IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
RUSSELL A. WILLIS, III	)	**Supreme Court #SC84696**
	)	
Respondent.	)	

INFORMANT'S REPLY BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULES 4-1.7 AND 4-1.8, 4-1.15, AND 4-8.4(c)(d) IN THAT HE FAILED TO SAFEGUARD CLIENT FUNDS, HIS REPRESENTATION OF THE TRUST CLIENTS WAS MATERIALLY LIMITED BY HIS OWN INTERESTS AND HE LOANED HIMSELF CLIENT MONIES WITHOUT CLIENT ADVICE AND CONSENT, AND HIS CONDUCT TOWARD THE TRUST CLIENTS INVOLVED DECEIT AND MISREPRESENTATION AND WAS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

Informant will reply collectively under Point I to the arguments raised under Respondent's Points I, II, and III.

Respondent would have the Court excuse his withdrawal of funds from the trust by urging the conceit that he was "acting not in his capacity as a lawyer, but as trustee of a private trust." Respondent's brief at 11. Respondent's attempt to exorcise himself from the Rules of Professional Conduct by designating his role in the conduct at issue as that of "trustee" and not lawyer is as self-serving as were the "loans" to which he helped himself from the trust assets.

By his own testimony, Respondent performed multiple roles in connection with the Roden Cox trust, including that of lawyer for the trust. Rule 4-1.15(a) states that a "lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property." Because Respondent served simultaneously as the trustee and the trust's lawyer, his conduct was contrary to the Rule by the Rule's express language. Respondent cannot enjoy the luxury of declaring that because he was also serving as trustee, a position that can be filled by non-lawyers, he was excused from complying with the ethical constraints placed on him as a lawyer. Furthermore, Respondent's misappropriation and failure to segregate trust funds from his personal account is sanctionable under Rule 4-8.4(c)(d), for which an attorney client relationship is not prerequisite, as well as 4-1.15(a).[1]

Informant is, frankly, at a loss to understand Respondent's Point II argument. Informant finds no rationale for the argument that subdivision (a) of Rule 4-1.7 applies to "the situation in which a lawyer's own interests conflict with those of an existing client (emphasis added)," whereas, according to Respondent, subdivision (b) of Rule 4-1.7 applies to the "situation in which a lawyer is contemplating undertaking a representation

[1] Informant notes that, contrary to the assertion under Point I of Respondent's brief, *State Bar Committee v. Stumbaugh*, 123 S.W.2d 51 (Mo. 1938) is listed under Informant's Table of Authorities. And, Informant has not listed all of the cases cited in the Argument portion of Informant's Point I under the Point Relied On in compliance with Rule 84.04(d)(5).

in which he might be limited by a conflict between the prospective client's interests and the lawyer's own interests (emphasis added)." Respondent's brief at 13. Rule 4-1.7 is not subdivided to recognize a temporal distinction in the stage of the relationship between lawyer and client, but rather, distinguishes between conflicts "directly adverse to another client," and those conflicts that may "materially limit" the lawyer's representation of a client.

Informant pled in paragraph 14.F and .G of the information that Respondent violated Rule 4-1.7(b) by representing the trust when his representation of the trust was materially limited by his own interests. The Comment to Rule 4-1.7 gives as an example the very failing so egregiously exhibited by Respondent's conduct:

> For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable rate. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Further, a recent A.B.A. Formal Opinion states that "Under the Model Rules of Professional Conduct, a lawyer may accept appointment as a personal representative or trustee named in a will or trust the lawyer is preparing for a client, subject to complying with Rule 1.4(b) and, in some circumstances, with

Rule 1.7(b)." Informant charged Respondent with violating the correct rule, and more than a preponderance of evidence has shown that Respondent did violate it.

Respondent's proposition that he was excepted from the constraints imposed on him by Rule 4-1.8 (lawyer shall not enter into a business transaction with a client unless specified steps intended to provide special scrutiny to the transaction are satisfied) because his "loans" were transacted as trustee of the trust and not as lawyer for the trust is specious and has been addressed earlier in this reply brief. See also Spurgeon, "The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations," 62 Fordham L. Rev. 1357, 1377 (1994) ("Model Rules intended that the appointment of a lawyer as fiduciary be governed by the conflict of interest rules, particularly 1.7(b) and 1.8(a)").

In addressing Respondent's Point III, Informant must initially correct the misstatement contained therein that "The information as filed does not cite Rule 8.4(d)." The information charges Respondent with violating Rule 4-8.4(d) in paragraph 15.

Respondent's contention that he did not act dishonestly and deceitfully defies credulity. The record shows that Respondent covertly withdrew substantial funds from a trust without telling anyone what he was doing or accounting therefore to either the trust's income beneficiary before her death (or her son, who held a durable power of attorney for the income beneficiary) or the contingent beneficiaries until some seven months after the income beneficiary's death, and then only when demand was made that he do so. Respondent suggests that he

showed his good intentions by drafting an unsecured promissory note from his consulting business to the trust. Perhaps Respondent's good intentions could be used as paving material if Respondent's clients had knowingly consented to the dubious transaction. But that did not happen. A lawyer/trustee is not held to a standard of "good intentions." As Judge Cardozo said, "Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace." *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546 (1928). Drafting an unsecured promissory note and revealing it to no one does no more to ameliorate the dishonesty and deceitfulness of Respondent's conduct than does crossing one's fingers behind one's back while telling a lie.

AGRUMENT

II.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE HE KNOWINGLY VIOLATED DUTIES TO HIS CLIENTS AND CESTUIS QUE TRUST IN THAT HE ENGAGED IN SELF-DEALING, WAS DECEITFUL, PUT CLIENT FUNDS AT RISK, AND VIOLATED THE TRUST REPOSED IN HIM BY CLIENTS AND CESTUIS, THEREBY INJURING THE CLIENTS AND THE LEGAL PROFESSION

It should be borne in mind that the record reveals two contradictory explanations by Respondent for his 18 months worth of withdrawals from the Roden Cox trust: Respondent on one hand continues to insist that the withdrawals were a tax-wise (apparently except for himself) planning strategy to assist the trust in avoiding capital gains taxes, and on the other hand contends he was loaning himself money from the trust, backed up by the secret, unsecured promissory note. If the former explanation is accepted, then the $29,000 plus the Respondent withdrew from the trust in excess of time spent on trust work and deposited directly in his personal bank account is clearly misappropriation.

Somehow "loaning" yourself client money with a self-declared intention to repay it "before getting caught" may seem less egregious misconduct. See e.g. *In re Miller*, 568 S.W.2d 246 (Mo. banc 1978). Either way, Informant urges the Court to recognize

misappropriation for what it is: knowing and intentional conversion of a trusting party's property by one abusing a position of trust.

Under similar circumstances, the Supreme Courts of Florida and Nebraska disbarred lawyers for abusing fiduciary positions. The lawyer in *State ex rel. Nebraska State Bar Ass'n v. Bremers*, 200 Neb. 481, 264 N.W.2d 194 (1978), was guardian of an incompetent, and later, her estate. It was learned after the incompetent's death that the lawyer had been loaning estate money to his friends and relatives for years and paying himself fees from the estate without court authorization. The court concluded, inter alia, that the lawyer engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation, conduct prejudicial to the administration of justice, failed to keep funds entrusted to him separate and apart from his own, failed to account properly for such funds, and failed to pay over promptly property belonging to others. The court noted that "restitution of funds wrongfully converted by a lawyer, after he is faced with legal accountability, is not an exoneration of his professional misconduct." *Id*. at 197 (emphasis added).

In *Florida Bar v. Rhodes*, 355 So.2d 774 (Fla. 1978) (per curiam), the court disbarred a lawyer who, while serving as executor of an estate, withdrew funds from the estate and substituted in the funds' place his personal promissory notes. The amount of money at issue was similar to that in the case at bar: $19,990 in principal and $3,086 in interest.

Respondent emphasizes that he cooperated with the Ikemeier brothers' lawyers and agreed to a consent judgment in the amount calculated by them. The Court should

not lose sight of the fact that the cooperation only started after Respondent was found out. Because Respondent, while serving as attorney for and trustee of the trust, sneakily withdrew trust funds to coincide with his personal cash needs over an eighteen month period, he should be disbarred.[2]

[2] Contrary to Respondent's assertion on page 18 of his brief, *In re Starr* is cited on pages 15 and 16 of Informant's brief.

CONCLUSION

Respondent has committed professional misconduct by withdrawing trust monies substantially in excess of that to which he was entitled as fees, placing the money in his personal account and spending it, deceiving his clients about what he was doing, and purporting to transact business with the clients' money without advising and obtaining the consent of the clients. Rules 4-1.7, 4-1.8, 4-1.15, 4-8.4(c)(d). Disbarment is the appropriate sanction owing to the seriousness of the offenses and the presence of many aggravating factors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of November, 2002, two copies of Informant's Reply Brief have been sent via First Class mail to:

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_____
Sharon K. Weedin

CERTIFICATION: SPECIAL RULE NO. 1(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 Special Rule No. 1(b);

3. Contains 2,262 words, according to Microsoft Word 97, 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.

_____
Sharon K. Weedin