IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
PATRICK F. ANDRE	**)**	**Supreme Court #SC87288**
	)	
Respondent.	**)**	

RESPONDENT'S BRIEF

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Black's Law Dictionary 26

John Milton, Paradise Lost (Scott Elledge editor, Norton 2d Critical edition 1975) 27

The American Heritage Dictionary of the English Language, 4th ed (2000) 26

Charles L. Wolfram, Modern Legal Ethics (Practitioner's Edition) (1986) 16, 22, 29, 30

STATEMENT OF JURISDICTION

An information was filed charging attorney Patrick F. Andre ("Andre") with violations of Rules 4-8.4(b), 4-8.4(c), and 4-1.15(a), and a disciplinary hearing took place on August 15, 2005. In early October 2005, the disciplinary hearing panel issued its decision finding that Andre violated each of the rules as charged and recommended disbarment. Andre did not concur in the panel's recommendation, so Informant filed the record with this Court pursuant to Rule 5.19. Jurisdiction over attorney disciplinary matters is established by Article V, §5 of the Missouri Constitution, Supreme Court Rule 5, and Mo. Rev. Stat. §484.040.

STATEMENT OF FACTS

Background.

Andre graduated with a law degree from St. Louis University in 1989. He was licensed in Illinois in 1989 and Missouri in 1990. Informant's Appendix ("App.") 6, 41. He took jobs with the federal government and then with the state of Illinois for about eleven years. Andre returned to St. Louis and obtained employment with Enterprise Bank & Trust ("Enterprise") in May, 2000. App. 42.

Andre worked as a trust officer at Enterprise from May, 2000, until he was terminated in July, 2004. App. 13, 42. Andre had not paid Missouri Bar dues while working out of state, and Enterprise paid past dues and related penalties. App. 10, 52. Andre used the title "Vice President and Trust Counsel" at Enterprise, although there were no legal duties attached to this position beyond those associated with any other bank trust officer. App. 42, 52. Andre was not hired to appear in legal proceedings involving Enterprise and never did so. Nor did he dispense or offer legal advice during his work at Enterprise except that which would be offered by a non-credentialed trust officer. App. 42.

After he left Enterprise in July, 2004, Andre practiced for a short time on his own in Alton, Illinois, sharing office space with other lawyers. While there, he searched for non-legal employment and eventually found a position with Charter Communications, where he continues to work. His job there, in internet security, is a non-legal position. App. 6, 42.

Facts underlying information.

In 2002, Andre filed bankruptcy. That proceeding was precipitated by an unrepaid loan of approximately $20,000 which he had made to one of his sisters to finance her husband's failing business. He failed to disclose the bankruptcy to Enterprise on an application for participation in the bank's incentive stock option program. When the bank discovered the bankruptcy, Andre was dismissed. App. 13,

43. After he left, an audit of the accounts he had managed uncovered that he had taken a little less than $16,000 from three accounts. App. 8.

First, he had taken funds from an account called the Irene Rosen Trust and from the personal account of Ms. Rosen. App. 25. Andre had done substantial work for Ms. Rosen, an elderly lady. He assisted her in finding care-givers, and he paid bills for her out of her accounts. Ms. Rosen had indicated a number of times that she wished to do something special to compensate him for his efforts. Andre understood that accepting gifts of cash from a bank customer was improper. App. 43. Despite this, he retained some cash that she had given him for deposit and also proceeds of her account which had been closed at another bank. App. 23-24. Over the period from December, 2003, to May, 2004, in four or five transactions, he also wrote checks drawn on her accounts for himself. App. 44, 49. These misappropriations from the Rosen accounts amounted to approximately $7,000. App. 43-44, 49.

Second, Andre made a transfer from a fund known as the "Coastal Trading Common Trust Fund," which was an account shared by nineteen high-value entities owned directly or indirectly by very savvy investors and administered by Enterprise. From that fund, Andre took $8,000 or $9,000 in a lump sum via a cashier's check he had drawn to another sister to repay a loan she had made to him. App. 43-44.

Andre was scheduled to receive a bonus from Enterprise of approximately $15,000 at the end of 2004, from which he intended to repay Ms. Rosen's accounts and the Coastal Trading Common Trust Fund. App. 44, 49. At the time of the misappropriations, Andre did not think of possible consequences if he were to be caught. App. 49.

After Enterprise completed the audit of accounts handled by Andre, Andre was asked to appear at Enterprise on the evening of Thursday, August 26, 2004. He met with Joseph S. von Kaenel, a partner in the law firm of Armstrong Teasdale LLP, which represents Enterprise; Kevin Eichner, the chief executive officer of Enterprise;

and James Wagner, the executive vice president of Enterprise. App. 19. Andre was told his misappropriations had been uncovered by an audit. Andre did not ask to see the results of the audit; he simply admitted what he had done. App. 44-45.

At the meeting, he was presented with a restitution agreement and promissory note which had been drafted by Armstrong Teasdale LLP. App. 15-16, 20. He immediately signed the restitution agreement, which amounted to a complete admission of his wrongdoing. He simultaneously executed the note. App. 16. He was told the purpose of the note was to memorialize the balance owed as a result of the defalcations and to reimburse Enterprise for the costs of the audit and legal fees. Since an exact amount for these items had not been calculated, he was informed the note had been drafted to state an amount greater than that actually due on the understanding that it would eventually be reduced to the true amount. App. 20, 44-45. At the meeting, there was no discussion of either potential criminal liability or the possibility of a report to the Office of Chief Disciplinary Counsel. App. 15-16, 20-21, 45.

To begin the repayment process, almost immediately, Enterprise set off on Andre's joint account with his wife, who was uninvolved and unaware of his conduct. She was not contacted by Enterprise prior to the setoff and did not give consent. App. 9. Respondent's Appendix ("R.App.") 118-119. In addition, Andre's 401K retirement plan and all stock options which he held with Enterprise were liquidated to repay Enterprise. App. 46; R.App. 120-126. In all, he has repaid about $42,000. App. 16, 45. He has never asked Enterprise to provide support for the amount which Enterprise claimed was owed, and he has no intention of doing that. App. 8, 16, 45.

Filing of complaint.

In January, 2005, the complaint in this case was filed as a result of information obtained by the Office of Chief Disciplinary Counsel from William Dowd, an attorney who represented Irene Rosen and her trust, and who learned that Andre had failed to

make the two deposits to Ms. Rosen's account as mentioned above. App. 14, 22-24, 56. Mr. Dowd had been very favorably impressed by the professional and friendly way Andre had interacted with Ms. Rosen and handled her financial affairs. App. 23. He was stunned and disappointed that the deposits had not been made. App. 24. His complaint included a statement that he understood that Andre had made some restitution. App. 57.

Evidence of mental disability–ADHD.

Because of the out-of-character nature of his conduct, Andre obtained a professional evaluation. He first visited Dr. Rafia Malik, a St. Louis metropolitan area psychiatrist. Based on her preliminary findings, Dr. Malik suggested that Andre schedule a more complete evaluation with a clinical psychologist to examine him for Adult Attention Deficit/Hyperactivity Disorder ("ADHD"). App. 10. Andre was then evaluated by Dr. Dean Rosen, a psychologist whose resume is extensive. R.App. 104. Dr. Rosen's experience includes five years of practice at Malcolm Bliss Mental Health Center, a Missouri state mental hospital, followed by twenty-five years of private practice. During that time, he has done extensive consulting work in the public and private sectors, including the St. Louis County Juvenile Court, worked as director of intern training at Malcolm Bliss, taught for many years at the graduate level, and been a presenter or workshop leader at over three dozen professional functions. Dr. Rosen has been diagnosing and treating ADHD for twenty years. App. 28; R.App. 104-109.

After interviewing and testing Andre in accordance with standard clinical practice and then evaluating the test results, Dr. Rosen concluded that Andre suffered from ADHD, a known psychological disorder. App. 29, 103. ADHD is a condition characterized by inability to concentrate, resulting in an individual's lack of power to listen well or plan ahead. ADHD is also characterized by impulsiveness, where the person takes some actions and, in doing so, does not take into account information that

he actually knows. App. 30, 31; R.App. 110-117. Thus, ADHD is characterized by occasional over-focusing, which occurs when, having failed to organize or plan, the ADHD person goes into overdrive to handle whatever he has neglected or, for inappropriate reasons, focuses on only one matter. Persons with ADHD can do very well in a structured environment where assignments, strategies, goals and potential rewards are clearly set forth. App. 31.

Irene Rosen made statements to the effect that she wanted to pay Andre something for his services herself or do something special for him. App. 43. Due to the characteristic of persons with ADHD, Andre failed to evaluate these comments in light of the common habit of elderly people who talk about giving something to somebody without any intention of ever completing the gift. Instead Andre, disregarding his responsibilities as an officer of the bank and the possible consequences should he be caught, took the money. Andre was faced with financial difficulties because his family, consisting of his wife and five children, spent more than he was earning. This financial difficulty caused him to over-focus on the possibility of taking her money and her statements that she wanted to do something for him. He testified, in fact, that he did not even consider the likelihood of getting caught. Instead, he planned to repay. App. 49.

While certainly not excusing Andre's conduct, his ADHD does explain why he was unable to develop a strategy to take care of his financial needs. His ADHD is demonstrated by his conduct of lending money to a sister–at a time when he clearly could not afford to do so–because the sister's husband's business was failing. As a result of this loan not being repaid, in 2002 he filed bankruptcy. App. 43.

The psychologist, Dr. Rosen, noted that because of Andre's relatively high intellect, Andre was not diagnosed with ADHD at a younger age. That clinicians were not on the alert for the disorder when Andre was growing up also contributed to the lack of an earlier diagnosis. App. 30. Dr. Rosen found that "ADHD would be

contributory to the illicit behavior he engaged in while working as an attorney for Enterprise." App. 103. Besides the diagnosis itself, this conclusion is based on the fact "that his behavior was done impulsively, with little thought to the consequences and showed poor judgment in predicting the likely consequences." *Id*. However, the tests and "Nothing in his history suggests that he is by nature anti-social or psychopathic."[1] *Id*.

Availability of ADHD treatment privately and through MOLAP.

Dr. Rosen recommended that Andre receive treatment for the disorder. That treatment would be both educational, so that Andre is able to understand and appreciate the ramifications of ADHD, and should also include a psychotherapeutic component, which will enable him to plan better and live within the means of his large family. If Andre were to do these things, the "prognosis for future improvement functioning is good."[2] App. 103-104.

The file in this case indicates that Dr. Rosen's diagnosis and comments are well taken. Due to the size of Andre's family, which includes five minor children and his wife, Andre has been unable to afford the therapy to this point. App. 11-12. In addition, he has been burdened with legal fees.[3] At the hearing, Jonathan E. Fortman, the Chairman of The Missouri Bar's Lawyers' Assistance Plan ("MOLAP"), testified that that program has generally been directed to drug and alcohol abuse. However, MOLAP has expanded into facilitating family counseling, dealing with clinically depressed lawyers, and other fields not related to substance abuse. Mr. Fortman

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[1] Rosen, D.L., Patrick Andre psychological report, App. 103-104 (ellipses omitted).

[2] Rosen, D.L., Patrick Andre psychological report, App. 104.

[3] Motion of Respondent to appoint or employ counsel to represent him; Exhibit 5, U.S. individual income tax return 2005, page 1.

indicated that MOLAP could structure a plan which would be suitable for ADHD and monitorable. App. 40-41.

Evidence of remorse.

The first person to know of Andre's misdeeds besides himself was his priest. As a regular churchgoer, he discussed his defalcations with this clergyman even before he was called upon to confess to Enterprise. The advice provided by the priest was that Andre should not self-report the misconduct nor make restitution directly to Enterprise and those he wronged. Instead, the priest told him that restitution should be made to charity. App. 47.

Andre has not attempted to deflect the blame from himself. He has not chosen to fasten his misdeeds on the original problem caused by the loan he made to assist his sister so she could help out the brother-in-law, even though he "doesn't particularly care for" the brother-in-law. App. 43.

In more than a religious sense, he has confessed his misdeeds. For example, while he never took gifts which Irene Rosen offered of her free volition, which was prohibited because of his trust officer relation to her, he admits to doing "something that was more improper" than that, to wit "diverting some of [her] funds" into his own account. App. 43.

Disciplinary case.

A panel hearing took place on August 15, 2005. Informant called Andre as her sole witness. App. 5-17. Besides himself, Andre called the following witnesses: T. Jack Challis, his supervisor at Enterprise; Joseph S. von Kaenel, counsel for Enterprise; William Dowd, who made the complaint; Dr. Dean L. Rosen, psychologist; and Jonathan E. Fortman of MOLAP. App. 3-4. Informant filed proposed findings requesting disbarment of Andre; Andre's proposed findings suggested a two-year suspension. R.App. 146. The panel adopted the Informant's proposed findings and recommended disbarment. App. 105-109. The Supreme Court,

by virtue of its inherent control over the practice of law, retains final authority to review all aspects of the disciplinary hearing *de novo*.[4]

[4] E.g., *In re Crews*, 159 S.W.3d 355, 360 (Mo. banc 2005); *In re Coe*, 903 S.W.2d 916, 918 (Mo. banc 1995).

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD SUSPEND RATHER THAN DISBAR RESPONDENT FOR HIS CONVERSION OF APPROXIMATELY $16,000 FROM THREE ACCOUNTS OVER WHICH HE SERVED AS A BANK TRUST OFFICER BECAUSE THERE ARE MITIGATING CIRCUMSTANCES IN THAT RESPONDENT MADE PROMPT RESTITUTION, THERE IS AN ABSENCE OF PRIOR SIGNIFICANT DISCIPLINE, THERE IS EVIDENCE THAT RESPONDENT SUFFERS FROM ADULT ATTENTION DEFICIT/HYPERACTIVITY DISORDER, RESPONDENT COOPERATED WITH BOTH THE BANK AND THE DISCIPLINARY AUTHORITIES, RESPONDENT HAS SUFFERED FROM THE IMPOSITION OF OTHER SANCTIONS, AND RESPONDENT SHOWS CONTRITION

Rule 4-8.4(b), (c)

Rule 4-1.15(a)

In re Nelson, 275 Kan. 377, 64 P.3d 413 (Kan. 2003)

People v. Shidler, 901 P.2d 477, (Colo. 1995)

In re Warren, 888 S.W.2d (Mo. banc 1994)

In re Scibetta, 117 A.2d 379, 509 NY2d 565 (App. Div. 1986)

American Bar Association, Standards for Imposing Lawyer Sanctions (Amended 1992)

II.

DISCIPLINE SHOULD NOT BE IMPOSED UNDER RULE 4-1.15(a) BECAUSE THE MISCONDUCT OF RESPONDENT DID NOT OCCUR "IN CONNECTION WITH A REPRESENTATION" AS REQUIRED BY THAT RULE, IN THAT RESPONDENT'S MISAPPROPRIATIONS TOOK PLACE EXCLUSIVELY IN CONNECTION WITH NON-LEGAL WORK

Rule 4-1.15(a)

Disciplinary Rule 9-102(A)(repealed effective January 1, 1986)

Charles Wolfram, Modern Legal Ethics, §4.8 (Practitioner's Edition) (1986)

ARGUMENT

I. THE SUPREME COURT SHOULD SUSPEND RATHER THAN DISBAR RESPONDENT FOR HIS CONVERSION OF APPROXIMATELY $16,000 FROM THREE ACCOUNTS OVER WHICH HE SERVED AS A BANK TRUST OFFICER BECAUSE THERE ARE MITIGATING CIRCUMSTANCES IN THAT RESPONDENT MADE PROMPT RESTITUTION, THERE IS AN ABSENCE OF PRIOR SIGNIFICANT DISCIPLINE, THERE IS EVIDENCE THAT RESPONDENT SUFFERS FROM ADULT ATTENTION DEFICIT/HYPERACTIVITY DISORDER, RESPONDENT COOPERATED WITH BOTH THE BANK AND THE DISCIPLINARY AUTHORITIES, RESPONDENT HAS SUFFERED FROM THE IMPOSITION OF OTHER SANCTIONS, AND RESPONDENT SHOWS CONTRITION

Standards for discipline.

"In disciplinary proceedings, the hearing panel's recommendation as to the appropriate measure of discipline is merely advisory."[5]

There is no dispute as to whether discipline is required in this case, only its nature. Determining the appropriate punishment requires consideration of mitigating factors set for in the *American Bar Association Standards for Imposing Lawyer Sanctions*. "In imposing a sanction after a finding of misconduct, a court should consider . . . the existence of aggravating or mitigating factors."[6] Since 1994, the

[5] *In re Donaho,* 98 S.W.3d 871, 873 (Mo. banc 2003).

[6] *ABA Standards for Imposing Lawyer Sanctions* (Amended 1992), §3.0(d) (hereafter referred to as "*ABA Standards*").

Missouri Supreme Court has referred to these standards in imposing discipline.[7] Respondent notes that most of the cases cited by Informant were decided prior to 1994. Informant's Brief at 2.

The *ABA Standards* list fourteen factors which may be considered in mitigation.[8] Seven of these factors bear on this discussion: timely, good-faith effort to make restitution; insignificant prior disciplinary record; mental disability, discussed with personal or emotional problems; Andre's full and free disclosure to the disciplinary authorities and others; the imposition of other penalties or sanctions; and, finally, remorse.

Prompt and complete restitution. The "timely good faith effort to make restitution or to rectify consequences of misconduct" is a significant factor to weigh when determining the disciplinary sanction according to the *ABA Standards*.[9]

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[7] According to a dissent authored by Judge Covington, "The first reported case to apply the *ABA Standards* was *In re Storment,* 873 S.W.2d 227 (Mo. banc 1994)." *In re Coe,* 903 S.W.2d 916, 922 (Mo. banc 1995). *Storment* was decided simultaneously with *In re Griffey,* 873 S.W.2d 600 (Mo. banc 1994), which also applied the *ABA Standards*. Since then, this Court has applied *ABA Standards*. *E.g.*, *In re Crews,* 159 S.W.3d 355, 360 (Mo. banc 2005); *In re Caranchini*, 956 S.W.2d 910, 918-19 (Mo. banc 1997); *In re Harris*. 890 S.W.2d 299, 302 (Mo. banc 1994).

[8] R.App. 148.

[9] *ABA Standards,* §9.32(d); R.App. 148.

When a lawyer misappropriates funds, the *ABA Standards* recognize that restitution is an important mitigating factor.[10] Recently, while one investigation of misconduct was pending, the disciplinary committee advised the lawyer that restitution would be considered in mitigation of punishment.[11] This acknowledgment of the importance of restitution has a very practical aspect–disregarding restitution as a mitigating factor discourages efforts to make the client whole.[12] Thus, even the mere promise of restitution at the moment of the disciplinary hearing has resulted in the Office of Chief Disciplinary Counsel giving consideration to the attorney.[13] The Supreme Court has ordered restitution as a condition of reinstatement.[14]

Conversely, an indifference to the client's situation and a laxity in making restitution are considered adversely and as aggravating factors.[15]

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[10] There are cases which predate the Missouri Supreme Court's reference to the *ABA Standards* that refuse to recognize restitution in mitigation of punishment, and many of those arise under the disciplinary rules which predated the adoption of Missouri's current Rules of Professional Conduct embodied in Rule 4 of the Missouri Supreme Court Rules. E.g., *In re Williams,* 711 S.W.2d 518, 521 (Mo. banc 1986).

[11] *In re Donaho,* 98 S.W.3d 871, 872 (Mo. banc 2003).

[12] *Florida Bar v. McShirley,* 573 So. 2d 807 (Fla. 1991).

[13] "At the hearing, respondent admitted [three counts] of the five-count Information, and agreed to pay restitution. In return, informant dropped the so-called "noncooperation" count, and recommended only a 60-day suspension from practice. *In re Barr,* 796 S.W.2d 617, 619 (Mo. banc 1990). Immediately before the hearing, the lawyer and disciplinary counsel agreed that in return for admission and restitution "before sundown" there would be a recommendation of reduced discipline *In re Kinghorn,* 764 S.W.2d 939, 939 (Mo. banc 1989).

[14] *In re Barr,* 796 S.W.2d 617, 620 (Mo. banc 1990).

[15] *In re Cupples,* 979 S.W.2d 932, 937 (Mo. banc 1998).

Within a short time of the meeting in which Andre signed the restitution agreement, Enterprise was made nearly whole. The restitution was made long before any involvement of the United States Attorney's Office, and certainly long before Andre had any notion of the requirements of the federal pre-trial diversion program.[16] At the time Andre agreed to reimburse Enterprise, criminal prosecution was not even discussed. App. 16. That he has made full restitution is acknowledged by the United States Attorney's Office in their pretrial diversion report.[17] Unlike the lawyer in *In re Adelman* who "did not make legitimate attempts to resolve the clients' problems [his failure to pay over amounts collected for the clients] until forced by the committee's actions,"[18] Andre repaid months before he knew that his misconduct would be reported to the Office of Chief Disciplinary Counsel.[19] In fact, he believed to the contrary since two lawyers, Mr. von Kaenel and Mr. Challis, were involved in the drafting and/or discussion of the restitution agreement, and Mr. von Kaenel, who attended the meeting where the restitution agreement was signed, made no mention

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[16] Andre made payments to Enterprise in late August, early September, 2004, and a last payment on October 7, 2004. R.App. 118-126; 136-137. Enterprise notified federal authorities of Andre's misappropriations on September 28, 2004, R.App. 87, after the restitution had been nearly completed. The agreement between Andre and the U.S. Attorney's Office was signed on June 23, 2005. App. 95.

[17] Item (10) of that report found on page 3 requires that, "You shall comply with the following special conditions: You shall make mandatory restitution in the amount of $0.00, restitution has been paid in full." App. 94.

[18] 734 S.W.2d 509, 511 (Mo. banc 1987). "[I]t was not until the hearing before the Master...that respondent finally tendered a check to the client." *Id* at 510 (ellipses omitted).

[19] The report to the Office of Chief Disciplinary Counsel was dated January 13, 2005.

of the possibility that Andre's actions would be reported. In fact, neither of these two attorneys did report Andre. App. 19, 21.

Absence of prior significant discipline. The *ABA Standards* suggest the attorney's past disciplinary record be examined.[20] The Missouri Supreme Court has specifically taken a lawyer's past record into account.[21] The record of Andre hitherto has been outstanding.

That is not to say that it is without blemish. There are two matters which have found a home in Andre's disciplinary file. One group of complaints was filed relating to an estate handled by Enterprise, and these complaints were dismissed without any action taken by the Office of Chief Disciplinary Counsel. R.App. 1-20. The other item was a technical matter regarding the unauthorized practice of law while Andre held only an Illinois license and worked for Enterprise.

After becoming employed as a trust officer at Enterprise, Andre requested reinstatement of his Missouri license. He had maintained his Illinois license, but had allowed his Missouri license to lapse while working out of state. Though he was performing trust officer functions for Enterprise and worked for no other entity, his business card designated him as "Counsel." App. 52. Unlike other states, the Missouri OCDC has taken a very hard line on such matters, and Enterprise eventually paid Andre's back dues. Thus, because Enterprise had full knowledge of the situation, Andre had an Illinois license, and the work Andre was doing was within the scope of duties performed by trust officers without legal credentials, there was no conceivable harm to the public, the profession or anyone else. Because Missouri uses a rather harsh formula for license reinstatement, the fines which were paid to reinstate Andre's

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[20] *ABA Standards*, §9.32(a).

[21] "It is proper to consider mitigating factors, including the attorney's previous record, when determining the appropriate discipline." *In re Crews,* 159 S.W.3d 355, 360 (Mo. banc 2005). See also, *In re Harris*, 890 S.W.2d 299, 302 (Mo. banc 1994).

license exceeded $2,000, though he had not used it during the period he was inactive in the state. App. 52, R.App. 22, 27.

Personal or emotional problems in the form of ADHD and mental disability.

> The [court] decisions are virtually unanimous in holding that a lawyer's alcoholism or mental illness at the time of misconduct is not a complete defense in the sense of exonerating the lawyer from any further disciplinary involvement. But courts are generally, and increasingly, willing to recognize those problems as the illnesses that they are and to deal with them in ways that attempt to provide an opportunity for the lawyer to achieve rehabilitation if that appears likely. . . . The present challenge for courts is to devise methods of dealing with alcoholism and mental illness that effectively prevent future harm to clients or the public yet provide an opportunity for a fully rehabilitated lawyer to become a useful and productive member of the profession.[22]

The *ABA Standards* specifically cite "personal or emotional problems" and "mental disabilities" as factors to be considered in mitigation.[23] Even before it regularly used the *ABA Standards*, the Missouri Supreme Court long recognized "personal or emotional problems" and "mental disabilities" as mitigating factors.[24]

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[22] Charles Wolfram, Modern Legal Ethics (Practitioner's Edition) (1986) §3.3.3, 95-96 (citations omitted).

[23] *ABA Standards*, §9.32(c) and (i).

[24] "Mental state is properly to be considered a mitigating factor." *In re Kopf*, 767 S.W.2d 20, 23 (Mo. banc 1989), citing *In re Mentrup*, 665 S.W.2d 324 (Mo. banc 1984).

The Missouri Supreme Court has not specifically addressed ADHD. There is no reason to put this particular affliction beyond the bounds of these categories, however.

Attention Deficit/Hyperactivity Disorder (ADHD) is a disorder syndrome which courts have considered in mitigation of punishment. Among courts which have considered ADHD, there has been a tendency to put this disorder in a hybrid category something like "mental state[25]" which is a concatenation of the *ABA Standards*' "personal or emotional problems"[26] criteria and the "mental disability"[27] category. No matter where it is placed in the *ABA Standards*, though, there is no doubt that ADHD is a recognized psychiatric disorder. It is categorized in the standard work of the American Psychiatric Association used by mental health professionals known as the Diagnostic and Statistical Manual (Fourth Edition), or DSM-IV, which Missouri courts consider to be "the authoritative manual for classification of mental disorders."[28] The manual is frequently referred to on a basis which assumes its influential stature.[29]

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[25] *In re Matson*, 274 Kan. 785, 790, 56 P.3d 160, 164 (Kan. 2002) (per curiam).

[26] *ABA Standards*, §9.32(c).

[27] *ABA Standards*, §9.32(i).

[28] *State v. Weekly*, 107 S.W.3d 340, 342 n.1 (Mo. Ct. App. W.D. 2003) (ellipses omitted).

[29] *Wilson v. State*, 813 S.W.2d 833, 844 (Mo. banc 1991) (an affliction mentioned in DSM, dependent personality disorder, is "a concept recognized" in a work which is "an analytical and diagnostic aid to practitioners"); *In re Moore*, 885 S.W.2d 722, 725 (Mo. Ct. App. W.D. 1994); *State v. Petty* 856 S.W.2d 351, 352 n.2 (Mo. Ct. App. S.D. 1993).

Among the prime motives for the original promulgation of the *ABA Standards* was that, "Inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and basic fairness of all disciplinary systems."[30] Thus, when applying the *ABA Standards*, the Missouri Supreme Court has looked to the holdings of the highest courts of sister states.[31]

Various courts have recognized ADHD as mitigating, finding that ADHD is encompassed by the *ABA Standards* as a personal or emotional problem or a mental disability. The Kansas Supreme Court treated ADHD with hyperactivity as a "physical or mental impairment" fitting within either the *ABA Standards'* category of personal or emotional problem or a mental disability.[32] The same court also recognized ADHD as a mitigating factor in *In re Matson*.[33] Citing the *ABA Standards*, the Vermont Supreme Court found that ADHD could be used in mitigation.[34] Colorado's high court has also endorsed the concept that ADHD is an impairment which mitigates punishment under the applicable standard for lawyer discipline.[35]

Even courts which do not refer to the *ABA Standards* consider ADHD a factor which mitigates punishment. The Oklahoma Supreme Court's decisions, *In re*

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[30] *ABA Standards*, Preface.

[31] *In re Cupples*, 952 S.W.2d 226, 234 (Mo. banc 1997) n. 2 (citing the Oregon Supreme Court's disciplinary decision, *In re Smith*, 315 Or. 260, 843 P.2d 449, 453 (1992)); *In re Coe*, 903 S.W.2d 916, 918 (Mo. banc 1995) (pointing to the *ABA Standards'* citation of the New Jersey decision, *In re Vincenti*, 92 N.J. 591, 458 A.2d 1268 (1983)).

[32] *In re Nelson*, 275 Kan. 377, 383, 64 P.3d 413, 417 (Kan. 2003) (per curiam).

[33] 274 Kan. 785, 56 P.3d 160 (2002).

[34] *In re Hunter*, 167 Vt. 219, 225, 704 A2d 1154, 1157 (1997).

[35] *People v. Shidler*, 901 P.2d 477, 479-80 (1995)(ADHD diagnosed in 1993).

Prather[36] and *In re Busch*,[37] both take account of the lawyer's ADHD when meting out punishment. New York courts opine similarly.[38] In fact, it seems the earliest reported decision to recognize ADHD in mitigation of lawyer punishment arose nearly two decades ago in New York when a lawyer used client funds for personal purposes. The lawyer's previously undiagnosed ADHD, which was the only issue at the disciplinary hearing, resulted in a punishment of a one-year suspension.[39]

Full and complete disclosure and cooperation. The *ABA Standards* mention as a mitigating factor "full and free disclosure to disciplinary board or cooperative attitude toward proceedings."[40] Andre's cooperative attitude has not led him even once to evade his culpability in the course of this proceeding. Indeed, as noted above, at the hearing, Informant called only Andre as a witness. App. 5-17. He has given similar cooperation to Enterprise and the United States Attorney's Office. From the moment he met with Enterprise on August 26, 2004 to this moment, there has never been a syllable of denial. The only questions Andre has raised relate solely to the issue of the appropriate punishment.

Imposition of other penalties or sanctions. Sanctions beyond those imposed by the bar are considered as mitigating factors.[41] This is sometimes seen in the context of a penalty imposed by a court, such as for contempt. In this case, however, the punishment and sanction comes from the United States Attorney's Office with which Andre has executed a pretrial diversion agreement which amounts to being placed on

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[36] 1996 OK 87, 925 P.2d 28,30 (Okla. 1996)(attorney's ADHD diagnosed in 1995).

[37] 1996 OK 38, 919 P.2d 1114,1120 (Okla. 1996).

[38] *In re Lenkiewicz*, 786 N.Y.S.2d 871, 872, 14 A.3d 151 (App. Div. 2004).

[39] *In re Scibetta*, 502 N.Y.S.2d 565, 117 A.D.2d 379 (1986).

[40] *ABA Standards*, §9.32(e), R.App. 148.

[41] *ABA Standards*, §9.32(l), R.App. 148.

probation for eighteen months. Among other things, he must make monthly reports to an employee of that office, maintain his job, follow any instructions from the United State Attorney, and limit alcohol intake. Moreover, he is barred for an indefinite time from taking employment with any institution insured by the Federal Deposit Insurance Corporation. In essence, because any relaxation of the latter stricture requires approval of the Federal Deposit Insurance Corporation, that bar is permanent. App. 94.

Remorse. The *ABA Standards* posit remorse as a mitigating factor.[42] This Court has acknowledged that remorse should be considered in mitigation.[43] Conversely, failure to acknowledge the wrongful nature of the conduct is viewed as an aggravating circumstance.[44] In addition to positive expressions of regret and remorse, courts have viewed the attorney's withdrawal from the practice of law as an expression of penitence, an indicia of remorse.[45]

There is no adequate legal definition of remorse. *Black's Law Dictionary* has no entry for the word. One popular dictionary defines it as, "Moral anguish arising from repentance for past misdeeds; bitter regret."[46] It may be often judged by its absence, which indicates one who abandons his conscience. John Milton wrote in the voice of Satan contemplating the course which he had charted in Hell, "So farewell hope, and with all hope fear, Farewell, remorse: all good to me is lost; Evil, be thou

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[42] *ABA Standards*, §9.32(m), R.App. 148.

[43] *In re Coe,* 903 S.W.2d 916, 918 (Mo. banc 1995).

[44] *In re Cupples,* 979 S.W.2d 932, 937 (Mo. banc 1998); *In re Caranchini,* 956 S.W.2d 910, 919 (Mo. banc 1997).

[45] *In re Penn*, 548 N.W.2d 526 (Wis. 1996).

[46] *The American Heritage Dictionary of the English Language*, 4th ed (2000).

my good; by thee at least divided empire with heav'n' King I hold."[47] Perhaps this quote and the popular dictionary definition disclose the underlying problem in attempting an adequate legal definition–remorse is a moral and religious concept which is not amenable to a technical legal definition. It is found in our own experiences and observations.

Andre has experienced and expressed his regret. Prior to Enterprise's discovery of his misappropriations, Andre confessed to his priest what he had done. App. 47. He acknowledged the wrongful nature of his conduct. He has testified that he fully appreciates the injury he has caused innocent others, and he has evidenced an understanding that, in the public eye, his unforgivable conduct has cast a shadow over those who continue to honorably and honestly practice law. App. 47-48. He has caused understandable distress for his family and their future. He has, without being sued, essentially handed over the better part of his family's fortune to remedy the wrong. App. 46, 48; R.App. 118-126, 136-137.

There has been nothing in Andre's conduct which contradicts his remorse. His behavior contrasts to that lawyer in *In re Caranchini* who went to the extreme of presenting evidence that her conduct, which had already been found sanctionable in federal court, was both proper and that she was entitled to have the federal court findings disregarded for purposes of the disciplinary hearing.[48]

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[47] Milton, J., *Paradise Lost*, book IV, lines 108-11 (Scott Elledge editor, Norton 2d Critical edition 1975).

[48] 956 S.W.2d 910, 919 (Mo. banc 1997).

Consistent with his feelings of remorse, Andre is not requesting that he evade all punishment in this case.[49] He is simply requesting that this Court take his ADHD and other aspects of his situation discussed above into account when deciding discipline to be imposed.

This Court has frequently ordered that the lawyer enter some form of rehabilitation, counseling or other program, and be denied the privilege of practicing law until the time he can present the Court with evidence that he has been restored to fitness. For example, a lawyer who misappropriated client funds to his own purposes under mental and emotional stress was ordered "suspended indefinitely from the practice of law with consideration of any application for reinstatement conditioned upon proof that he is medically fit and emotionally equipped to resume the practice."[50] An extensive order to this effect was entered in the case of *In re Warren*,[51] where the lawyer was suspended with the condition that, "before seeking reinstatement respondent is ordered to obtain psychological counseling and at the time of seeking reinstatement to provide a report of the counseling professional as to the nature of the counseling and the results thereof to the Office of the Chief Disciplinary Counsel."

II. DISCIPLINE SHOULD NOT BE IMPOSED UNDER RULE 4-1.15(a) BECAUSE THE MISCONDUCT OF

[49] *State v. Hostetter*, 126 S.W.3d 831, 834 (Mo. Ct. App. W.D.2004) ("Consistent with his remorse for the assault, [Appellant] was not asking to be set free, but only that the jury be allowed to consider his evidence that he did not intend to inflict serious physical injury.")

[50] *In re Adelman*, 734 S.W.2d 509, 511 (Mo. banc 1987).

[51] 888 S.W.2d 334, 337 (Mo. banc 1994).

RESPONDENT DID NOT OCCUR "IN CONNECTION WITH A REPRESENTATION" AS REQUIRED BY THAT RULE, IN THAT RESPONDENT'S MISAPPROPRIATIONS TOOK PLACE EXCLUSIVELY IN CONNECTION WITH NON-LEGAL WORK

This Court's review of the findings and legal conclusion of the panel that Andre violated Rule 4-1.15(a) is *de novo*.[52]

While Andre recognizes the nature of his wrongdoing and that he is deserving of discipline, he also believes that it is inappropriate to charge him under Rule 4-1.15(a), which requires that a lawyer hold property of a client or other person separate from his own when that property is obtained "in connection with a representation." This rule is designed primarily to require segregation by way of a trust fund. Andre is charged with violating this rule in count III of the information. The Informant argues that there is an authoritative text to the contrary, Wolfram's *Modern Legal Ethics*. Informant's Brief at 11.

The text of that authority does not support Informant's argument for several reasons. First, Wolfram focuses on the need for discipline even when there are "ambiguities" surrounding the relationship between the lawyer and the victim. For example, a lawyer may act as both a trustee for the family trust and as the family's lawyer. That is not the case here. Andre did not act as a lawyer for any of the parties from whom he intercepted funds, and none of them believes he was acting as their attorney. Second, the Wolfram text, authoritative as it may be, was authored in 1986. The ABA Model Rules were authored in 1983 and adopted in Missouri effective 1986. Accordingly, Wolfram deals primarily with the impact of the old rules such as Disciplinary Rule 9-102(A) (repealed) which did not have the requirement that the misconduct have a nexus to any representation. Third, Wolfram acknowledges this and states that the new rule, Rule 4-1.15(a), "seems subject to an equally broad

[52] *In re Donaho*, 98 S.W.3d 871, 873 (Mo. banc 2003).

interpretation." It might be subject to that interpretation if there were an ambiguity as to the true role of the lawyer, but it is hard to justify using the rule in that fashion when there are other rules which are entirely adequate to the task. Wolfram concurs by saying "general prohibitions against dishonesty would also suffice."[53]

[53] Charles Wolfram, Modern Legal Ethics, §4.8, 178 (1986).

CONCLUSION

This Court has posed a question which perhaps subsumes certain parts of many of the explicitly stated categories of mitigation discussed above and which is a more basic and human question: Has a lawyer subject to discipline "continued a disturbing pattern of failing to stand up and face his responsibilities" or has he not?[54]

Unquestionably, Andre has not persisted in any conduct which could be thought consistent with his serious disciplinary violation. To the best of his ability and at extreme expense and hardship to himself and his family of five children, he made immediate restitution. Though he took or used only approximately $16,000 of funds, he has repaid Enterprise approximately $42,000. At all times when he could have denied, excused or prevaricated about his conduct, he has admitted it forthrightly; first to his former employer, then to the Office of Chief Disciplinary Counsel, then to the panel at the hearing, and finally to the United States Attorney's office. He has not wasted a moment of anyone's time deflecting blame to others or denying the wrongful transfers occurred. He has been nothing but remorseful and has fully recognized the nature and consequences of his conduct.

Andre respectfully suggests that he has not violated Rule 4-1.15(a) and that an appropriate punishment for his violations of Rules 4-8.4(b) and 4-8.4(c) would consist of suspension from the practice of law for a period of two (2) years plus proof provided to the Missouri Lawyers' Assistance Program that he has adequately abated any threat that his ADHD may pose for the public, his clients and the profession.

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_____
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[54] *In re Warren*, 888 S.W.2d 334, 336 (Mo. banc 1994) (ellipses omitted).

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2006, two copies of Respondent's Brief and a diskette containing the brief in WordPerfect9 format have been sent via FedEx overnight to:

Ms. Sharon K. Weedin
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Counsel for Informant, Chief Disciplinary Counsel, Maridee F. Edwards

_____

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 7,489 words, according to WordPerfect9, which is the word processing system used to prepare this brief; and

4. That the disk is virus free.

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IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
PATRICK F. ANDRE	**)**	**Supreme Court #SC87288**
	)	
Respondent.	**)**	

RESPONDENT'S APPENDIX

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ATTORNEYS FOR RESPONDENT

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