IN THE SUPREME COURT
STATE OF MISSOURI

In re:	)	
	)	
Russell A. Willis III	)	**Supreme Court No. SC84696**
	)	
Respondent.	)	

RESPONDENT'S BRIEF

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Jurisdictional Statement

This Court's jurisdiction over lawyer disciplinary proceedings is established by Article 5, section 5 of the Missouri Constitution, Supreme Court Rule 5, the common law, and Section 484.040 RSMo 1994.

There is, however, some question whether this matter is properly before this Court. Rule 5.14 requires that the chair of the advisory committee assign an information to a disciplinary hearing panel within fifteen (15) days after his receipt of a timely answer and request for hearing. Respondent further observes that in the present case the answer and request for hearing were timely mailed on November 21, 2001, within thirty days after service of the information upon him, and that under Rule 44.01(a) and (e), these would be deemed to have been received by the chair of the advisory committee on November 26 (three days' mailing time, plus the weekend), but that the assignment to the disciplinary hearing panel did not occur until January 4, 2002, thirty-nine (39) days later. Respondent does not claim that he has been prejudiced by this delay, but does question whether Rule 5.14 is jurisdictional on this point.

Respondent further observes that Rule 5.15 requires that the presiding officer of the disciplinary hearing panel set a date for hearing that is no more than sixty (60) days from the date the information was assigned to the panel. Respondent observes that in the present case the assignment was made on January

4, 2002, but that the panel hearing was set for April 9, 2002, ninety-five (95) days later. Again, respondent does not claim that he has been prejudiced by this delay. However, respondent notes that there is language in Rule 5.15 expressly to the effect that the rule is not jurisdictional on this point, and that the absence of similar language in Rule 5.14 may imply that the requirement of that rule that assignment to the panel be made within fifteen (15) days of the filing of a timely answer and request for hearing is jurisdictional.

Statement of Facts

Pursuant to Missouri Supreme Court Rule 84.04(f), respondent acknowledges that the statement of facts set forth in informant's brief is reasonably accurate, and indeed, that the statement of facts set forth in informant's brief presents a more accurate summary of the evidence produced at the disciplinary panel hearing than does the report of the panel itself. And since the panel's report is a part of the record before this Court, respondent believes that it is necessary to make the following exceptions to that report.

First, with respect to paragraph 1 of the panel's findings, the testimony was that respondent's initial engagement was for the purpose of terminating the Spilcker trust, without any reference to whether there may or may not have been "irregularities" in the management of the trust by the then trustee (**Tr. 10-11, 62**).

Second, again with respect to paragraph 1 of the panel's findings, while the complaining witness, Frank Ikemeier, may have had knowledge that respondent was employed by the disciplinary committee, the testimony is at best equivocal whether he learned this from respondent or from another lawyer who referred the complaining witness to respondent (**Tr. 22**).

The same comment applies to the related recitation in the second paragraph of the panel's findings.

Third, with respect to paragraph 9 of the panel's findings, it should be noted that a satisfaction of judgment was entered in the action to recover the money owed by respondent to the complaining witness and his brothers (**Inf. Exh. 22**).

Fourth, with respect to paragraph (e) of the panel's conclusions, since no tax returns were produced in evidence at the hearing, there is no evidence to support the conclusion that false tax returns were filed. Respondent's testimony was that he believed and continues to believe that the accrual of anticipated legal fees into the tax year in which the capital gain had been incurred was a reasonable reporting position (**Tr. 69-70, 86-87**), and no expert or other testimony was introduced at the panel hearing to contradict this position. Respondent also testified, without contradiction, that he had reported the monies withdrawn by him from the April 1997 trust as income on his personal returns (**Tr. 91**), though he was treating amounts withdrawn in excess of his earned fees as a debt to the trust (**Tr. 87-88**), and that he had paid income tax on the amounts withdrawn at marginal rates higher than the trust would have paid on the capital gain.

And finally, with respect to paragraph (b) of the panel's conclusions, there was no evidence that respondent treated any of the amounts withdrawn from the trust in excess of his earned fees as fees, excessive or otherwise.

Points Relied On

1. The evidence adduced at the disciplinary panel hearing does not support a finding that respondent violated Rule 4-1.15(a), in that the uncontradicted testimony was to the effect that the withdrawal by respondent from the trust of funds in excess of the amounts that had been earned as fees was in the nature of a loan, and not an advance against unearned fees, so that the fact that respondent did not segregate these funds does not constitute a violation of Rule 4-1.15(a).

People v. DeRose, 945 P.2d 412 (Colo. 1997)

In re Griffey, 873 S.W.2d 600 (Mo. banc 1994)

In re Lowther, 611 S.W.2d 1 (Mo. banc 1981) (Morgan, Bargett dissenting)

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

Rule 4-1.15(a)

2. The evidence adduced at the disciplinary panel hearing with respect to respondent's having documented the difference between the amounts withdrawn from the trust in the form of checks payable to himself and the amount of earned fees by means of a promissory note to the trust on which the named obligor was a sole proprietorship in which respondent's interest was "undisclosed" does not support a finding that respondent violated Rule 4-1.7(b), in that the rule literally applies to a situation in which a lawyer is contemplating undertaking a representation in which he might be limited by a conflict between the prospective client's interests and the lawyer's own interests, and not to a situation in which the lawyer's own interests conflict with those of an existing client.

Rule 4-1.7(a) and (b)

Rule 4-1.8(a)

3. The evidence adduced at the disciplinary panel hearing does not support a finding that respondent violated Rule 4-8.4(c), in that by executing a promissory note to the trust (rather than, for example, claiming that the amounts advanced to respondent from the trust had been earned as fees) respondent was acknowledging his obligation to the trust, and not engaging in "conduct involving conduct involving dishonesty, fraud, deceit or misrepresentation" within the meaning of Rule 8.4(c).

Rule 4-8.4(c) and (d)

4. Even if this Court finds that respondent has violated one or more of the cited rules, some sanction short of disbarment is appropriate in the circumstances of this case, in that respondent made a complete disclosure to the complaining witness and his brothers of the entire transaction, worked cooperatively with their lawyers to arrive at an accounting of the amount respondent owed them, and entered into a consent judgment for the debt, which judgment has been satisfied.

In re Kohlmeyer, 327 S.W.2d 249 (Mo. banc 1959)

In re Witte, 615 S.W.2d 421 (Mo. banc 1981),
appeal dismissed, cert. denied, 454 U.S. 1025 (1982)

In re Schaeffer, 824 S.W.2d 1 (Mo. banc 1992)

In re Conrad, 340 Mo. 582, 105 S.W.2d 1 (Mo. banc 1937)

In re Starr, 538 S.W.2d 334 (Mo. banc 1976)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.), Rule 9.32(d)

Argument

1. The evidence adduced at the disciplinary panel hearing does not support a finding that respondent violated Rule 4-1.15(a), in that the uncontradicted testimony was to the effect that the withdrawal by respondent from the trust of funds in excess of the amounts that had been earned as fees was in the nature of a loan, and not an advance against unearned fees, so that the fact that respondent did not segregate these funds does not constitute a violation of Rule 4-1.15(a).

Apart from *People v. DeRose*, 945 P.2d 412 (Colo. 1997), in which a three-year suspension was imposed on a lawyer who had made loans to family members from a fund of which he as acting as trustee, respondent has been unable to find any caselaw dealing directly with the question whether or how Rule 4-1.15 might apply to a situation in which a lawyer, acting not in his capacity as a lawyer but as trustee of a private trust, borrows money from that trust. None of the decisions cited by informant in its brief addresses this question even indirectly. *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994), dealt with a situation in which the respondent had forged a client's signature and had given no accounting of the subject funds. *In re Lowther*, 611 S.W.2d 1 (Mo. banc 1981), in which the imposed sanction was a one-year suspension, concerned a lawyer having acquired a financial interest in a client's business venture. Judges Morgan and Bardgett,

dissenting, would have issued a public reprimand. *In re Snyder*, 35 S.W.3d 380 (Mo. banc 2000) (per curiam), in which the imposed sanction was a six-month suspension, concerned a lawyer having acquired a conflicting interest in a client's bankruptcy estate by asserting liens for unpaid fees.

The other decision mentioned in the body of informant's argument under its first point, *State Bar Committee v. Stumbaugh*, 123 S.W.2d 51 (Mo. 1938), is not listed in the "table of authorities" section of informant's brief or cited under its point relied on. That case involved embezzlement.

Respondent would ask this Court to consider that the withdrawal by respondent from the April 1997 trust of funds in excess of the amounts that would have been justified by the agreed hourly rate was in the nature of a loan from the trust to respondent, and not a fee, "unreasonable" or otherwise, for purposes of Rule 1.5(a), and that because the withdrawal of these funds from the April 1997 trust was in the nature of a loan from the trust to respondent, and not an advance against unearned fees, the fact that Respondent did not segregate these funds does not constitute a violation of Rule 1.15(a).

2. The evidence adduced at the disciplinary panel hearing with respect to respondent's having documented the difference between the amounts withdrawn from the trust in the form of checks payable to himself and the

amount of earned fees by means of a promissory note to the trust on which the named obligor was a sole proprietorship in which respondent's interest was "undisclosed" does not support a finding that respondent violated Rule 4-1.7(b), in that the rule literally applies to a situation in which a lawyer is contemplating undertaking a representation in which he might be limited by a conflict between the prospective client's interests and the lawyer's own interests, and not to a situation in which the lawyer's own interests conflict with those of an existing client.

It should first be noted that the information as filed does not cite Rule 4-1.7(a), which deals with the situation in which a lawyer's own interests conflict with those of an existing client, but rather Rule 4-1.7(b), which deals with the situation in which a lawyer is contemplating undertaking a representation in which he might be limited by a conflict between the prospective client's interests and the lawyer's own interests. The evidence adduced in the disciplinary panel hearing related to respondent's having documented the difference between the amounts withdrawn from the trust in the form of checks payable to himself and the amount of earned fees by means of a promissory note to the trust on which the named obligor was a sole proprietorship in which respondent's interest was "undisclosed." None of the decisions cited by informant in its brief address this distinction.

In this connection, respondent would note that he was not acting in his capacity as a lawyer to LaVaughn Ikemeier Roden Cox (or to the complaining witness, Frank Ikemeier, individually, or to any of the remaindermen of the April 1997 trust) in borrowing the money or in documenting the loan, but as trustee of the April 1997 trust, and that the terms of the promissory note were at least arguably fair and reasonable to the trust and its beneficiaries. As a technical matter, at least, the transaction does not fall within the scope of Rule 4-1.8(a), and informant cites no decisions supporting an argument that it does.

3. The evidence adduced at the disciplinary panel hearing does not support a finding that respondent violated Rule 4-8.4(c), in that by executing a promissory note to the trust (rather than, for example, claiming that the amounts advanced to respondent from the trust had been earned as fees) respondent was acknowledging his obligation to the trust, and not engaging in "conduct involving conduct involving dishonesty, fraud, deceit or misrepresentation" within the meaning of Rule 8.4(c).

No decisions are cited by informant in support of its argument that respondent's conduct violated Rule 8.4(c) or (d). The information as filed does not cite Rule 8.4(d) (conduct prejudicial to the administration of justice). Thus,

respondent will limit the present discussion to whether his conduct violated Rule 4-1.8(c) (dishonesty, fraud, deceit, or misrepresentation).

When respondent met with the Ikemeier brothers shortly after their mother's death, he openly acknowledged to them that the distribution they were then receiving from the April 1997 trust was not complete, and that an additional amount, in excess of twenty thousand dollars, remained to be distributed (**Tr. 25-26**). It is true that respondent did not exhibit the promissory note from Pegasus/Planned Giving Solutions to the Ikemeier brothers in that meeting. However, respondent did not misdescribe the note as either a certificate of deposit, a money market fund, or a bond, but he simply gave no specific description of the instrument at all to the Ikemeier brothers at that time (**Tr. 26**). Respondent did provide a copy of the note to the complaining witness, Frank Ikemeier, immediately when requested to do so, on or about October 20, 1999 (**Tr. 30-31**). Respondent then wrote a letter to all three of the Ikemeier brothers on October 29, 1999, which detailed the entire history of the representation and of the note transaction (**Inf. Exh. 12**). The October 29, 1999 letter acknowledged that the attorney's fees actually earned in connection with the litigation against the former trustee of the Spilcker trust did not approach the amounts that respondent had withdrawn from the April 1997 trust, and it stated that respondent was unable immediately to repay the difference between the amounts he had withdrawn from

the April 1997 trust and the fees actually earned. The letter openly expressed respondent's regret for what had occurred and his desire to work out an arrangement for repayment of the debt. None of this conduct constituted an affirmative misrepresentation of any fact, nor did it constitute a withholding of information that had been requested.

4. Even if this Court determines that respondent has violated one or more of the cited rules, some sanction short of disbarment is appropriate in the circumstances of this case, in that respondent made a complete disclosure to the complaining witness and his brothers of the entire transaction, worked cooperatively with their lawyers to arrive at an accounting of the amount owed, and entered into a consent judgment for the debt, which judgment has been satisfied.

From the outset, respondent has cooperated with the complaining witness and his lawyers in an effort to work out a plan for repayment of the debt. Respondent delivered complete account records of the trust to the complaining witness' first lawyer, and these formed the basis of the settlement eventually reached with the second lawyer (**Tr. 38-46, Inf. Exhs. 14, 15, 17**).

On October 25, 2000, respondent consented to a judgment under which he was required to pay to the complaining witness and his brother, on behalf of themselves and the third remainderman of the April 1997 trust, the full amount of

the claimed difference between the amount of funds withdrawn by respondent from the trust and the amount that would have been justified by the agreed hourly rate, plus interest at nine percent, compounded annually, from the date of the promissory note to the date of the judgment (**Inf. Exh. 21**). Respondent acceded to the figures developed by the complaining witness' lawyer, even though they did not correspond with his own calculations (**Tr. 53**). The nine percent rate is the same rate that was recited in the promissory note (**Inf. Ex. 10**). In his letter to the complaining witness and his brothers dated October 29, 1999 (**Inf. Exh. 12**), respondent had offered to confess a judgment for the amount owed, with interest.

The stipulation for settlement submitted with the consent judgment includes a recitation that the judgment is not dischargeable in bankruptcy, citing sections 523(a)(2)(A) and 523(a)(4) of the federal bankruptcy code (**Inf. Exh. 21**). While this recitation could be construed as admitting a violation of Rule 8.4(c), respondent asserts that it was placed in the stipulation for settlement at his own suggestion for the purpose of protecting the remaindermen of the April 1997 trust. On April 9, 2001 the complaining witness and his brother filed a satisfaction of judgment, acknowledging that respondent had satisfied his obligations under the consent judgment (**Inf. Exh. 22**).

In a letter to this Court dated October 2, 2002 informant has acknowledged that subpart (d) of Rule 9.32 of the ABA Standards for Imposing Lawyer

Sanctions (1991 ed.) lists "timely good faith effort to make restitution" as a mitigating factor. None of the decisions cited by informant in its brief deals with voluntary restitution as a mitigating factor. *In re Kohlmeyer*, 327 S.W.2d 249 (Mo. banc 1959), involved embezzlement and no intent to repay. *In re Witte*, 615 S.W.2d 421 (Mo. banc 1981), appeal dismissed, cert. denied, 454 U.S. 1025 (1982), and *In re Schaeffer*, 824 S.W.2d 1 (Mo. banc 1992), each involved the deposit of proceeds of an unauthorized settlement into the lawyer's own account. *In re Conrad*, 340 Mo. 582, 105 S.W.2d 1 (Mo. banc 1937), in which the sanction imposed was a four-month suspension, involved the payment by the opposing party of an undisclosed fee from what would otherwise have been settlement proceeds. *In re Starr*, 538 S.W.2d 334 (Mo. banc 1976), which is listed in informant's "table of authorities," is not mentioned in the argument portion of informant's brief.

Respondent has made voluntary restitution to the complaining witness and his brothers, without any regard to the status of the present proceedings. The Court should consider this fact in mitigation of any sanction it might impose.

Conclusion

For the foregoing reasons, respondent would ask this Court to dismiss the present information or, if the Court determines that respondent has violated one or more of the cited rules, to issue a public reprimand.

Respectfully submitted,

_____

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Certificate of Service

Two copies of the foregoing Respondent's Brief were mailed, postage prepaid, this ____ day of October, 2002 to

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_____
Russell A. Willis III

Certification per Special Rule 1(c)

I certify that to the best of my knowledge, information, and belief this brief includes the information required by Rule 55.03, that it complies with the limitations contained in Special Rule No. 1(b); and that it contains 3,530 words, according to Microsoft Word 97 SR-2, which is the word processing system used to prepare this brief. Inoculate IT Personal software was used to scan the disk for viruses, and it is virus-free.

_____
Russell A. Willis III