agrees that the initial set fee paid is fully earned after twenty-one (21) days of the date of payment." (App. 55, Tr. 216; Record 2821-2828, 2832-2835, and 2839-2841, Exh. T, U, W, Z,).

As a result of his frustration with his efforts to have things done properly in the firm, Respondent told Mr. Ray that the only way Respondent could get things to change would be if Mr. Ray gave him some authority. (App. 49, Tr. 190).

Respondent became a partner with Lawrence Ray in the Blum & Ray law firm on August 15, 2015. (App. 49, Tr. 190). Respondent's ability to make changes in how things were done did not occur immediately because the staff members were set in the

ways they had done things when they worked solely for Lawrence Ray and did not do what he told them to do. (App. 49, Tr. 190-191). Respondent did not gain control over the trust account in the fashion that he thought he should have until November 2014 when he terminated Serena Hendrickson. (App. 50, Tr. 195). Even then, Chelsea Hanneken, who staffed the Rolla office, knowingly and intentionally handled client funds improperly. (App. 12, Tr. 42-43; App. 606, Exh. GG, App. 57, Tr. 222-223).

When Respondent became a partner in the law firm, he found that Mr. Ray had not kept ledgers and had incomplete QuickBooks records. (App. 51, Tr. 197-198). Ultimately, only $4339.38 was transferred from the Lawrence E. Ray, P.C., trust account to the Blum & Ray trust account. The bank statement shows that $9417.38 was initially transferred but $5,078 was almost immediately transferred back using Check 97 due to outstanding checks. (App. 51, Tr. 197, Record 1315-1317, Sealed Exh. 11).

Not long before the hearing, Respondent finished an analysis of what should have been transferred to the Blum & Ray trust account from the Lawrence E. Ray, P.C., trust account. Respondent performed this analysis by reviewing client files for records of payments. Respondent concluded that over $60,000 should have been transferred from the Lawrence E. Ray, P.C., trust account to the Blum & Ray trust account. (App. 51, Tr. 199-201).

After the partnership was formed, Mr. Ray terminated the bookkeeper. (App. 49, Tr. 192). Respondent terminated three other staff, including Chelsey Hanneken and Serena Hendrickson, disgruntled former employees who filed complaints against

Respondent and testified against Respondent at the hearing. (App. 49, Tr. 192). Respondent terminated them related to their handling of funds. (App. 50, Tr. 193).

Respondent now believes that Serena Hendrickson was responsible for the missing funds for which he terminated another employee. (App. 49-50, Tr. 192-193). Respondent terminated Serena Hendrickson as a result of a client payment she had not been handled properly. Respondent found the receipt for the payment in a receipt book he had placed in his office to remove from use. Although the receipt book should have been in Respondent's office, it was hidden in Serena Hendrickson's office. Respondent found the receipt for the payment in a receipt book he had placed in his office to remove from use. (App. 60, Tr. 233- 235).

Respondent terminated Chelsey Hanneken in January 2014. (App. 57, Tr. 222-224). Ms. Hanneken had held payments from clients that she received in the Rolla office on December 9, 10, and 18, 2013, and personally prepared a Counter Deposit slip and deposited them into the operating account on January 6, 2014, so the funds would be available to cover her paycheck. She was supposed to send those payments to the St. Robert office for proper handling. (App. 12, Tr. 42-43; App. 606, Exh. GG, App. 57, Tr. 222-223).

Ms. Hanneken knew that she was not handling these payments properly. (App. 12, Tr. 43-44). Ms. Hanneken obtained online access to the trust account despite the fact that Respondent told her that she did not need access to it and that he did not want her to have access to it. (App. 13, Tr. 45). Ms. Hanneken was a disgruntled employee prior to

her termination and a lot of her actions in the law firm were focused on making sure she got paid. (App. 13, Tr. 46).

After Respondent and Mr. Ray formed the partnership, Mr. Ray had access to the Blum & Ray trust account. Mr. Ray made a cash withdrawal from the trust account on September 3, 2013, for no apparent firm purpose. (App. 608, Exh. HH; App. 60-61 Tr. 236-237). Respondent was a partner with Mr. Ray when all of these deficiencies occurred.

Informant made a number of allegations in Count XVII about trust account violations related to clients other than those specifically addressed elsewhere, based on the complaint of Chelsey Hanneken. Informant failed to introduce evidence of these violations, including whether the alleged payments were received before or after August 15, 2013. As submitted in Informant's proposed findings, the Disciplinary Hearing Panel found: "The OCDC at trial did not provide evidence on the remaining clients from Ms. Hanneken' s list who were named in Count XVII of the Information."

POINTS RELIED ON

I.

THIS COURT SHOULD REMAND THIS CASE TO A DIFFERENT DISCIPLINARY HEARING PANEL BECAUSE RESPONDENT WAS DENIED A FAIR HEARING DUE TO THE PANEL'S ERROR IN DENYING RESPONDENT DISCOVERY:

A. REGARDING INFORMANT'S DOCUMENTS RELATED TO THE BLUM & RAY LAW FIRM AND IN THAT THE ALL DOCUMENTS RELATED TO THE BLUM & RAY LAW FIRM WERE RELEVANT AND COULD BE PROVIDED BY INFORMANT UNDER RULE 5.31, AND

B. REGARDING DOCUMENTS WHICH INFORMANT CLAIMED WERE WORK PRODUCT IN THAT INFORMANT IS NOT ENTTITLED TO THE TRIAL PREPARATION WORK PRODUCT PRIVILEGE.

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

In re Board of Registration for the Healing Arts v Spinden, 798 S.W. 2d 472 (Mo. App. W.D. 1990)

Edwards v. Missouri State Bd. of Chiropractic Examiners, 85 S.W.3d 10, 23 (Mo. App. W.D. 2002)

Section 536.083, RSMo

Rule 5.11(c)

Rule 5.15(c)

Rule 5.31

POINTS RELIED ON

II.

THIS COURT SHOULD NOT FIND THAT RESPONDENT VIOLATED RULE 4-1.3 ON DILIGENCE BECAUSE INFORMANT DID NOT MEET HIS BURDEN OF PROOF IN THAT THE EVIDENCE DOES NOT SUPPORT A FINDING THAT RESPONDENT WAS NOT DILIGENT IN HIS REPRESENTATION OF CLIENTS.

In re Mirabile, 975 S.W.2d 936, 940 (Mo. banc 1998)

Rule 4-1.3

POINTS RELIED ON

III.

THIS COURT SHOULD NOT FIND THAT RESPONDENT VIOLATED RULE 4-8.4(C) RELATED TO FRAUD OR DECEIT BECAUSE INFORMANT FAILED TO MEET HIS BURDEN OF PROVING THE ELEMENTS OF THIS RULE VIOLATION IN THAT INFORMANT DID NOT PROVE THAT RESPONDENT MADE REPRESENTATIONS TO THE CLIENTS REGARDING THE HANDLING OF THEIR FUNDS.

Hernandez v. State Bd. of Registration for the Healing Arts, 936 S.W.2d 894, 899 n. 2 (Mo. App. W.D.1997).

State ex rel. Williams v. Purl, 228 Mo. 1 (1910)

Advisory Committee Formal Opinion 128

POINTS RELIED ON

IV.

IF THIS COURT DOES NOT REMAND THIS CASE FOR A NEW HEARING, THIS COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH LEAVE TO APPLY FOR REINSTATEMENT AFTER ONE YEAR, THE SUSPENSION SHOULD BE STAYED AND RESPONDENT SHOULD BE PLACED ON PROBATION FOR TWO YEARS.

In re Coleman, 298 S.W.3d 857 (Mo. banc 2009)

In re Forck, 418 S.W. 3d 437 (Mo. banc 2014)

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010)

Matter of Owens, 893 P.2d 1284 (Ariz. banc 1995)

Rule 4-1.15

Rule 4-3.8

Rule 5.11(c)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

THIS COURT SHOULD REMAND THIS CASE TO A DIFFERENT DISCIPLINARY HEARING PANEL BECAUSE RESPONDENT WAS DENIED A FAIR HEARING DUE TO THE PANEL'S ERROR IN DENYING RESPONDENT DISCOVERY

A. REGARDING INFORMANT'S DOCUMENTS RELATED TO THE BLUM & RAY LAW FIRM AND IN THAT THE ALL DOCUMENTS RELATED TO THE BLUM & RAY LAW FIRM WERE RELEVANT AND COULD BE PROVIDED BY INFORMANT UNDER RULE 5.31, AND

B. REGARDING DOCUMENTS WHICH INFORMANT CLAIMED WERE WORK PRODUCT IN THAT INFORMANT IS NOT ENTTITLED TO THE TRIAL PREPARATION WORK PRODUCT PRIVILEGE.

In Respondent's First Request for Production of Documents Directed to Informant, Respondent requested:

1. A complete copy of all documents obtained or prepared in the course of the investigation, preparation, or both, of the above-referenced case, that have not been previously provided to Respondent.

2. A complete copy of all documents related to statements or interviews Informant has conducted related to the law firm of Blum and Ray, regardless of the case or investigation in which the documents were prepared or obtained.

Informant responded:

1. A complete copy of all documents obtained or prepared in the course of the investigation of the above styled case, less privileged communication and work product, has previously been provided to the Respondent.

2. All documents relating to statements or interviews Informant has conducted in this case have previously been provided as stated in paragraph one above. Any documents involving any other lawyer or investigation, if conducted and/or in existence, have not been provided. Informant objects and states that any such documents (if even in existence) are not discoverable pursuant to the provisions of Missouri Supreme Court Rule 5.31, which in part states as follows:

(a) Confidential records and proceedings.

(1) All proceedings and the records of all proceedings under this Rule 5 shall be confidential except as otherwise provided in this Rule 5.31.

(d) Permissible disclosure of confidential records.

> (1) Confidential records may be inspected only by the advisory committee, chief disciplinary counsel, members of the regional disciplinary committee conducting an investigation, the person complained against or that person's duly authorized representative, unless otherwise ordered by this Court. A complainant may be provided with copies of those materials the complainant submitted.

The Disciplinary Hearing Panel denied Respondent's Motion to Compel Regarding Respondent's First Request for Production of Documents Directed to Informant.

The Panel's decision was erroneous and deprived Respondent of a fair hearing. The rules related to these proceedings allow discovery, including requests for production. Rule 5.15(c).

A. Confidentiality of Documents

Informant's reliance on Rule 5.31(d) is misplaced. Rule 5.31(d) states, in part:

> (1) Confidential records may be inspected only by … **the person complained against or that person's duly authorized representative**, unless otherwise ordered by this Court. A complainant may be provided with copies of those materials the complainant submitted.
>
> * * * *
>
> (3) The chief disciplinary counsel may make otherwise confidential records of disciplinary proceedings available to:

* * * *

(E) Other persons as reasonably necessary to perform duties under this Rule 5.

(Emphasis added).

Respondent believes documents related to the Blum & Ray law firm could be produced by Informant as production to "the person complained against or that person's duly authorized representative." Even if that provision does not permit Informant to provide these documents to Respondent, they could be produced under 5.31(d)(3)(E) in order to comply with discovery.

The Blum & Ray law firm is a successor law firm to Lawrence Ray's law firm. Lawrence Ray was Respondent's partner in the Blum & Ray law firm. Respondent was entitled to "all documents related to statements or interviews Informant has conducted related to the law firm of Blum & Ray." Further, if Respondent had received these documents, it may have led to the discovery of other information that would have led to evidence helpful to Respondent.

To the extent that Informant chose to investigate Lawrence Ray separately, Informant's choice should not be a basis for denying Respondent discovery. Informant could have included both partners in the same proceeding. Rule 5.11(c). Lawrence Ray is also responsible for any trust account violations. Informant states in Informant's Brief: "Our Supreme Court has recently clarified beyond any doubt that the operation of

the client trust account is a non-delegable duty." Informant cites *In re Farris*, 472 S.W.3d 549 (Mo. banc 2015). Informant can't have it both ways. Informant should not be permitted to protect Lawrence Ray, Respondent's partner who is also responsible for any violations of the trust account rule in the Blum & Ray law firm.

Respondent's privilege log did not identify any documents related to the second paragraph of Respondent's request for production. Informant has refused, by the wording of his objection, to indicate whether any such documents exist, although Respondent believes they do.

B. Work Product

Informant also asserted work product as a basis for refusing to produce some documents. Informant's privilege log listed the following:

1. Inter-Office Emails regarding status of case.

2. Emails with witnesses Chelsey Hanneken, Serena Hendrickson and Matthew Rossignol regarding trial conflict dates.

3. Notes from trial preparation meeting with Chelsey Hanneken and Serena Hendrickson on April 14, 2015 post Information filing.

4. Notes from trial preparation meeting with Matthew Rossignol on April 14, 2015 post Information filing.

5. Notes from trial preparation meeting with Mary Knehans on July 7, 2015 post Information filing.

Respondent does not assert that he is entitled to the first item, 'Inter-Office Emails." Respondent was and is entitled to the remaining items.

Informant is not entitled to the trial preparation work product privilege. *See, In re Board of Registration for the Healing Arts v Spinden,* 798 S.W. 2d 472 (Mo. App. W.D. 1990). *Spinden* is a case in which the Board of Registration for the Healing Arts sought a writ of prohibition against Paul Spinden, who was a Commissioner on the Administrative Hearing Commission.

Materials prepared in the in the ordinary course of business are not protected by the work product privilege, even if the materials were prepared for an imminent trial. *Id.* at 478. In *Spinden,* the Court of Appeals ruled that the Board of Registration for the Healing Arts does not have the trial preparation work product privilege because its actions are all in the regular course of business. Informant's role in relation to attorneys is nearly identical to the role of the Board of Registration for the Healing Arts in relation to physicians.

In addition to supporting Respondent's position that Informant is not entitled to the work product privilege, except for opinion work product, *Spinden,* at 478, supports a liberal approach to discovery:

> **The rules of discovery are to be liberally construed.** A licensee's eligibility to practice a particular profession is controlled by the Board. The government and the public have a right to expect entities like the Board to ensure that competent and ethical people practice these

regulated professions. By the same token, **in a disciplinary proceeding the licensee, as a matter of fair play, should be allowed to discover, within the Rules, all materials relating to those proceedings.**

The appellant argues that permitting discovery in this case unfairly allows Dr. Lagueruela to reap the benefits of the Board's labors. It seems more unfair to require a doctor to try to duplicate the Board's investigation so he can, at best, guess the strength of the Board's case against him. Requiring Dr. Lagueruela to show substantial need and undue hardship presupposes that the Board gathered its materials in anticipation of litigation and not in the ordinary course of business.

The Board further argues that if this court deems the investigative reports were prepared in the ordinary course of the Board's business, then the Board will essentially be deprived of work product immunity. This court disagrees. The work product doctrine would protect materials such as the Board's minutes, votes, and the broad category of materials constituting opinion work product. This is not an invitation for the Board to commingle its trial strategy information with its investigative reports. As proposed by Spinden such materials could be reviewed *in camera,* and information covered by work product doctrine could be expunged before allowing discovery. *See e.g.*, *Sires v. National Service Corp.*, 560 So.2d 448, 449 (La.App.1990).

> As discussed earlier, the work product doctrine protects materials prepared in anticipation of litigation, but the "mere likelihood of suit is not sufficient to invoke the privilege." Stauffer Chemical Co. v. Monsanto Company, 623 F. Supp. 148, 152 (E.D.Mo.1985). Materials prepared in the ordinary course of business do not fall within the work product exception. Id. **Even assuming the Board could satisfy the court that the materials were prepared for an imminent trial, this court rules such action was in the ordinary course of its business, defeating any privilege.**

(emphasis added).

In Informant's Response to Respondent's Motion to Compel Regarding Respondent's First Request for Production of Documents Directed to Informant, citing *Spinden*, Informant argued that Respondent had not demonstrated need to obtain the items through discovery. Informant ignored the fact that *Spinden* stands for the proposition that the items are not considered work product at all. Therefore, Respondent is not required to demonstrate need. Respondent also argued that Rule 5.31(d)(3) lists situations in which Informant may make confidential records available. Informant emphasizes that the word "may" gives the Chief Disciplinary Counsel discretion. Informant ignores the fact that his discretion is removed by his duty to comply with discovery. Yet, his argument that Informant "may" disclose the items, within his discretion, contradicts his argument that the materials are protected from discovery

because they are confidential. If Informant "may" disclose the documents in his discretion, he certainly "may" disclose the documents in response to discovery. If it was necessary to protect Lawrence Ray, the documents could have been subject to a protective order.

Respondent was deprived of items to which he was clearly entitled. The Panel's ruling was an abuse of discretion. The Panel did not conduct an *in camera* review of the documents, which may have resulted in at least some of the documents being produced, as occurred in *Edwards v. Missouri State Bd. of Chiropractic Examiners*, 85 S.W.3d 10, 23 (Mo. App. W.D. 2002). Because Respondent was deprived of the discovery of the documents sought and the opportunity to conduct further discovery and trial preparation based on the information obtained, this Court should remand this case for a new hearing. Although §536.083, RSMo, is not binding in attorney discipline proceedings, this Court should remand this case to be heard by a different hearing panel following the public policy of this state as set forth in that statute:

> Notwithstanding any other provision of law to the contrary, in any administrative hearing conducted under the procedures established in this chapter, and in any other administrative hearing conducted under authority granted any state agency, no person who acted as a hearing officer or who otherwise conducted the first administrative hearing involving any single issue shall conduct any subsequent administrative rehearing or appeal involving the same issue and same parties.

ARGUMENT

II.

THIS COURT SHOULD NOT FIND THAT RESPONDENT VIOLATED RULE 4-1.3 ON DILIGENCE BECAUSE INFORMANT DID NOT MEET HIS BURDEN OF PROOF IN THAT THE EVIDENCE DOES NOT SUPPORT A FINDING THAT RESPONDENT WAS NOT DILIGENT IN HIS REPRESENTATION OF CLIENTS.

Informant has alleged that Respondent violated Rule 4-1.3 because he was not diligent in representing the following clients: Edwards, Miller, Finn, Nichols, McCarthy, Nash, Barve, Mathenia, Moyle, Timms, and Arnold. Rule 4-1.3 states: "A lawyer shall act with reasonable diligence and promptness in representing a client."

The Disciplinary Hearing Panel found that Respondent was not diligent regarding: Edwards, Finn, Nichols, McCarthy, Mathenia, Moyle, Timm, and Arnold. None of these clients complained about Respondent's representation. None of these clients testified at the hearing. Because Informant's brief did not indicate that Informant has abandoned the allegations regarding the clients where the Panel found no diligence violation, Respondent is addressing all of the allegations.

Edwards

The Edwards hired Blum & Ray in October 2013 to represent them in a bankruptcy proceeding. (App. 29, Tr. 109). Respondent filed the petition on July 23,

2014. (App. 260, Exhibit 14). Jacki Hendrickson, a Blum & Ray paralegal, testified: "We had actually had it ready to file, and the client called us in the process of us trying to get a pay stub, I believe, and informed us that they wanted us to wait due to a medical bill that they were supposed to be receiving that they wanted us to make sure that we had included." (App. 43, Tr. 168).

Miller

Miller made the last payment in September of 2013. As of the hearing date, the Miller bankruptcy had not been filed. Jacki Hendrickson testified: "I believe it was the husband had filed bankruptcy prior. His income also does not fall under being able to file a Chapter 7 so we were having to wait for the time line to lapse for him to be allowed to file another bankruptcy. And we were trying to get it -- do research to make sure that we were correct in him having to file a Chapter 13 instead of a Chapter 7. We also later had them meet with Mike. They reviewed paperwork several times and discovered that the wife needed to be included as well for the benefit of the clients. (App. 44, Tr. 169). The Disciplinary Hearing Panel found that Respondent did not violate Rule 4-1.3. (App. 615).

Finn

Mr. Finn made his final payment in November of 2013. (App. 32; 273, Tr. 124). Respondent's Exhibit C shows Mr. Finn received a bankruptcy discharge on January 27, 2015. (App. 480). Jacki Hendrickson testified Mr. Finn had not provided the office updated information, resulting in delays. (App. 44, Tr. 169).

Nichols

Ms. Nichols paid Blum & Ray for her bankruptcy in November 2013. (App. 34; 53, Tr. 129; 205). Ms. Nichol's bankruptcy petition was filed July 11, 2014. (App. 296). She received a bankruptcy discharge on October 27, 2014. (App. 482). Jacki Hendrickson testified: "I believe we had difficulty getting updated pay stubs for her, and I want to say she also had some medical emergencies. She had surgery so she was unable to meet and review her paperwork so we were kind of delayed in that as well." (App. 44, Tr. 170).

McCarthy

Mr. McCarthy paid Blum & Ray in November of 2013 to file a bankruptcy petition. (App. 34; 53; 314-315, Tr. 132; 205). Mr. McCarthy's bankruptcy petition was filed August 29, 2014. (App. 307). He received a final discharge on July 17, 2015. (App. 313, 483).

Nash

Belinda Nash hired Blum & Ray, or Blum & Ray's predecessor Lawrence E. Ray, P.C. to file a bankruptcy petition. (App. 35; 53, Tr. 136; 208). As of the date of the hearing, Ms. Nash's bankruptcy petition had not been filed. Respondent testified that Ms. Nash had not provided all information necessary for her bankruptcy filing, was now married, and that her circumstances may have changed. (App. 53-54, Tr. 208-209). The Disciplinary Hearing Panel found Respondent not guilty of violating Rule 4-1.3. (App. 622-623).

Barve

Larry Barve hired Blum & Ray in August of 2013 by to file a bankruptcy petition. (App. 36; Tr. 137; 319-321). As of the date of the hearing, no bankruptcy petition had been filed on behalf of Mr. Barve. Respondent's Exhibit H is a letter from his office to Mr. Barve dated June 24, 2015 attempting to contact Mr. Barve in an effort to have the bankruptcy matter proceed. (App. 487). The Disciplinary Hearing Panel found Respondent not guilty of violating Rule 4-1.3 on diligence. (App. 623-624).

Mathenia

The Mathenias hired Blum & Ray in October of 2013 to file a bankruptcy petition only for Ms. Mathenia. (App. 36; 330-332, Tr. 139). The bankruptcy was filed May 29, 2015. (App. 327). Ms. Mathenia received a bankruptcy discharge on September 1, 2015. (App. 488).

Moyle

In January of 2013 Blum & Ray's predecessor, Lawrence E. Ray, P.C., was hired by Frank Moyle to prepare a bankruptcy petition. (App. 337). Respondent first became an associate of Mr. Ray's in June of 2013, and by August of 2013 became a partner in the firm of Blum & Ray. **(**App. 49, T. 190). The Moyle bankruptcy petition was filed on July 23, 2014. App. 334. Mr. Moyle was discharged in bankruptcy on October 21, 2014. **(**App. 489). Ms. Hendrickson testified it was a little hard to get updated information from Mr.

Moyle. “He constantly would tell me well, I don't have this, I can't do this, or he would be very vague about the information. So it took a little while to get the specifics from him to make sure that I had everything correct before filing.” (App. 44, Tr. 172).

Timm

The Timms hired Lawrence E. Ray, P.C., or Blum & Ray in the summer of 2013 to file a bankruptcy petition. (App. 347-348). The Timms’ bankruptcy petition was filed May 27, 2014. (App. 343). Jacki Hendrickson testified the office had difficulty getting proper documentation for wages. **(**App. 44-45, Tr. 172-173).

Arnold

The Arnolds hired Blum & Ray in October of 2013 to file a bankruptcy petition. (App. 349-351). The Arnolds’ bankruptcy petition was filed on March 22, 2014. (App. 352). The Arnolds were discharged on August 19, 2014. (App. 356, 494).

Lack of Evidence

The evidence establishes some dates of hiring and filing or discharge in bankruptcy cases. During the course of the lengthy hearing, Respondent provided an unrebutted explanation for the timing in some of the cases. However, Informant has the burden of proof and Respondent bears no obligation to rebut Informant’s evidence when Informant’s evidence does not prove a violation. Respondent’s failure to provide evidence rebutting Informant’s lack of proof of a violation should not create an inference that there was a violation. In other words, this Court should not infer a violation from the fact that Respondent did not present evidence explaining the timing of the bankruptcy for

some of these clients. Informant's evidence was only dates. Dates alone do not establish lack of diligence. Informant's date evidence did not create a need for Respondent to provide an explanation. The fact that Respondent or Jacki Hendrickson provided an explanation related to some clients should not be held against Respondent.

There is no evidence that any of these clients complained about the diligence with which their cases were handled. In some instances, Respondent or his staff testified that there were delays caused by the clients. The Panel not only seemed to expect Respondent to rebut Informant's evidence that did not prove a violation but also expected Respondent to provide documentation, in addition to testimony, in some instances in which Respondent did provide rebuttal testimony.

It appears that Informant and the Panel took some sort of *res ipsa loquitur* approach to proving a lack of diligence. Such an approach simply does not apply to circumstances in which there may be many perfectly legitimate explanations for the timing of the filing of a bankruptcy case. Alternatively, perhaps some type of burden shifting idea was applied by the Panel in response to Informant's allegations. No cases of this Court support such concepts. Rule 5.15(c) establishes that the burden is on Informant to prove violations by a preponderance of the evidence. A charge of professional misconduct does not create a rebuttable presumption of professional misconduct. *In re Mirabile*, 975 S.W.2d 936, 940 (Mo. banc 1998). Informant has failed to meet his burden of proving any violations of Rule 4-1.3.

ARGUMENT

III.

THIS COURT SHOULD NOT FIND THAT RESPONDENT VIOLATED RULE 4-8.4(c) RELATED TO FRAUD OR DECEIT BECAUSE INFORMANT FAILED TO MEET HIS BURDEN OF PROVING THE ELEMENTS OF THIS RULE VIOLATION IN THAT INFORMANT DID NOT PROVE THAT RESPONDENT MADE REPRESENTATIONS TO THE CLIENTS REGARDING THE HANDLING OF THEIR FUNDS.

Informant alleged that Respondent violated Rule 4-8.4(c). Informant specifically alleged that Respondent violated this rule by engaging in "fraud" or "deceit" with regard to the following clients: Nichols, McCarthy, Barve, Mathenia, Arnold. In some instances, Informant specifically alleges that Respondent engaged in fraud or deceit "in that Respondent's trust account balance fell below that amount represented by [the client[s]'s] advance fee payment." In other instances, Informant alleges: "in that Respondent failed to place unearned funds in Respondent's trust account and therefore utilized the same for his own purposes."

Rule 4-8.4(c) states, in relevant part:

> It is professional misconduct for a lawyer to:
>
> * * * *

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

Informant produced no evidence that representations were made to these clients. "Fraud is defined generally under the common law as an intentional perversion of truth to induce another, or to act in reliance upon it." *Hernandez v. State Bd. of Registration for the Healing Arts*, 936 S.W.2d 894, 899 n. 2 (Mo. App. W.D.1997). *State ex rel. Williams v. Purl*, 228 Mo. 1 (1910) discusses deceit:

> The same author defines the word "deceit" in the following language:
>
> "1. An attempt or disposition to deceive or lead into error; any declaration, artifice or practice, which misleads another, or causes him to believe what is false; a contrivance to entrap; deception; a wily device; a trick; fraud.
>
> "2. Law. Any trick, collusion, contrivance, false representation, or underhand practice, used to defraud another. When injury is thereby effected, an action of deceit, as it is called, lies for compensation. See Fraud."

There is no evidence that any representations were made to these clients regarding where their funds would be held. That evidence is critical to establishing a violation of Rule 4-8.4(c) through fraud or deceit. Informant may argue that some understanding should be implied. There is no basis for claiming that a representation regarding where funds would be held was implied or understood by members of the public. Until 2010

when the Supreme Court Advisory Committee issued Advisory Committee Formal Opinion 128, flat fees such as the fees Respondent received from these clients were considered earned upon receipt and placed in the operating account. Since many attorneys are unaware of the change that occurred in 2010, it strains the imagination to believe that the general public is aware of the change. Formal Opinion 128 states, in part:

> Part of the confusion surrounding this topic may stem from the historical view that a flat fee is earned upon receipt for trust account purposes. However, in the course of reviewing that approach, we have determined that it is not consistent with the current Rules of Professional Conduct. Rule 4-1.15(f) states: "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." We believe that all flat fees must be deposited into a lawyer trust account and promptly removed when actually earned, similar to prompt removal of earned hourly fees. Flat fees could be removed based upon reaching a particular stage of a case or based on some other reasonable criteria, depending on the nature and circumstances of the representation.

As discussed below, Respondent acknowledges that he did not follow the specific requirements of the trust account rule regarding some of these clients. However, there is simply no evidence to support the elements of fraud or deceit. Respondent did not make any false representations to these clients and Informant has not alleged that he did. To

the extent that Respondent mishandled funds, the evidence does not support that it was intentional. Intent is another element of fraud or deceit, as defined above. Informant has not met his burden of establishing that Respondent violated Rule 4-8.4(c) by engaging in fraud or deceit.

ARGUMENT

IV.

IF THIS COURT DOES NOT REMAND THIS CASE FOR A NEW HEARING, THIS COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH LEAVE TO APPLY FOR REINSTATEMENT AFTER ONE YEAR, THE SUSPENSION SHOULD BE STAYED AND RESPONDENT SHOULD BE PLACED ON PROBATION FOR TWO YEARS.

Lack of Fairness of the Proceeding

As asserted under Point I, Respondent asks this Court to remand this case for a new hearing before a different Disciplinary Hearing Panel. Alternatively, in the event this Court does not remand this case, it should place Respondent on probation with a stayed suspension, for the reasons discussed below.

It is not possible to know the extent to which Respondent should ultimately be held responsible for the violations of Rule 4-1.15 because Informant chose not to file this case jointly against both Blum & Ray partners, Lawrence Ray and Respondent. The problems with the operation of the firm started when Lawrence Ray operated the

Lawrence E. Ray, P.C. When Respondent became Lawrence Ray's partner, with the goal of straightening out the problems, he inherited a horrible situation. Prior to becoming a partner, Respondent did not have access to the trust account. (App. 48, Tr. 186). He did not realize just how bad it was until shortly before the hearing in this case, when he finished his analysis of payment records in client files.

All of the circumstances of that situation should have been brought to light during the hearing in this case but they were not. A joint hearing was the best way to obtain a just result. As a prosecutorial officer, Informant should follow the spirit of the Comment to Rule 4-3.8 and function as a minister of justice and not simply as an advocate. *Matter of Owens*, 893 P.2d 1284, 1289 n.6 (Ariz. banc 1995). Informant had the option include both partners in the same case, but chose not to do so. Rule 5.11(c). Further, as discussed in Point I, Informant inexplicably sought to protect Lawrence Ray by refusing to disclose information in discovery. Although Mr. Ray is apparently no longer an active member of the Bar, Respondent has found no record that he has been disciplined or that any proceeding is pending against him.

It is illogical and unjust for Respondent to be disciplined as though he were solely responsible for all of the violations. Not only is this true because Mr. Ray and Respondent were partners but there is specific evidence of Mr. Ray's misconduct involving the trust account after the partnership was formed. Respondent only presented one instance of Mr. Ray's direct misconduct but Respondent testified that he did not feel

that he truly gained control over the trust account until November of 2014. Mr. Ray was still a partner and had been the previous employer of the staff.

Respondent has continued to serve the clients of Lawrence E. Ray, P.C., and the Blum & Ray law firm despite significant financial difficulties due to the fact that more than $60,000 that should have been transferred from the Lawrence E. Ray, P.C., trust account were never transferred to the Blum & Ray trust account.

Handling Funds

Respondent admits that funds were not handled properly for Edwards, Miller, Finn, Pennington, Nichols, McCarthy, Nash, Mathenia, Timm, Arnold, Beasley, and Lack. Respondent also acknowledges that a slip up that he cannot explain resulted in undue delay in sending a replacement check to Mr. Rossignol, once it was determined that the original check simply was not going to be delivered by the Post Office. Respondent accepts that he should be disciplined for these violations of Rule 4-1.15.

Knehans

Respondent does not believe he violated Rule 4-1.15 regarding his representation of Ms. Knehans. He tried to get the matter resolved but met with a lack of responsiveness. Respondent regrets that Ms. Knehans suffered as a result of the bureaucracy of the federal government and its contractor. Respondent believes that the unfair manner in which Ms. Knehans was treated by the Social Security Administration is the result of the federal government not recognizing that a dispute was still pending, despite Respondent's communications. Ms. Knehans was not the first and surely won't

be the last to suffer as a result of the inefficiency and bureaucracy of the federal government and its contractors.

Informant alleged that Respondent violated "Rule 4-1.15 on safekeeping property by failing to pay funds to a third-party." Respondent could not pay the funds to Medicare or the Medicare contractor because Ms. Knehans disputed the lien. Respondent could not pay the funds to Ms. Knehans because of the lien.

ABA Standards

This Court regularly relies on the ABA Standards for Imposing Lawyer Sanctions (1991 ed.) (the "*ABA* Standard") when determining the appropriate sanction to achieve the goals of attorney discipline. *In re Coleman*, 298 S.W.3d 857, 869 (Mo. banc 2009). Under the *ABA Standards,* the factors to be considered "are the ethical duty and to whom it is owed, the attorney's mental state, the amount of injury caused by the attorney's misconduct, and, finally, any aggravating or mitigating circumstances." *Id.*

Respondent's conduct does not fall within the ABA Standards for disbarment. ABA Standard 4.11 states: "Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client." Respondent did not cause injury to any client. He took over a bad situation and kept clients from being injured. He strived to gain control of the trust account. Respondent's conduct falls between ABA Standards 4.12 and 4.13. Standard 4.12 applies when the conduct is knowing. Standard 4.13 applies when the conduct is negligent. The ABA Standards Definitions provide:

> "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.
>
> "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

This Court routinely uses probation as a sanction for trust account violations. Unfortunately, the ABA Standards do not address the situations in which probation is appropriate for trust account violations. Respondent asks this Court to conclude that this is an appropriate case for probation with a stayed suspension. Respondent did not set up a flawed system. Under the rules, Respondent should have walked away and left Lawrence Ray's clients in a lurch. Although attorneys are not free to disregard the rules, sometimes the legal thing, as defined by the rules, does not seem like the right thing. Respondent made the mistake of trying to do what seemed to him to be the right thing while not complying with the rules but trying to come into compliance.

Aggravating and Mitigating Factors

As aggravating factors, Respondent has a prior disciplinary history and that there are multiple offenses involved. ABA Standards 9.22 (a) and (d).

As mitigation, Respondent had no selfish or dishonest motive but was, in fact, doing what he could to serve clients of Lawrence E. Ray, P.C., and clients of the Blum &

Ray law firm. ABA Standard 9.32(b). Respondent's tax returns filed with his Motion for Appointment of Counsel amply demonstrate that Respondent has not obtained personal benefit from the trust account violations. Respondent has properly represented the clients of both firms. Respondent provided these legal services to all of the clients, despite the fact that the Blum & Ray trust account started out substantially underfunded. Only two of the clients involved in Information complained. Respondent acknowledges that he did not approach the problem with the funding of the Blum & Ray trust account in the proper manner but he has taken care of the firm's clients. Informant admits in his brief, at page 56, that Respondent has expressed remorse. Despite Informant's attempt to add a condition to the ABA Standard, remorse is a mitigating factor. ABA Standard 9.32(l).

Although Respondent has been on probation before. The circumstances of this case are unique. The extent that he, as compared with Lawrence Ray, should be held responsible for these violations had not been established. These circumstances lead to the conclusion that his prior discipline does not mean he must be disciplined more harshly in this case. Respondent's actions in firing staff who were not handling client funds properly shows that he had learned from his previous discipline. Respondent should be suspended for a minimum of one year but that the suspension should be stayed and that Respondent should be placed on probation for two years. This Court has placed many attorneys on probation as an appropriate discipline in cases involving trust account violations.

The Supreme Court follows a policy of progressive discipline, but it has also recognized that the policy does not always require that subsequent discipline be at a higher level than prior discipline. *In re Forck*, 418 S.W. 3d 437, 444-445 (Mo. banc 2014. The progressive discipline policy should not be routinely applied to Respondent in this case. In contrast to *In re Ehler*, 319 S.W.3d 442 (Mo. banc 2010), Respondent became a partner in a practice that already had significant trust account problems. Respondent did not ignore those problems. He terminated staff. (App. 50, Tr. 193). Respondent accepts that he cannot avoid responsibility for the actions of the staff. However, the cases Informant has cited involve attorneys who were not really trying to address the problems. The fact that the genesis of the trust account problems came from Lawrence Ray and staff members who had worked for Lawrence Ray should be considered in mitigation.

CONCLUSION

This case should be remanded for a hearing before a different hearing panel, so that Respondent has the opportunity to engage in all of the discovery to which he is entitled.

Alternatively, if this case is not remanded, Respondent should be suspended with leave to apply after one year. The suspension should be stayed and he should be placed on probation for two years. The conditions of probation should be the same as those in Exhibit 4 (App. 120-130), except the mental health provisions (Paragraph 8). Additionally, at any time Respondent is an employee of an entity other than a private law

firm, he should not be responsible for maintaining professional liability insurance (Paragraph 6) or employing a consultant (Paragraph 9).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify I signed the "original" in accordance with Rule 103.04 and that this 31st day of May, 2016, I have served a true an accurate copy of the foregoing via efiling to:

Carl Schaeperkoetter, Attorney for Informant, Carl.Schaeperkoetter@courts.mo.gov

Sara Rittman

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 8,669 words, exclusive of the cover, certificate of service, Rule 84.06 certificate, and signature block, according to Microsoft Word, which is the word processing system used to prepare this brief.

Sara Rittman