SC92044

IN THE SUPREME COURT OF MISSOURI

IN RE:
RONALD KAY BARKER

Respondent

RESPONDENT'S BRIEF

January 10, 2012

Ronald K. Barker
211 SE Grand Avenue, Suite A
Lee's Summit, MO 64063
rkbarker.law@gmail.com
(816) 246-7650
(816) 246-7623
RESPONDENT *pro se*

TABLE OF CONTENTS

TABLE OF CONTENTS..... 2-3

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES CITED 3

STATEMENT OF FACTS 4-20

POINTS RELIED UPON.....20-21

I. THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT FOR MULTIPLE VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT BECAUSE:

A. RESPONDENT DID NOT MISAPPROPRIATE CLIENT FUNDS ON TWENTY SEVEN SEPARATE OCCASSIONS OVER A ONE YEAR PERIOD AND DID NOT PROMPTLY FAIL TO DELIVER CLIENT PROPERTY UPON REQUEST IN VIOLATION OF RULE 4-1.15(f) (2008) 21-37

1. Standard of Review 21

2. Rule 4-1.15(f) 22-26

B. RESPONDENT DID NOT FAIL TO PROVIDE A FULL ACCOUNTING OF CLIENT PROPERTY UPON REQUEST IN VIOLATION OF RULE 4-1.15 (f) (2008), AND RESPONDENT DID NOT FAIL TO MAINTAIN ACCURATE AND COMPLETE TRUST ACCOUNT RECORDS IN VIOLATION OF RULE 4-1.15(a) (2007) AND 4-1.15(c) (2008) 26-27

C. RESPONDENT DID COMMINGLE NON-TRUST FUNDS WITH TRUST FUNDS IN VIOLATION OF RULE 4-1.15(c) (2008) 27-30

D. RESPONDENT DID NOT FAIL TO PROMPTLY REPAY THE DECEASED CLIENT'S PROBATE ESTATE AND DID NOT DELIBERATLY ATTEMPT TO CONCEAL THE MISCONDUCT FROM THE ESTATE AND THE OCDC, THEREBY ENGAGING IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE AND CONDUCT INVOLVING DECEIT, DISHONESTY, FRAUD AND MISREPRESENTATION IN VIOLATION OF RULE 4-8.4 (c) AND (d) 27-30

II. DISBARMENT IS NOT THE APPROPRIATE SANCTION IN THIS CASE BECAUSE RESPONDENT DID NOT KNOWINGLY CONVERT OR MISAPPROPRIATE OVER $93,000 IN CLIENT MONEY AND THERE ARE COMPELLING AND SUBSTANTIAL MITIGATING FACTORS IN THIS CASE.

ARGUMENT 21-39

CONCLUSION.....39-40

CERTIFICATE OF COMPLIANCE 40

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES CITED

CASES

Dean Machinery Co. v. Union Bank, 106 SW3d 510 (Mo. banc) 22, 23

Fehman v. Pfetzing, 917 SW2d 600 Mo.App.E.D. 1996) 22, 23

Hampton v. Stephens, 691 SW2d 287 (Mo.App.1985) 23

In re Crews, 159 SW3d 355 (Mo. banc 2005) 21

In re Ehler, 319 SW3d 442 (Mo. banc 2010) 22, 29, 34, 37

In re Warren, 888 SW2d 334 (Mo banc 1994) 21

Jefferson v. Bick, 782 SW2d 115 (Mo.App.E.D. 1994) 23

RULES AND STATUTES

Rule 4-1.15, Missouri Rules of Professional Conduct 20, 22, 28, 27

Rule 4-1.15 (c), Missouri Rules of Professional Conduct 28

Rule 4-1.15 (f), Missouri Rules of Professional Conduct 19, 22, 29, 28

Rule 4-1.18 (a), Missouri Rules of Professional Conduct 19

Rule 4-8.4 (c) and (d), Missouri Rules of Professional Conduct 19, 33

M.A.I. – Civil 23.12 (1) 22

STATEMENT OF FACTS

Respondent's Miscalculation of Fees

Following settlement of James H.D. Medlin's personal injury case, respondent prepared a Settlement Distribution Sheet (Exhibit 19, A254-255.) The settlement distribution calculation was not accurate in that respondent miscalculated the amounts received in the settlement received by James Medlin (in the client's favor.) Respondent reported receiving only $187,000 in gross settlement proceeds from Old Republic Insurance Company on a disability insurance policy. In fact, the gross settlement proceeds on that claim should have included the value of a contractual subrogation lien asserted by Old Republic Insurance Company for $41,215.33 in medical and disability benefits paid directly to Hank Medlin and/or his medical providers. The total value of amounts received on Hank Medlin's disability and medical benefit claims against Old Republic was $228,715.33. An additional $100,000.00 was received from Country Insurance for the claim against the other driver in the July 3, 2003 vehicle collision (A80-c, p. 19; A85, pp. 38-39; A86, p. 41; A130, pp. 209-210; A131, pp. 215-216.)

Respondent's Law Practice

Respondent is the President and sole shareholder of Ronald K. Barker, P.C. Respondent employs law students, top-level high-school students, and part-time secretarial staff who don't want full-time positions because they have children at home. He has other lawyers in the office on an office-sharing basis, as was the case in Hank Medlin's case. Respondent does his own bookkeeping. Formerly, it

was done by Hawkins, Shipley & Mitchell (HSMC.) (A84, pp. 35-36.)

Lance Lefevre

Lance Lefevre is not a member or employee or "Of Counsel" of respondent's law firm. He shared office space with respondent. He paid the telephone bill. All other office expenses were paid by respondent's professional corporation (A127, p. 208; A130, p. 209.) Mr. Lefevre was primarily responsible for defeating the subrogation claim of Old Republic Insurance Company (A171, pp373-376.) That was an additional $41,215.33 in Hank Medlin's pocket. Hank Medlin did not have a separate fee agreement with Lance Lefevre (A90, pp. 59-60.) Lance Lefevre received a 1/3 distribution form the cash settlement proceeds.

Hank Medlin

Hank Medlin was a six-foot four-inch man that weighed over 400 pounds. According to his brother and his daughter, "he was a very large, very loud, outspoken man" (A155, p. 310; A160, p. 330.) He had been to several other attorneys. Nobody wanted to take him as a client (A80-c, p. 20.) He first contacted respondent on November 19, 2004. He was a truck driver. He had been in an auto/truck accident His injuries caused a disability that prevented his working as a truck driver. Hank Medlin engaged respondent on a contingent fee basis to file a lawsuit against the driver of the automobile involved in the collision and against his disability insurance company, to get his medical bills paid and compensation for his injuries. (A85, pp. 37-40; A91, pp. 61-62; A159, p. 327.) Hank Medlin brought with him a letter from an attorney for Old Republic

Insurance Company making a subrogation claim for $41,215.33 in medical disability benefits paid under the disability policy. (A170, pp. 371-372; Exhibit 104.)

Attorney Fee Contract

An Attorney Fee Contract dated August 20, 2005, by and between Ronald K. Barker, P.C. and Hank Medlin was prepared by respondent from a form received at a seminar conducted by James Humphrey [Respondent now uses the Missouri Bar recommended contracts that still don't contain a provision for a written agreement advising the client of a fee splitting arrangement with specified other lawyers.] (A80-c, p.20; A85, p. 37; A86, p. 42; Exhibit 1; A91, pp. 63-65.) It was not respondent's usual contingent fee contract at the time because respondent usually made the client put some money up front. Hank Medlin couldn't do that (A91, p. 63.) The fee agreement provides in relevant part, as follows:

"2. **COMPENSATION**: The attorneys' fee shall be **contingent** upon making a recovery on any claims; in other words, if there is no recovery, there will be no fee. If there is a recovery a percentage fee shall be paid to the attorneys, measured as follows:

> "THIRTY-THREE and ONE-THIRD PERCENT (33 1/3%) of the gross amount recovered by way of settlement or negotiation, FORTY PERCENT (40%) of the gross amount if this case is not settled within twenty (20) days before trial, before deducting the costs of litigation incurred by attorneys, either advanced by the firm or billed to the client.
>
> "a. It is expressly understood that all **expenses** (discussed below) are separate from the attorney's fees.
>
> "b. The law firm is authorized to associate or consult with any other attorneys, in the firm or in other law firms, to

> assist in the handling of this case, and this contract shall apply to any attorneys so associated." (A22-23, Exhibit "C"; A181-182, Exhibit 1)

Although the Fee Agreement does not specifically mention Lance Lefevre, respondent and Hank Medlin knew that it meant that respondent could associate with any other lawyer or law firm to assist in the handling of Hank Medlin's case. Hank Medlin sat down with Mr. Lefevre. Mr. Lefevre represented Hank Medlin at his deposition. He negotiated on Hank Medlin's behalf at the mediation (A91, p. 61.)

Lance Lefevre prepared the initial response to Old Republic's subrogation claim in September 2005 (A170,-171, pp 372-373; Exhibit 105.) Correspondence regarding the dispute over Old Republic's subrogation claim eventually resulted in a $41,215.33 enhancement of the $187,000.00 cash recovery Hank Medlin eventually realized against Old Republic (A171, pp. 373-376; Exhibits 106, 107.) Respondent filed Hank Medlin's lawsuit against Old Republic and Harris in January 2006 (A85, p. 40.)

Mediation

Country Insurance agreed to pay the policy limits of its automobile policy ($100,000) on behalf of its insured, Harris, the other driver involved in the collision (A80-c; A86, pp 41-43.) After Hank Medlin and Old Republic completed mediation a settlement was reached. The final offer from Old Republic during mediation was $150,000.00 (A172, p. 377; Exhibit 110.) Hank Medlin demanded $210,000.00. Lance Lefevre recommended the acceptance of the offer of

$150,000.00. Respondent took over the negotiation at that point and negotiated the settlement up to $187,000.00 (without regard to the negotiation of the $41,215.33 subrogation lien claim of Old Republic.)

Respondent's Fee

The total settlement was $328,715.33, not $287,500.00. A settlement check was received in December 2006 from Country Insurance (Harris' insurer) payable to Ronald K. Barker, P.C. and James H.D. Medlin A87, p. 48; Exhibit 4.) It was endorsed by respondent for Ronald K. Barker, P.C. and by Hank Medlin (A185-187, Exhibits 3 & 4.) The payment of $187,500 from Old Republic was received several weeks later. It was made payable to Ronald K. Barker, P.C. The check was endorsed and placed in respondent's trust account (A88, pp50-51; A188, Exhibit 5.) A total of $287,500.00 was deposited in respondent's trust account at Country Club Bank (A86, pp. 42-43.) Respondent understood that he was the trustee of the funds in that account and that he was handling those funds in a fiduciary capacity (A87, pp. 45-46.)

Respondent's fee based upon the contingent fee contract should have been one-third of $328,715.33, i.e., $109,571.77. Respondent's fee based upon the cash amounts received from Old Republic and Country Insurance was one-third of $287,500.00, i.e., $95,833.33. Respondent calculated his fee based upon only the amounts received from Old Republic and Country Insurance (Harris' insurer.) In miscalculating his fee, respondent shorted himself $13,738.47. Respondent's miscalculation is shown on Exhibit 19, pp. 255-256; see also A134, pp. 226-228.

The same miscalculation was made by counsel for the OCDC (A4, ¶ 13; A5, ¶18; A86, pp. 42-43; A92, pp. 66-68; A96-97, pp. 84-87; Exhibit 22, A262; A101, pp. 103-104; A112, p. 148), counsel for the Estate of James H.D. Medlin (A143, p. 262; A150, p. 291Exhibit 31, A283-285), and the Chairman of the Hearing Panel (A94, pp. 75-77; A96, pp. 81-82; A112, p. 147.)

As a result of the miscalculation of respondent's fees, check no. 1218 dated April 2, 2007 (A211, Exhibit 9; A101, p. 101; A213, Exhibit 11; Exhibit 12, A218;), no. 1222 dated April 16, 2007 (A212, Exhibit 10; A101, p. 101; A213, Exhibit 11; Exhibit 12, A218), and no. 1229 dated May 18, 2007 (Exhibit 12, A218; A101, p. 101; A213, Exhibit 11) were, in fact, a part of respondent's contingent fee. Respondent believed he had borrowed the money from Hank Medlin when, in fact, he borrowed his own money and gave Hank Medlin promissory notes for it. (Exhibit M, A38-42; A99-100, pp. 96-100; A125-126, pp. 200-201.)

Settlement Distribution Sheet

It is respondent's practice to provide his clients with a settlement distribution sheet at the conclusion of a contingent fee case. Respondent provides his clients with a bill if it's an hourly matter, such as Hank Medlin's traffic matters (A89-90, pp 56-57.) On several occasions, respondent offered Hank Medlin a settlement distribution sheet that accounted for all the proceeds, but he didn't take it. His response was, "No, I trust you to keep track of it all" (A81, p. 24; A89, pp 55-56.) Hank Medlin did not keep records (A157, p.319.) The settlement

distribution sheets offered to Hank Medlin were updated as money was distributed to Hank Medlin through September 8, 2008. They showed litigation expenses and distributions after settlement (A145, p. 272) They were identical to the document provided to John Allinder, with the exception that the final settlement distribution did not include the $38,000.00 paid to the Estate of James H.D. Medlin (A106, pp.121-123; Exhibit 19, pp. 254-255; A134, pp. 225-226; A145, p. 271-272; Exhibit 19) Respondent felt it was important to keep a settlement distribution sheet for his own records (A90, p. 57.)

Distribution of Settlement Proceeds

Hank Medlin did not have anywhere to put his money and was using respondent to make distributions to him and to others for the payment of his living expenses, his medical bills, and his credit card bills (A81, p. 24.) Accordingly, the settlement proceeds were Hank Medlin's money used to pay the attorney's lien and Medlin's creditors (A88, p. 49.) A check for $11,333.33 issued from respondent's trust account to Mr. Lefevre was returned for lack of a proper endorsement and renegotiated (A88-89, pp. 52-53; A185-186, Exhibit 3.) Six checks from respondent's trust account were written to respondent and Mr. Lefevre for attorneys' fees totaling $96,500.00. Mr. Lefevre was paid a total of $32,254.17 ($32,166.66 for fees; $87.51 for expenses), from the settlement proceeds (A90, pp. 58-59; A92, pp. 66-68; Exhibit 7, A192, 194 & 198.) Respondent was paid $64,333.33 for attorney's fees from the $287,500.00 deposited in the trust account (A90, pp. 58-59; A92, pp. 66-68; Exhibit 7, A193,

197, 198-199.) Respondent did not charge Hank Medlin for expenses that he incurred such as copies, a filing fee, service fees, mileage, etc. (A93, p. 69). Attorney fees and expenses as then calculated totaled $95,920.84. Neither respondent nor Mr. Lefevre were paid a fee or expenses on the $41,215.33 in medical and disability benefits paid directly to Hank Medlin and/or his medical providers by Old Republic and for which Old Republic asserted a subrogation lien (A90, pp. 59-60; A92, pp. 66-68.) From the settlement proceeds, respondent also paid himself $830.00 that Hank Medlin owed respondent for a traffic matter (A95, p. 78; Exhibit 7, A197.)

Respondent used his fees to pay off past due debt. The fees were not invested or placed into savings somewhere. (A95, p. 77.)

Respondent also was directed by Hank Medlin to pay debts totaling $39,852.99 to or for third parties: $5,812.01 to Dr. Nancy Russell; $4,884.00 to Lakewood Chiropractic; $13,461.66 to USAA / Mastercard; $372.95 to Gene Dolginoff Court Reporters; $14,573.32 to Commerce Bank on two separate credit card accounts; $700.00 to Withers, Brant, Igoe & Mullinnix for mediation fees; and $49.05 to HIM - J.A. Still for medical records. Counsel for OCDC miscalculated here against respondent by $1,121.99 (A81, pp. 21-22; A95, pp. 78-80; Exhibit 7, pp. 193-196, 200, 202A151, pp. 294-295; A175, p. 389.) There was no ***written*** direction from Hank Medlin to pay those third party expenses or to borrow his money from the trust account (A126, p. 201.) Respondent paid all of the medical bills Hank Medlin provided to him. There were no hospital bills even

though Hank Medlin had been in the hospital a couple of times since his accident (A160, pp. 330-331.) Old Republic had paid medical disability benefits on behalf of Hank Medlin before respondent began his representation of Hank Medlin (A170, pp. 371-372; Exhibit 104.)

Hank Medlin came to respondent's office when he needed money. He wanted a piecemeal distribution of his money. That explains the numerous transactions. On one occasion, when respondent wasn't going to be in his office, respondent signed a check and left the amount to be filled in by Hank Medlin i.e., $3,500.00. (A81, p. 23.) From February 2007 through August 4, 2008, Hank Medlin received direct distributions from respondent's trust account totaling $63,250.00 (A105, pp. 118-119; Exhibit 3, A185-186; Exhibit 6, A190-191; Exhibit 7, A192, 199-208; A175, p. 390;A153, p. 302; *Cf.* A176; p. 393, where respondent testified that the amount was $58,920 from the incomplete bank records contained in Informant's Exhibits.) From May 2, 2007 through September 8, 2008, Hank Medlin received direct distributions from respondent's business account totaling $6,450.00 (A106, pp121-122; Exhibit 23, A263-A273; A149, p. 285.) This included small cash amounts totaling $1,470.00 (A156, p. 316; Exhibit 19, p. 255.)

Federal Tax Identification Numbers

Respondent advised Hank Medlin that the money in respondent's trust account was earning money for IOLTA, the Interest on Lawyers Trust Accounts; that he was not getting any of that interest. Respondent offered to help Medlin's

put his remaining funds into a money market account if he would provide a social security number. However, Medlin would not provide respondent with federal ID number (A80-c, p.19; A98, pp. 89-90; A99, p. 94.) [Respondent was not then aware that Hank Medlin's money could be placed in a non-IOLTA account without Hank Medlin's social security number (A98, p. 89-92).]

Hank Medlin would not provide respondent with a federal tax identification number. He had not paid income taxes for about four years (A80-c, p. 19; A131, p. 216; A157, p. 320.) Likewise, the attorney for the Estate of James H.D. Medlin would not provide respondent with federal tax identification number for either Hank Medlin or the Estate, even after respondent paid the Estate a lump sum of $38,000.00 (A148, pp. 281-283.) It was respondent's belief that Hank Medlin was attempting to avoid paying taxes to the IRS (A81, pp. 21-22; A115-116, pp. 160-161; A172, p. 380.) Respondent recommended to Hank Medlin that he hold his money for preparing and paying his taxes. Respondent knew that if all of the money was distributed to Hank Medlin, the taxes wouldn't get paid (A80-c, p. 19; A131, p. 213-216.) Respondent was trying to get documentation from Hank Medlin to have his tax returns prepared by an outside accountant (A132, pp.217-221.) After Hank Medlin's death, respondent estimated that it would take approximately $20,000.00 to have his tax returns prepared and paid (A163, pp. 342-343; A172, p. 380.)

Federal and State Assistance

It was at the Disciplinary Panel Hearing that witness Brenda Ford disclosed

that Hank Medlin didn't want his money in a bank account because it would cause trouble with his federal and state assistance (A156, p. 314, A158, p. 321-323; A159, p. 325.)

Loans to respondent

Hank Medlin was financially wise in the ways of the world. He knew about loans. He knew that he didn't want to place his money in an account with his social security number on it. He knew about interest rates that banks paid on deposits. He knew about interest rates that banks charged for loans to individuals. He knew enough about the stock market that he didn't want to get involved with it (A81, p. 22; A121, pp 181-182; A149, p. 286; A173, p. 381.).

In February or March 2007, after attorney's fees and expenses and all expenses to third parties had been paid from the cash portion of the settlement, as directed by Hank Medlin, respondent and Hank Medlin talked about how much money he [Hank] would make off of the money still to be paid to him. Hank Medlin was happy with 9 %. He didn't want to put it in a bank account that would pay him 1½ %, then loan it out to someone at 9 %. The 9 % was supposed to be paid out on each amount that respondent borrowed it from the time it was borrowed (A119, pp. 175-176; A133, p. 223; A175, p. 389.) Respondent and Hank Medlin had at least three conversations in respondent's office because he didn't want anybody else present (A156, pp. 315-316; A173, p. 381.)

At that time, respondent believed that Hank Medlin wasn't any longer a client because he had received his money and the case had been concluded. Hank

Medlin then had to make the decision of what he going to do with his money and how he was going to maximize his income from it through some type of investment. He did not want his money in respondent's trust account. He did not want it in any account with his social security number. He didn't want it all distributed to him at one time. He didn't want any amount in excess of $10,000.00 distributed to him for the fear that it would alert the IRS. He wanted it for his retirement and for his daughter after she graduated from college. (A81, p. 21-22; A121, pp 182-183; A131, pp. 213-214; A172, pp. 379-380; A175, p. 390.) Respondent doesn't believe he handled Hank Medlin's settlement proceeds wrongly. Respondent gave Hank Medlin what was requested (A122, p. 188.)

Before borrowing money from Hank Medlin, respondent told him that the only thing he had at the time was the Court of Appeals Opinion in the *Dulin v. Desselle* matter (*Bob Dulin, d/b/a Bob Dulin Homes, Appellant v. H. Kent Desselle, et al., Respondents,* WD 64817 in the Missouri Court of Appeals, Western Division.) Respondent told Hank Medlin that the decision was handed down in April 2006 and that he finally had Kent Desselle in a position to collect a judgment against him from which respondent would collect approximately $110,000.00 in fees. Respondent knew of property owned by Desselle in two lake developments. All respondent needed was for Judge Stephen Nixon to enter the judgment for approximately $250,000.00 (A81. p. 22;A120, pp. 179-180; A173-174, pp. 384-387.) Despite the filing of an unopposed Motion for Summary Judgment in January 2009, that case has not been ruled on as of the date of

submission to this Court [*Olathe Millwork Company v. Bob Dulin, et al.*, Case No. 02 CV 205812 consolidated with *Cobblestone Construction Finishes, Inc. v. Bob Dulin, et al.*, Case No. 02 CV 225023 in the Circuit Court of Jackson County, Missouri at Independence.] (A81, p. 22; A177, p. 398-399; Exhibit 115.) Respondent also informed Hank Medlin the he had borrowed privately on previous occasions, and paid it back (A81, p. 22; A98, p. 90; A173, pp. 381-382.)

Respondent also disclosed to Hank Medlin that he [respondent] was having ongoing financial difficulties with collecting fees from clients; that he was suing his clients. But the usual result was that if a judgment was entered against them, they would take bankruptcy or file a complaint with the Bar Association. Respondent also pointed out that sometimes judges wouldn't cooperate in a timely fashion in rendering judgments, particularly Judge Nixon. Respondent told Mr. Medlin that he [respondent] had to wait a year for a decision from Judge Nixon on two different domestic cases. As a consequence, respondent lost his fee because the clients did not want to pay for a decision that took over a year to get from the court. (A120-121, pp. 179-181.)

Respondent offered Hank Medlin a 1976 Corvette Stingray as collateral for the loans. Mr. Medlin declined because he judged it was not in good enough shape at that time to take it as collateral (A121, p. 181.)

Respondent and Hank Medlin agreed that after all of Medlin's expenses and debts to third parties had been paid, respondent could borrow what he needed , as it was needed, at nine percent (9%) interest (A99, p. 93.) Respondent used a

Demaree form format to document the money borrowed from Hank Medlin (A116, p. 163.) There were some mistakes in the amounts shown in the top left hand of the notes as compared with the amounts recited in the notes. The amounts recited in the notes were controlling. Those notes were later corrected when the errors were discovered. None of the notes were created and signed after Hank Medlin's death (A116-118, pp. 165-168, 170.) Interest on the notes was calculated after Hank Medlin's death (A118, pp. 169-170; A133, p. 223; A135, p. 230-231.) In responding to John Allinder's request for an accounting, and in speaking with Mr. Allinder, respondent stated that he was preparing an additional accounting of interest earned at nine percent (9%) on Mr. Medlin's money. This was an indication that there were loans (A118-119, pp. 172-173: A142, p. 259; Exhibit 30.)

Respondent recognizes a possible conflict of interest in that he should have had Hank Medlin sign-off on a conflict of interest form when they entered into their agreement. Respondent did not look at Rule 4-1.8 at the time that he had an attorney-client relationship with Hank Medlin. The Rule wasn't in effect when respondent's agreement was made with Hank Medlin. (A121, pp. 183-186.)

Rule 4-1.5 was not in effect in April 2007 when respondent and Hank Medlin entered into their agreement. Respondent does not acknowledge any instance of misappropriating client money or a cover-up (A122-123, pp. 188-190.) Respondent does acknowledge commingling his personal funds with trust funds, a failure to keep and maintain accurate trust account records, and a failure to

segregate Hank Medlin's money from the rest of his trust account money (A123, pp. 189-190.) Respondent didn't have many transactions in this trust account and kept track of it in his head. He didn't account for individual client money held in his trust account because he didn't know how to use the QuickBooks program for that function at the time. Since that time, John Allinder and a Missouri Bar program have helped to educate respondent on that program function (A130, pp. 211-212.)

Probate

Hank Medlin's probate estate included a number of vehicles. John Allinder filed a motion to allow the personal representative to sell the vehicles. It also included $38,000.00 received from respondent and the claim against respondent. Respondent did not object to any of the Probate proceedings and stipulated to the Judgment against him (A120, p. 178; A149, pp. 287-288; A155, p. 311; Exhibit 31, A283-285; A159, p. 328.)

Respondent borrowed $38,000.00 from a friend so that there would be money to pay for Hank Medlin's funeral expenses (A82, p. 26; A162-163, pp. 340-341; A165, p. 349; A172, p. 378-379; A173, p. 383; Exhibit 20, A261; A317.) Hank Medlin's brother is his personal representative. He doesn't believe there is enough in the estate to pay all of the remaining debt (A164, pp. 345-347.)

Not all of the fees charged to the estate by John Allinder were for maintaining a lawsuit against respondent (A164, p. 347.)

The Information

Count I of the Information charges respondent with misappropriating client funds in violation of Rules 4-1.15 (f) (2008) and 4-8.4(c) (A10.).

Count II is alleged in the alternative to Count I. Count II charges respondent with "borrowing" money from Hank Medlin without the required safeguards in violation of Rule 4-1.8 (a) (A10-13.)

Count III charges respondent with failure to timely satisfy his obligation to Medlin's estate in violation of Rule 4-8.4(d) (A13-14.)

Count IV charges respondent with failure to provide a timely, accurate and complete accounting of the settlement distribution upon request by Hank Medlin's estate in violation of Rule4-1.15 (f) (A14.)

Count V charges respondent with violating Rule 4-1.5(e) by splitting attorney fees with another lawyer who was not in the same law firm (A14-15.) The Disciplinary Hearing Panel found no violation of Rule 4-1.5 (e). (A328,A331-332.) The Chief Disciplinary Counsel accepted the decision (A337.)

Allegations of a Cover-up

At the request of the Chairman of the Disciplinary Hearing Panel (A140, pp. 251-252), respondent's daughter printed out screen prints of folders on respondent's secretarial computer. [The Chairman then commented that he didn't think the documents would show anything! (A167, p 358.)] The screen prints were requested in order to show the dates that the promissory notes were created. However, the screen prints would only show the date of creation as the date that

new computers were installed in respondent's office in about 2009, when the files were copies from the old computer to the new computer. (A167, pp. 351-364.)

Rule 4-1.15

At the instance of the Chief Disciplinary Counsel, respondent has attended three annual Missouri Bar programs entitled "Keeping Your Law Practice on Track." During the most recent program held on December 2, 2011, the Chief Disciplinary Counsel described Rule 4-1.15 as "a morass" for lawyers. One of the program moderators, Sarah J. Read, further stated that the Rule was a "swamp." A lengthy discussion ensued.

POINTS RELIED UPON

I. THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT FOR MULTIPLE VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT BECAUSE:

A. RESPONDENT DID NOT MISAPPROPRIATE CLIENT FUNDS ON TWENTY SEVEN SEPARATE OCCASSIONS OVER A ONE YEAR PERIOD AND DID NOT PROMPTLY FAIL TO DELIVER CLIENT PROPERTY UPON REQUEST IN VIOLATION OF RULE 4-1.15(f) (2008)

1. Standard of Review

In re Crews, 159 SW3d 355 (Mo. banc 2005)

In re Ehler, 319 SW3d 442 (Mo. banc 2010)

In re Warren, 888 SW2d 334 (Mo banc 1994)

Rule 4-1.15

2. Rule 4-1.15(f)

B. RESPONDENT DID NOT FAIL TO PROVIDE A FULL ACCOUNTING OF CLIENT PROPERTY UPON REQUEST IN VIOLATION OF RULE 4-1.15 (f) (2008), AND RESPONDENT DID NOT FAIL TO MAINTAIN ACCURATE AND COMPLETE TRUST ACCOUNT RECORDS IN VIOLATION OF RULE 4-1.15(a) (2007) AND 4-1.15(c) (2008)

C. RESPONDENT DID COMMINGLE NON-TRUST FUNDS WITH TRUST FUNDS IN VIOLATION OF RULE 4-1.15(c) (2008)

D. RESPONDENT DID NOT FAIL TO PROMPTLY REPAY THE DECEASED CLIENT'S PROBATE ESTATE AND DID NOT DELIBERATLY ATTEMPT TO CONCEAL THE MISCONDUCT FROM THE ESTATE AND THE OCDC, THEREBY ENGAGING IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE AND CONDUCT INVOLVING DECEIT, DISHONESTY, FRAUD AND MISREPRESENTATION IN VIOLATION OF RULE 4-8.4© AND (d)

II. DISBARMENT IS NOT THE APPROPRIATE SANCTION IN THIS CASE BECAUSE RESPONDENT DID NOT KNOWINGLY CONVERT OR MISAPPROPRIATE OVER $93,000 IN CLIENT MONEY AND THERE ARE COMPELLING AND SUBSTANTIAL MITIGATING FACTORS IN THIS CASE.

ARGUMENT

I. A. RESPONDENT DID NOT MISAPPROPRIATE CLIENT FUNDS ON TWENTY SEVEN SEPARATE OCCASSIONS OVER A ONE YEAR PERIOD AND DID NOT PROMPTLY FAIL TO DELIVER CLIENT PROPERTY UPON REQUEST IN VIOLATION OF RULE 4-1.15(f) (2008)

A. Standard of Review

The findings of the Disciplinary Hearing panel are advisory. This Court reviews the evidence de novo and makes its own conclusions of facts and law. *In re: Warren*, 888 SW2d 334 (Mo banc 1994). "Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed." *In re Crews*, 159 SW3d 355, 358 (Mo. banc 2005).

Respondent's alleged violations of the rules of professional conduct all occurred before December 31, 2008. Respondent's alleged trust account violations occurred from January 2007 to December 2008, so they are governed by the version of Rule 4-1.15 in effect from January 1, 2007, to December 31, 2008. The 2009 Missouri Supreme Court Rules and Rules of Professional Conduct contain the text of the rules in effect at the time of Respondent's alleged misconduct. *In re Ehler*, 319 SW3d 442, 453, n. 1, 2 and 4 (Mo. banc 2010). Rule 4-1.15 was amended in 2009. *In re Ehler*, 319 SW3d at 442. Notwithstanding, the OCDC entered into evidence Rule 4-1.15 in effect after the 2009 amendments. Now, when before this Court, counsel for the Chief Disciplinary Counsel claims violations of the 2008 version of the Rules.

B. Rule 4-1.15

In Count I of the Information, the OCDC charges respondent with conversion. The tort of conversion is the "unauthorized assumption and exercise of the right of ownership over the personal property of another to the exclusion of the owner's rights." *Dean Machinery Co. v. Union Bank*, 106 SW3d 510, 522 (Mo.App.W.D. 2003). The Missouri verdict director for conversion lists three elements in proving conversion: (1) plaintiff was the owner of the property or entitled to possession of it; (2) defendant took possession of the property with the intent to exercise some control over it; and (3) defendant thereby deprived plaintiff of the right to possession of the property. MAI 23.12(1) (1989). *Fehman v. Pfetzing*, 917 SW2d 600, 602 Mo.App.E.D. 1996).

To establish the first element, Informant is required to prove that Hank Medlin either was the owner or was entitled to immediate possession of the property at the time of the alleged conversion. *Fehman v. Pfetzing*, 917 SW2d 600, 602 Mo.App.E.D. 1996), citing ***Hampton v. Stephens,*** 691 S.W.2d 287, 289 (Mo.App.1985).

To recover under a theory of conversion, the OCDC must establish that Hank Medlin had a right to possession of the converted property at the time of the alleged conversion. *Dean Machinery Co. v. Union Bank,* 106 SW3d at 522. Conversion can be proved in three ways: (1) by tortious taking; (2) by any use or appropriation to the use of the person in possession, indicating a claim of right in opposition to the owner's rights; or (3) by refusal to give up possession to the owner on demand, even though the defendant's original possession of the property was proper. *Id.* Intent may be inferred from the facts and circumstances of the situation. *Id.*

Obviously, if an owner consents, there is no unauthorized taking. That consent can be express or implied. "Implied" means necessary deduction from the circumstances, general language or conduct of the parties. "Implied consent" is that manifested by signs, actions or facts, or by inaction or silence that creates an inference that consent has been given. *Jefferson v. Bick,* 782 SW2d 115, 118 (Mo.App.E.D. 1994).

Respondent did not misappropriate client funds under the circumstances of this case. Respondent was loaned funds by Hank Medlin at an interest rate of nine

percent (9%) in order to maximize the recovery made in Medlin's case against Old Republic and Country Insurance. Hank Medlin was described by both his brother and his daughter as "a very large, very loud, outspoken man" (A155, p. 310; A160, p. 330.) It is significant that such a man did not file a complaint with Chief Disciplinary Counsel if he considered that he had been wronged by a lawyer.

Respondent believed that Hank Medlin was avoiding taxes. He had not filed taxes for about four years, and he would not provide his tax identification number. Then the attorney for Hank Medlin's estate refused to provide tax identification numbers for Hank Medlin and for the Estate. Respondent became suspicious. As a consequence, respondent has been left with the income tax liability for the complete cash settlement of $287,500.00, even though the amount actually borrowed from Hank Medlin was $28,074.00.

Respondent had no reason to believe that there were any outstanding claims for medical bills. Old American was claiming a subrogation lien for medical disability benefits it paid as a result of the accident. Hank Medlin directed that medical bills to Dr. Nancy Russell and Lakewood Chiropractic. Then witness Brenda Ford testified at the Disciplinary Panel Hearing that Hank Medlin did not want his money in a bank account because it would cause trouble with his federal and state assistance (A156, p. 314, A158, p. 321-323; A159, p. 325.) This statement alerted respondent to the fact that there is probably an outstanding Medicaid lien. Since the hearing, respondent has been in contact with the Cost Recovery Unit of the Department of Social Services to determine the existence

and amount of any such lien. The process has been hampered by the lack of tax identification numbers. Respondent has not yet received a response, but is advised that the Cost Recovery Unit is putting together a claim. It is likely there is a Medicaid lien and that it is greater than the amount owed to Hank Medlin's estate. The lien is respondent's responsibility to pay out of settlement proceeds.

In this case there was substantial evidence that Hank Medlin consented to loaning respondent some of the settlement proceeds, i.e. possession. First, although Hank Medlin was entitled to immediate possession, he did not demand immediate possession of the settlement proceeds. He requested that respondent pay his personal expenses from the settlement proceeds. He requested two $9,500.00 distributions to purchase a truck. For the balance of the money, he wanted to earn as much interest as possible for his retirement and to distribute to his daughter upon her graduation from college. Further, Hank Medlin did not want to place money in any account that required his tax identification number. He did not want a separate money market account for that reason and because it would not earn him enough interest. He did not want an investment in any stock or bond account because of the condition of the economy. He did not want to leave his money in respondent's trust account because the interest earned went to the Missouri Bar Foundation. Instead, he loaned the money to respondent.

Respondent testified that the transaction with Hank Medlin was that the money loaned would be repaid at nine percent (9%) annual interest. Respondent produced a series of twenty-six promissory notes payable to Hank Medlin, some

of which had been fully satisfied. Respondent's bank records show payments on the promissory notes directly to Hank Medlin up to the date of his death. There was no complaint from Hank Medlin that respondent converted his settlement proceeds. There was substantial evidence that Hank Medlin expressly consented to loaning respondent some of the settlement proceeds after all expenses of the lawsuit had been paid as well as his personal expenses. Mr. Medlin impliedly consented to the transaction by receiving periodic payments from respondent and making no complaint of any theft of his settlement proceeds.

Hank Medlin was not entitled to immediate possession of the settlement proceeds until respondent received a social security account number to report the distributions. Both parties produced evidence that Hank Medlin had failed to file federal and state income tax since at least 2003, before the representation by respondent. In presenting Hank Medlin's case against Old Republic on the disability policy issued to Hank Medlin, respondent did not have the income tax returns to prove Hank Medlin's loss of income. Respondent testified that he advised Hank Medlin to have the tax returns prepared. Hank Medlin produced one file box of documents that were reviewed by a person in respondent's office for information with which to prepare tax returns. However, there was no information from which any tax returns could be prepared. Those documents were delivered to John Allinder, the attorney for Hank Medlin's estate. Informant's evidence was that as of the date of the committee's hearing in this case, no tax returns had been filed.

The undisputed evidence in this case is that respondent requested a social security number from Hank Medlin and a federal identification number for Hank Medlin's estate from attorney John Allinder. Also undisputed is that no one has provided respondent with a tax identification number to report distributions to Hank Medlin or to his estate. In the absence of those tax identification numbers, all of the income from the settlements was reported as income to respondent from the time the settlement payments were deposited in respondent's trust account. No professional fiduciary would make distributions without a social security account number with which to report those distributions.

There is no evidence in this case that respondent took possession of the property (settlement proceeds) with the intent to exercise some control over it. There is no evidence that respondent paid his personal expenses from a client trust account in violation of Rule 4-1.15. The evidence in this case is that Hank Medlin exercised control over the settlement proceeds with the intent and purpose of maximizing his income from those proceeds at nine percent (9%) per annum. Upon Hank Medlin's request, his litigation and personal expenses were paid from respondent's trust account. His requests for money to purchase a truck were paid in the sums he requested from respondent's trust account. Additional payments were made to Mr. Medlin upon his request through the date of his death, September 27, 2008. The evidence further shows that Hank Medlin did not prepare or file income tax returns since at least 2003, and he did not want to set aside money to pay those taxes. Respondent advised Mr. Medlin to have the tax

returns prepared and filed and to reserve some of the settlement proceeds for paying taxes. Now it appears that Hank Medlin and his estate plan to have respondent pay those taxes. Otherwise, respondent would have been provided with social security account numbers.

Respondent did not promptly fail to deliver client property upon request in violation of Rule 4-1.15(f) (2008) because (1) there is no client property to promptly deliver until the matter of the Medicaid lien is resolved, (2) respondent is entitled by law to have tax identification numbers to report the distributions, and (3) the version of Rule 4-1.15(f) claimed to have been violated was not in effect until after the action complained of by the Chief Disciplinary Counsel.

B. RESPONDENT DID NOT FAIL TO PROVIDE A FULL ACCOUNTING OF CLIENT PROPERTY UPON REQUEST IN VIOLATION OF RULE 4-1.15 (f) (2008), AND RESPONDENT DID NOT FAIL TO MAINTAIN ACCURATE AND COMPLETE TRUST ACCOUNT RECORDS IN VIOLATION OF RULE 4-1.15(a) (2007) AND 4-1.15(c) (2008)

The OCDC alleges Respondent violated Rule 4-1.15, Safekeeping Property, by failing to properly maintain a client trust account, failing to deliver funds to Henry H. D. Medlin and, instead, utilizing portions of that money for his own purposes. Rule 4-1.15(c) requires a lawyer to keep all client property or third-party property in the lawyer's possession separate from the lawyer's own property. This rule also requires that complete records of the client trust account be maintained and preserved for a period of at least five years, and an accounting must be completed promptly on a client's request. Additionally, Rule 4-1.15(f) requires a

lawyer, on receipt of client funds, to promptly notify the client and deliver the funds to the client. *In re Ehler*, 319 SW3d at 450.

The evidence shows that Respondent initially miscalculated the amounts received in the settlement received by James H.D. ("Hank") Medlin from Old Republic on a disability insurance policy. Respondent reported receiving $187,500.00 in gross settlement proceeds from Old Republic. In fact, the gross settlement proceeds should have been increased by a contractual subrogation lien asserted by Old Republic for $41,215.33 in medical and disability benefits paid directly to Hank Medlin and/or his medical providers under the disability policy before Respondent's representation of Hank Medlin. Respondent (largely through the efforts of Lance Lefevre) was successful in convincing Old Republic that it was not entitled to a contractual lien under the laws of the State of Missouri. Instead of reducing the settlement of $100,000.00 received on the liability policy issued to Linda Harris by the $41,215.33 lien asserted by Old Republic, Hank Medlin received Linda Harris' full policy limits of $100,000.00 and an additional settlement amount of $187,500.00 from Old Republic. Accordingly, the total settlement proceeds received from Old Republic was $228,715.33. Respondent calculated his fee on the $187,500.00. Respondent erred in his client's favor by $13,738.44. This error in accounting was also made in the report prepared by Mr. Medlin's executor entitled "Monies Due and Paid to Medlin" filed in the adversary probate proceeding entitled *In re the Estate of James H.D. Medlin v. Ronald K.*

Barker, Estate No. 09P9-PR00051 in the Circuit Court of Jackson County, Missouri, Probate Division at Independence.

The correct calculation of attorney's fees and other amounts paid from the settlement proceeds should have been as follows:

12/27/06	Gross Settlement Proceeds from Country Insurance (Harris)	$100,000.00
01/09/07	Gross Settlement Proceeds from Old Republic Insurance	$228,715.33
		$328,715.33
Attorney's fees (Attorney's fees and expenses actually paid = $96,587.50)		($109,571.77)
Settlement proceeds paid directly for litigation expenses, client expenses, etc.		($ 40,683.93)
Payments directly to James H.D. Medlin (including payments from Old Republic)		($112,385.33)
Payment to Estate of James H.D. Medlin		($ 38,000.00)
Balance due Estate of James H.D. Medlin (exclusive of interest)		$ 28,074.00

The evidence in this case is that respondent unintentionally commingled the property of the client with his own property when respondent failed to accurately calculate his fee according to the contingent fee agreement. However, the miscalculation was in the client's favor. In effect, respondent borrowed $13,738.44 of his own money and promised to pay it back with interest to Hank Medlin.

It is respondent's practice to provide his clients with a settlement distribution sheet at the conclusion of a contingent fee case. Respondent provides his clients with a bill if it's an hourly matter, such as Hank Medlin's traffic matters (A89-90, pp 56-57.) On several occasions, respondent offered Hank Medlin a settlement distribution sheet that accounted for all the proceeds, but he didn't take

it. His response was, "No, I trust you to keep track of it all" (A81, p. 24; A89, pp 55-56.) Hank Medlin did not keep records (A157, p.319.) The settlement distribution sheets offered to Hank Medlin were updated as money was distributed to Hank Medlin through September 8, 2008. They showed litigation expenses and distributions after settlement (A145, p. 272.) They were identical to the document provided to John Allinder, with the exception that the final settlement distribution did not include the $38,000.00 paid to the Estate of James H.D. Medlin (A106, pp.121-123; Exhibit 19, pp. 254-255; A134, pp. 225-226; A145, p. 271-272; Exhibit 19.) Respondent felt it was important to keep a settlement distribution sheet for his own records (A90, p. 57.) Respondent's Settlement Distribution Sheet is far more detailed than those prepared by Counsel for the Chief Disciplinary Counsel and the attorney for the Estate of James H.D. Medlin.

Thus, due to a miscalculation of respondent's fee (in the client's favor), all of the calculations in this case are inaccurate, including those set forth in Informant's Brief. Once again, respondent is charged with violating Rules that were not in effect at the time of the alleged violations: Rule 4-1.15 (f), and Rule 4-1.15(c). These are part of the "morass" and "swamp" complained of by the Chief Disciplinary Counsel and others at the Missouri Bar sponsored program on December 2, 2011

C. RESPONDENT DID COMMINGLE NON-TRUST FUNDS WITH TRUST FUNDS IN VIOLATION OF RULE 4-1.15(c) (2008)

Respondent has admitted that he commingled non-trust funds with trust

funds. But here, respondent was not charged with commingling non-trust funds with trust funds in the information.

D. RESPONDENT DID NOT FAIL TO PROMPTLY REPAY THE DECEASED CLIENT'S PROBATE ESTATE AND DID NOT DELIBERATLY ATTEMPT TO CONCEAL THE MISCONDUCT FROM THE ESTATE AND THE OCDC, THEREBY ENGAGING IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE AND CONDUCT INVOLVING DECEIT, DISHONESTY, FRAUD AND MISREPRESENTATION IN VIOLATION OF RULE 4-8.4© AND (d)

Respondent cannot repay, and cannot be required to repay, Hank Medlin's probate estate so long as he has not received tax identification numbers to report distributions to the IRS (now long overdue), and so long as there may be an existing Medicaid lien to be paid to the State of Missouri by respondent. Clearly, the existence of that lien has not been researched by anyone other than respondent, albeit hampered by the lack of tax identification numbers. The reluctance to provide those tax identification numbers by Hank Medlin and by the attorney for his estate raises suspicion. Certainly respondent was entitled to those numbers after making significant distributions to and on behalf of Hank Medlin and his estate. As of this date, they have not been provided.

Neither has respondent engaged in conduct prejudicial to the administration of justice or conduct involving deceit, dishonesty, fraud or misrepresentation in violation of Rule 4-8.(c) and (d), by withholding payment to satisfy outstanding liens for public assistance. The purpose of the loans to respondent was to maximize the recovery to Hank Medlin in (his?) anticipation of those liens. Demanding tax identification numbers to report the distributions to Hank Medlin

and his estate cannot involve deceit, dishonesty, fraud or misrepresentation.

There is nothing close to a preponderance of the evidence offered by the Chief Disciplinary Counsel that respondent engaged in deceit, dishonesty, fraud and misrepresentation in violation of Rule 4-8.4 (c) and (d). OCDC claims that the promissory notes prepared by respondent for respondent's use in documenting loans were fabricated after the fact. It must be recalled that Hank Medlin did not keep records and refused to take copies even of the Settlement Distribution Sheets. The only purpose of the promissory notes could be to document the loans as they occurred. Moreover, because of respondent's error in calculating his fee (an error in the client's favor), respondent was loaning himself his own money and then prepared at least three promissory notes in favor of Hank Medlin.

Proof by a preponderance of the evidence is not made by the OCDC in respondent's failure to produce documents suggesting that the promissory notes were created before February 2009. (Informant's Brief, p. 42.) OCDC seeks to shift the burden of proof to respondent!

Hank Medlin asked respondent for closed conferences on at least three occasions in respondent's office to discuss his financial matters in private. That is not an uncommon request in lawyer-client relationships. OCDC has no evidence to the contrary, much less a preponderance of the evidence. Ila Medlin never testified that she had ever accompanied Hank Medlin to respondent's office. Brenda Ford never accompanied Hank Medlin into respondent's office, and was not with Hank Medlin on every occasion that he did visit respondent's office.

II. DISBARMENT IS NOT THE APPROPRIATE SANCTION IN THIS CASE BECAUSE RESPONDENT DID NOT KNOWINGLY CONVERT OR MISAPPROPRIATE OVER $93,000 IN CLIENT MONEY AND THERE ARE COMPELLING AND SUBSTANTIAL MITIGATING FACTORS IN THIS CASE.

The OCDC recommends disbarment of the respondent. It appears that most of the OCDC's allegations and arguments are taken from the decision in *In re Ehler*, 319 S.W.3d 442 (Mo. banc 2010). The preponderance of the evidence in that case demonstrated violation of Rule 4-1.1, Competence, by failing to correctly calculate and deliver the amount of money owed to a client and an opposing party and by failing to provide opposing counsel with requested discovery information to avoid a default judgment against her client; Rule 4-1.3, Diligence, by failing to pay money owed to a client and an opposing party in a timely fashion and by failing to provide opposing counsel with discovery information to avoid a default judgment against her client; Rule 4-1.4, Communication, by failing to communicate with clients and opposing counsel; Rule 4-1.15, Safekeeping Property, by misappropriating and mishandling client funds and by failing to properly maintain a client trust account; and Rule 4-8.4, Misconduct, by violating other rules of professional conduct and by engaging in conduct involving deceit and misrepresentation. *Id.* at 444-445.

The facts in this case are substantially different. Respondent disputes that he has mishandled or converted trust funds warranting disbarment. There is no allegation that respondent acted without competence in representing Hank Medlin. In fact, respondent and Mr. LeFevere increased Mr. Medlin's recovery by

$78,715.33. [$41,215.33 subrogation claim of Old Republic Insurance Company; $37,500.00 over the $150,000.00 offered at mediation by Old Republic Insurance Company].

There is no allegation or evidence that respondent acted without diligence by failing to provide opposing counsel with discovery information to avoid a default judgment against his client. (Respondent was previously admonished for taking too many extensions of time in preparing an appellate brief).

There is no allegation or evidence that respondent violated Rule 4-1.4, Communication, by failing to communicate with his client and opposing counsel. (This was the subject of the other admonition given respondent). There is no evidence that the subjects of the two prior admonitions were present in this case.

There is no evidence that respondent Rule 4-1.15, misappropriated and mishandled client funds. After all of Hank Medlin's expenses and requests for money had been satisfied, he looked for a way to maximize the income from the balance of the settlement proceeds. Respondent kept records of the amounts loaned by Hank Medlin and of the repayments on those loans.

There is no evidence that respondent engaged in conduct involving deceit and misrepresentation. The OCDC claims that respondent presented false evidence or engaged in deceptive practices alleging that the 26 promissory notes prepared by respondent were back-dated and suspicious. To the contrary, the promissory notes were prepared at the request of Hank Medlin in a simple format so that he could easily understand the transactions. Likewise, the accounting was prepared

in a simplified format so that Mr. Medlin could understand the disposition of the settlement proceeds.

The OCDC has failed to prove that respondent acted with a selfish or dishonest motive or for financial self-interest, i.e., receiving a loan of client funds without repayment. It has failed to prove a pattern of misconduct from April 2007 to April 2008. It has ignored the pattern of loan repayments over the period of time ending with Hank Medlin's death on September 27, 2008 and the lump sum payment in November 2008 at the request of Hank Medlin's family for money to pay his burial expenses.

Respondent has denied the allegations of misconduct because the transaction with Hank Medlin was fully disclosed to Mr. Medlin and it was in accord with Mr. Medlin's expressed wishes for the distribution of the settlement proceeds.

Respondent admits to having practiced law for more than 30 years prior to the alleged misconduct.

There is no indifference to restitution in this case. Respondent is not required to pay income taxes on Hank Medlin's settlements. Some restitution has been made. However, respondent is entitled to have Federal tax identification numbers to report distributions made to Hank Medlin and made and to be made to his estate. These have been requested over a period of 2½ years, but not provided.

In 2009, 2010 and 2011, at the suggestion of the OCDC, respondent took the Practice Management Course: "Keeping Your Law Practice on Track." Each

year this included a day-long interactive course of study concentrating on basic "lawyering" and office skills, including law office management, client relations, business development, fees and billing and other management practices. Respondent has incorporated many of the lessons learned in his practice. The MoBar suggested contingency fee agreement has been adopted, including the optional paragraph on participation by "other lawyers." Respondent has discovered how to use the QuikBooks program for managing individual client trust accounts. Respondent has had a full indoctrination in the Missouri Supreme Court Rules of Professional Conduct and their amendments. Respondent sought treatment of a psychiatrist for anxiety arising from the death of respondent's mother in April 2007 and his brother in August 2007. As a result, respondent is currently prescribed with 40 mg. of Citalopram daily.

The Court in the *Ehler* case had previously suspended Ms. Ehler's license for six months for prior violations of the rules of professional conduct that were of the same nature as her current violations. It stayed her suspension and imposed a two-year term of probation. She committed some of the acts of professional misconduct then before the court while she was on probation. The Court concluded that the effort to educate Ms. Ehler and assist her in modifying her professional behavior to comply with the rules of professional conduct had failed. In light of the severity of her acts of misconduct and the Court's progressive application of discipline, it decided that disbarment was appropriate.

Respondent has never been suspended or disbarred in 35 years of practice for violations of the Rules of Professional Conduct similar to the allegations made against him in this case. Respondent has never been accused of conduct similar to the allegations made in this case. Respondent respectfully suggests a maximum penalty of suspension for six months with a stay of that suspension and a period of probation.

Respondent's Affirmative Defense

Respondent's agreement with Mr. Medlin to borrow money from Mr. Medlin was a direct result of the Supreme Court of Missouri's failure to monitor cases for disposition within a reasonable time. Specifically, in the consolidated cases styled *Olathe Millwork Company v. Bob Dulin, et al.*, Case No. 02 CV 205812 and *Cobblestone Construction Finishes, Inc. v. Bob Dulin, et al.*, Case No. 02 CV 225023 in the Circuit Court of Jackson County, Missouri at Independence, respondent appealed the decision to the Western District of the Missouri Court of Appeals in the case styled *Bob Dulin, d/b/a Bob Dulin Homes, Appellant v. H. Kent Desselle, et al., Respondents,* WD 64817 (WD 64817. A decision reversing the trial court (Judge Stephen Nixon in Division 5 in the Circuit Court of Jackson County, Missouri) was handed down on April 25, 2006. The Mandate was issued May 17, 2006. The trial court refused to act on the Judgment of the Court of Appeals. Defendant H. Kent Desselle filed a Motion for Amended Judgment in December 2008. Plaintiff Robert Dulin (represented by respondent herein) filed timely Suggestions in Opposition to the Motion for Amended Judgment. Plaintiff

Robert Dulin filed a Motion for Summary Judgment on January 2, 2009. The trial court set a Case Management Conference for February 13, 2009. Plaintiff Dulin appeared by counsel (respondent herein.) Defendants H. Kent Desselle and Shirley Desselle failed to appear in person or by counsel. The trial court instructed plaintiff's attorney to prepare a Judgment. The Judgment was submitted by e-mail to the trial court on April 1, 2009. No action was taken on any pending motion (including Plaintiff's Motion for Summary Judgment). Plaintiff's counsel dismissed the case against defendant Shirley Desselle on July 29, 2010, due to her personal bankruptcy. As of this date there has been no decision in *Olathe Millwork Company v. Bob Dulin, et al.*, Case No. 02 CV 205812 in the Circuit Court of Jackson County, Missouri at Independence, a case decided by the Missouri Court of Appeals in 2006, and in which a Motion for Summary Judgment has been on file and unopposed for more than two years. Mr. Medlin's decision and Mr. Miller's decision to loan money to respondent was based, in part, upon their knowledge of the Missouri Court of Appeals decision in the *Dulin* case and the then existing assets of H. Kent Desselle and Shirley Desselle available to satisfy the Judgment in that case. This Court can take judicial notice of these facts contained in the record of the Jackson County Circuit Court.

CONCLUSION

Any disciplinary action in this case is premature. Respondent has yet to close the case for Hank Medlin. An accurate settlement distribution record cannot be produced until the issue of the Medicaid lien is resolved. Respondent is the

person to whom the State of Missouri will look for reimbursement. Further, respondent has a legal obligation to report distributions of the settlement proceeds to the IRS. That cannot be accomplished without tax identification numbers. At the least, there must be further proceedings in this case.

Respectfully submitted,
RONALD K. BARKER, P.C.
s/ Ronald K. Barker
Ronald K. Barker MO #25233
211 Se Grand Avenue, Suite A
Lee's Summit, MO 64063-1842
(816) 246-7650
(816) 246-7623 FAX
rkbpc@sbcglobal.net
Respondent *pro se*

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that:

1. The above and foregoing Respondent's Brief complies with the limitations contained in Rule 84.06 (b) of the Missouri Rules of Civil Procedure.

2. There are 9,797 words in Respondent's Brief.

3. An electronic mail message with an attachment containing a copy of Respondent's Brief has been sent to the Court. The word processing format is Microsoft Word for Windows.

4. The file has been scanned for viruses and it is virus-free.

RONALD K. BARKER, P.C.
s/ Ronald K. Barker
Ronald K. Barker MO #25233
211 SE Grand Avenue, Suite A
Lee's Summit, MO 64063
(816) 246-7650
(816) 246-7623 FAX
RESPONDENT *pro se*