IN THE SUPREME COURT
STATE OF MISSOURI

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

INFORMANT'S REPLY BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

SHARON K. WEEDIN #30526
STAFF COUNSEL
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400

ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

POINT RELIED ON

I.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE HE CONVERTED CLIENT FUNDS IN THAT HE MISAPPROPRIATED APPROXIMATELY $16,000.00 FROM TWO TRUSTS OVER WHICH HE SERVED AS A FIDUCIARY.

In re Conner, 207 S.W.2d 492 (Mo. banc 1948)

In re Staab, 785 S.W.2d 551 (Mo. banc 1990)

In re Wilson, 391 S.W.2d 914 (Mo. banc 1965)

ABA Standards for Imposing Lawyer Sanctions (1991 ed. and 1992 amend.)

Rule 6.01

ARGUMENT

I.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE HE CONVERTED CLIENT FUNDS IN THAT HE MISAPPROPRIATED APPROXIMATELY $16,000.00 FROM TWO TRUSTS OVER WHICH HE SERVED AS A FIDUCIARY.

Respondent's brief focuses on the mitigating factors he argues should bring his sanction level down from disbarment to suspension. As a starting point, disciplinary counsel agrees with Respondent's assertion that the ABA Standards for Imposing Lawyer Sanctions (1991 ed.) is an appropriate and helpful reference, recognized by this Court, for use in lawyer sanction analysis. While there is agreement that the Standards provide an appropriate and useful "theoretical framework" for analyzing lawyer sanctions, disciplinary counsel strongly disagrees, in several critical respects, with the sanction analysis undertaken and conclusions drawn by Respondent in his brief. Disciplinary counsel's specific points of disagreement with Respondent's sanction mitigation analysis follow.

Restitution. To put it simply, restitution is the least a misappropriating lawyer can do. It must be remembered that restitution is only putting back, or restoring, property stolen by a fiduciary. Undoubtedly it was in recognition of this "at a bare minimum" quality of restitution that led this Court to state, repeatedly, in discipline cases that restitution is no defense. See *In re Staab*, 785 S.W.2d 551, 554 (Mo. banc 1990) ("Restitution of the converted funds is no defense to the charges."); *In re Wilson*, 391

S.W.2d 914, 920 (Mo. banc 1965) ("But restitution is not a defense."); *In re Kohlmeyer*, 327 S.W.2d 249, 252 (Mo. banc 1959) ("It is well established that the making of restitution is no defense to such charges as these."); *In re Conner*, 207 S.W.2d 492, 500 (Mo. banc 1948) ("The payment at long last of the money due to distributees might, or might not, satisfy those persons but it does not deprive the public of its right to be protected from an unsafe member of a privileged class.").

While restitution is no defense to misconduct charges, it can, in a particular and narrow context, act to mitigate the sanction appropriate to misconduct charges. The ABA Standards recognize the constrained role restitution can play by reserving a mitigating function to restitution made, and only if it is made, "timely," and "in good faith." "Forced or compelled" restitution is expressly accorded neither aggravating nor mitigating status by the Standards. See Standard Rule 9.4(a). The policy reason for so constraining what might otherwise be thought of as an ameliorating action, i.e., returning the money, is nowhere better expressed than it was by this Court in *In re Conner*, 207 S.W.2d at 500: "If a professional man offers to do the right thing merely because he might be degraded or disbarred if he failed to, he has ceased to act uprightly. When attorneys take their oaths as court officers they pledge themselves to something far above the honesty of compulsion."

The record in this case reflects that it was only after Mr. Andre's discharge from the bank for falsifying information on the bank's employee personal financial forms, and it was only after being summoned back to the bank and confronted with the evidence of his defalcation, that Mr. Andre agreed to allow the bank to liquidate several of his

accounts. As more fully explained in Informant's brief, there are several aspects of Mr. Andre's "restitution" that qualify it as more "forced or compelled" than made in "timely good faith." The most obvious is that Mr. Andre himself never revealed the misappropriations. The money was taken between late 2003 and May 2004. Mr. Andre was discharged in late July of 2004 for reasons other than the misappropriation, about which the bank became aware and confronted Respondent on August 26, 2004, after his discharge. Only when presented with the information that he had been caught red-handed did Respondent agree with the bank's suggestion that it use his accounts to offset the purloined funds. This is hardly the kind of remorseful restitution, initiated by a lawyer, that should be accorded full mitigating weight.

Absence of Prior Discipline. Mr. Andre decries the past due enrollment fees and penalties his employer was required to pay to effect his reinstatement in 2000. See *In re Andre*, SC82816. Just what the bank's payment of Respondent's overdue enrollment fees and penalties in the reinstatement case has to do with Respondent's prior disciplinary history is left to the imagination. Mr. Andre was issued an admonition in May of 2001 for the unauthorized practice of law, misconduct that did come to light in the course of the reinstatement investigation. Mr. Andre accepted that admonition. The prior admonition is in Respondent's disciplinary history, and as Respondent points out, should properly be considered by the Court as an aggravating factor in this case.

As an aside, Respondent's brief refers to the "rather harsh formula for his reinstatement," and OCDC's alleged "very hard line," with respect to license reinstatement. Respondent's brief at 21. Apparently, and it can only be a matter of

conjecture inasmuch as Respondent's brief supplies no logic or explanation for the foregoing conclusions, Mr. Andre is referring to the fact that he (or as he acknowledges, his employer at the time) was required to pay his overdue fees and fines as part of his fee reinstatement case. In point of fact, it is Supreme Court Rule 6.01 that requires the payment of "the enrollment fee prescribed for each calendar year of the [fee] suspension plus the accumulated penalty," not some arbitrary, draconian policy of OCDC, as Respondent's brief suggests.

Mental Disability. Disciplinary counsel does not disagree with the proposition that attention deficit/hyperactivity disorder is included in the American Psychiatric Association's Diagnostic and Statistical Manual. The point of disagreement is whether Respondent's evidence established the disorder as a mitigating factor in this case – clearly it did not. That a professional diagnosed the disorder in Respondent (after the disciplinary case was initiated) is only one of four prerequisites set forth in the ABA Standards for giving mitigating consideration to a mental disability. The three other parts of the analysis – that the mental condition caused (not simply contributed to) the misconduct, that the lawyer's recovery has been demonstrated by a meaningful and sustained period of rehabilitation, and that recovery arrested the misconduct and made its recurrence unlikely – are completely absent from this record. See Standard Rule 9.32 Standards (1992 amendments). See also *In re Chase*, 339 Or. 452, 121 P.3d 1160, 1165 (banc 2005) (Court does not treat mental disability as a mitigating factor because the evidence did not establish a meaningful and sustained period of recovery).

If anything, the evidence that Respondent has undergone no treatment for the illness, which was diagnosed after the disciplinary case was initiated, is all the more reason to protect the public from any possible future transgressions. The mitigating factors touted by Mr. Andre in support of his plea for suspension, rather than disbarment, do not rise to the task. For all the reasons explicated in Informant's brief, Respondent should be disbarred.

CONCLUSION

By converting more than $15,000 over a six month period in multiple transactions, Respondent has demonstrated his unfitness to practice law. Respondent's professional misconduct in violation of Rules 4-1.15(a) and 4-8.4(b)(c) is of the most serious nature of misconduct. He should be disbarred.

Respectfully submitted,

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

By: _____

Sharon K. Weedin #30526
Staff Counsel
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2006, two copies of Informant's Reply Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

Mark D. Pasewark
Virginia G. Pasewark
711 Old Ballas Rd., #102
St. Louis, MO 63141-7068

Attorneys for Respondent

_____
Sharon K. Weedin

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 1,594 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

_____
Sharon K. Weedin