IN THE SUPREME COURT
STATE OF MISSOURI

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

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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ATTORNEYS FOR INFORMANT

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Facts Underlying Misconduct

Respondent Patrick Andre graduated from the University of Illinois in 1986, and from St. Louis University School of Law in 1989. **App. 11**. He was licensed to practice in Missouri in 1990. **App. 6**. Respondent started his legal career with the Department of the Treasury in Washington, then worked for the State of Illinois. **App. 42**. In 2000, Mr. Andre began working for Enterprise Bank and Trust in St. Louis. **App. 6-7, 42**. Mr. Andre's job title throughout his tenure at Enterprise was Trust Counsel. His primary job duties were to act as trust administrator over approximately forty accounts. **App. 42, 51**.

Respondent did not pay Missouri bar dues in the years that he worked outside of Missouri. After he returned to work in Missouri, he applied for reinstatement to the Missouri Bar. The bank paid Respondent's delinquent dues and penalties. **App. 52**. Respondent was reinstated and his license is currently in good standing.

One of Mr. Andre's Enterprise Bank and Trust accounts was the Irene Rosen Trust. Ms. Rosen was an older lady. **App. 43**. Mr. Andre did a good job of making Ms. Rosen comfortable with allowing someone else (Mr. Andre) handle her financial affairs. **App. 25-26**. He ended up paying her bills for her and arranging for caregivers. **App. 43**.

Another of Mr. Andre's accounts was the Coastal Trading Trust. It was a common trust fund set up at Enterprise by nineteen different investors. **App. 43**.

Over a six month period beginning in late 2003 and ending in May of 2004, Respondent Andre misappropriated approximately $16,000.00 from Irene Rosen and the Coastal Trading Trust. **App. 6, 43, 50**. He did so by pocketing cash entrusted to him for

deposit in Ms. Rosen's trust and the Coastal trust, **App. 24, 26, 44**, and by writing checks out of the accounts. **App. 56-88**. Respondent Andre stole approximately $6,000.00 to $7,000.00 from Irene Rosen and $8,000.00 to $9,000.00 from Coastal Trading Trust. **App. 50**. The defalcations were accomplished in five to seven transactions. **App. 49-50**.

In 2002, Respondent filed for personal bankruptcy. **App. 12**. In connection with his participation in an incentive stock purchase program offered by Enterprise, Respondent completed personal financial statements, which were submitted to the bank. **App. 43**. Mr. Andre lied on those statements by not disclosing that he had declared bankruptcy. **App. 13, 43**. When the bank discovered Mr. Andre had lied about the bankruptcy on his personal financial statements, he was asked to resign. **App. 43**. Mr. Andre separated from his job with the bank on July 31, 2004. **App. 13**.

Respondent's falsifications on the financial forms triggered an audit of the accounts over which Respondent had exercised control. **App. 13, 50**. The audit revealed that from $15,000.00 to $16,000.00 had been misappropriated from Coastal Trading Trust and Irene Rosen's trust and accounts. **App. 13**.

On August 26, 2004, bank officials asked Respondent, whose job at the bank had ended on July 31, to return to the bank, where he was confronted with the information revealed through the audit. **App. 44**. Mr. Andre admitted the defalcations and agreed to sign a "Reimbursement Agreement" that was presented to him for signature at the meeting. Mr. Andre admitted to his former supervisors that he misappropriated no more than $16,000.00, so that was the sum written into the reimbursement agreement. **App. 16, 44-45, 89-90**. The agreement also required Mr. Andre to reimburse the bank for the

expenses it incurred as a consequence of the misappropriation. At the time of the disciplinary hearing, Respondent had reimbursed the bank $42,000.00 -- $16,000.00 for the misappropriated funds and $26,000.00 for costs incurred by the bank in investigating and recovering the funds. **App. 8, 16, 45**. The bank liquidated accounts held at the bank by Respondent and his wife in order to gain reimbursement. **App. 9, 46**.

Mr. Andre knew right from wrong at the time he was misappropriating the money. **App. 48**. He knew it was stealing. **App. 50**. He thought he could repay the money from an anticipated year end bonus before anyone caught what had happened. **App. 44, 49**. He used the money for various personal purposes, including repayment of a loan to a sister and to buy an air conditioner. **App. 43, 49-50**.

In the fall of 2004, the bank notified Ms. Rosen's attorney, William Dowd, that there were "irregularities" in the accounts Mr. Andre had administered for Ms. Rosen. **App. 22-23**. Mr. Dowd reported the conduct to the Office of Chief Disciplinary Counsel in a letter dated January 13, 2005. **App. 56-57**.

Mr. Dowd had become acquainted with Mr. Andre through Mr. Andre's administration of Ms. Rosen's trust and accounts. Respondent had won Ms. Rosen's confidence and appeared to be very good to her. **App. 23**. After the investigation revealed that Mr. Andre had never deposited $1,850.00 in cash that had been found in Ms. Rosen's home after she was moved to a residential facility, and that some money Mr. Andre was supposed to have transferred from Ms. Rosen's bank account to her trust was never deposited to the trust, Mr. Dowd filed the report. **App. 24, 56**.

Mr. Andre entered into a pretrial diversion agreement with the U.S. Attorney's office in June of 2005. **App. 92-98**. The agreement subjects Respondent to an eighteen month period of probation. **App. 47-48**. Mr. Andre is prohibited by federal law from employment in a federally insured depository institution. **App. 94**.

Evidence of Mental Disability

After a disciplinary information was filed, Mr. Andre's lawyer contacted Dr. Rosen, a clinical psychologist, about evaluating Respondent. Counsel told Dr. Rosen he wanted Mr. Andre tested for attention deficit hyperactivity disorder (ADHD). **App. 32**. Dr. Rosen understood that Respondent's counsel was considering using an ADHD diagnosis to defend a bar complaint he was told was pending against Mr. Andre. **App. 33**.

Dr. Rosen evaluated Mr. Andre on March 28, 2005. **App. 29**. Dr. Rosen concluded in his report that Mr. Andre "presents with typical symptoms of Attention Deficit Hyperactivity Disorder." **App. 103**. In Dr. Rosen's opinion, Mr. Andre's ADHD could have contributed to Mr. Andre's misconduct in that the disorder could cause Mr. Andre not to listen carefully and clearly, interfere with his ability to think ahead, and cause him to act impulsively. **App. 30**. Dr. Rosen agreed that Mr. Andre knew that stealing was wrong, but believed that Mr. Andre may not have considered the consequences of his actions. **App. 35-36**. Dr. Rosen agreed with the proposition that an individual who does not think about the consequences of his conduct should not be placed in a position of trust over other people's money. **App. 36**.

Prior to Dr. Rosen's exam on March 28, 2005, Mr. Andre had never been diagnosed with ADHD, and had no prior history of behavioral problems. **App. 12, 34, 99**. Respondent's use of alcohol or drugs "is not significant or contributory." **App. 100**. Mr. Andre has not sought treatment for and is taking no medication for ADHD. **App. 11-12**.

Disciplinary Case

On March 17, 2005, an information was filed charging Mr. Andre with violation of Rules 4-8.4(b) (commit criminal act reflecting adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer), 4-8.4(c) (engage in dishonest, fraudulent, deceitful conduct, or conduct involving misrepresentation), and 4-1.15(a) (lawyer shall hold client property separate from his own). On April 13, 2005, Respondent filed an answer, admitting that his defalcations constituted professional misconduct. **App. 111, 113**.

The disciplinary hearing took place on August 15, 2005. Respondent admitted at the hearing that his conduct violated Rules 4-8.4(b) and (c). **App. 8, 14**. In early October, 2005, the panel issued a decision finding facts supporting the panel's conclusion that Mr. Andre violated each of the charged Rules. The panel recommended disbarment. **App. 105-109**. Respondent did not concur in the panel's recommendation, so the record was filed with the Court pursuant to Rule 5.19.

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.

Rule 4-8.4(b)(c)

Rule 4-1.15(a)

In re Conner, 207 S.W.2d 492, 500 (Mo. banc 1948)

In re Mendell, 693 S.W.2d 76, 78 (Mo. banc 1985)

In re Maier, 664 S.W.2d 1, 2 (Mo. banc 1984)

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

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.

There is no factual dispute regarding Respondent's misconduct. He has admitted keeping for his personal use cash found at Ms. Rosen's home and cash sent for investment in the Coastal trust. He has admitted writing checks out of third party funds to buy an air conditioner and to repay a personal loan. Mr. Andre has admitted using his position as Trust Counsel at the bank to access for his personal use funds belonging to an elderly lady and trust beneficiaries. He has admitted that his conduct violated Rules 4-8.4(b) (commit criminal act reflecting adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer) and 4-8.4(c) (engage in dishonest, fraudulent, deceitful conduct, or conduct involving misrepresentation). **App. 8, 14**.

It should be noted that, while Mr. Andre admits stealing from Ms. Rosen and the Coastal trust, he denied violation of Rule 4-1.15(a) in his answer and in his hearing testimony on the grounds "he was not representing either Irene Rosen" or her trust at the time of the defalcation. **App. 15, 42, 114**. The argument that the lawyer acting as a fiduciary, but not, arguably, acting in a lawyer-client relationship, is not subject to model rule 1.15(a) is not one that finds favor with courts. "Because the professional fiduciary rules apply generally, most courts have not been impressed with arguments that the

requirements of the professional rules should be narrowly applied to client-lawyer relationships and have applied the rules even if the lawyer was technically functioning as a trustee, guardian, real estate broker, or corporate officer . . . ." C. Wolfram, *Modern Legal Ethics* § 4.8, at 178 (1986). Given that Mr. Andre went to the trouble to be reinstated to the bar after assuming the bank position as "trust counsel," it is a bit disingenuous of Mr. Andre to now argue that Rule 4-1.15(a) does not apply to his defalcations.

A license to practice law is a privilege extended by this Court only to individuals who have demonstrated the requisite mental attainment and moral character. *In re Haggerty*, 661 S.W.2d 8, 10 (Mo. banc 1983). Conversion is conduct warranting disbarment. The "appropriate remedy for willful conversion or misappropriation of client's funds is disbarment. . . . Honesty . . . is an all important quality for an attorney. Situations in which a dishonest attorney could deceive a trusting client arise far too often." *In re Mendell*, 693 S.W.2d 76, 78 (Mo. banc 1985). "Certainly where an attorney misappropriates a client's funds, protection of the public is uppermost in our minds and disbarment is generally appropriate in such cases." *In re Williams*, 711 S.W.2d 518, 522 (Mo. banc 1986). "Where conversion of client's money is involved, disbarment is the appropriate remedy." *In re Griffey*, 873 S.W.2d 600, 603 (Mo. banc 1994). "The privilege to practice law is only accorded those who demonstrate the requisite mental attainment and moral character and, absent mitigating circumstances, an attorney who betrays the trust reposed in him for personal financial gain demonstrates he no longer possesses the requisite moral character." *In re Maier*, 664 S.W.2d 1, 2 (Mo. banc 1984).

Respondent's payment of restitution should be accorded little, if any, mitigating weight. The record on restitution in this case is this: Mr. Andre purloined the money between December of 2003 and May of 2004. No one had discovered the misappropriations at the time Mr. Andre was "asked to resign," in July of 2004. Respondent was dismissed from his position of trust with the bank not because of missing funds, inasmuch as the misappropriations had not yet been discovered, but because the bank had learned he lied on the personal financial statements submitted by him to the bank. The misappropriation was discovered, and Mr. Andre was confronted with it, only after Respondent left the bank's employ. It is significant that Mr. Andre did not, on his own volition, reveal his transgressions to the bank. Nor did he offer, on his own volition, to make restitution. The ABA Standards for Imposing Lawyer Sanctions, at §9.32(d), accord mitigating status to restitution only if it is made timely, and in good faith.

And while it is true that Mr. Andre has reimbursed the bank by allowing it to liquidate accounts held at the bank by Respondent and Respondent and his wife, it is significant that Mr. Andre did so only upon being confronted with the proof of what he had done. Further, restitution was requisite to participation in the federal government's pretrial diversion program. **App. 48, 93**. Consistent with the ABA's Standards, forced or compelled restitution should be given neither mitigating nor aggravating weight in sanction analysis. Standards at § 9.4(a).

Additionally, restitution, at most, and even then only where the circumstances show it was made timely and in good faith, may play only a mitigating role in sanction analysis. Restitution of converted funds is not a defense. *In re Staab*, 785 S.W.2d 551,

554 (Mo. banc 1990) (restitution of converted funds is no defense to disciplinary charges); *In re Wilson*, 391 S.W.2d 914, 920 (Mo. banc 1965); *In re Kohlmeyer*, 327 S.W.2d 249, 252 (Mo. banc 1959) (well established that restitution is no defense to conversion charges); *In re Conner*, 207 S.W.2 492, 500 (Mo. banc 1948).

Respondent pled in his answer and produced evidence at the hearing to support his claim that Attention Deficit Hyperactivity Disorder (ADHD) should be considered in mitigation of sanction. The ABA Standards for Imposing Lawyer Sanctions § 9.32(i) (1992 amendments) recognize mental disability as a mitigating factor in the following circumstances:

> 9.32(i): (1) there is medical evidence that the Respondent is affected by a chemical dependency or mental disability;
>
> (2) the chemical dependency or mental disability caused the misconduct;
>
> (3) the Respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
>
> (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

Mr. Andre did produce medical evidence of ADHD. His expert witness even went so far as to testify that Mr. Andre's "actual behavior on the job that's lead to these charges against him would be consistent with that diagnosis in the sense that he wouldn't listen carefully and clearly, wouldn't think ahead, would act impulsively, not take in the

information that he actually knows, which is sort of the definition of the impulsive action. So, yes, I think it's consistent and, therefore, contributory." Putting aside for the moment the expert witness's use of the word "contributory," which is not the same as "caused," it should be remembered that Mr. Andre testified he has had no treatment, either by counseling or medication, for ADHD since his post-information diagnosis. There has been, therefore, no "meaningful and sustained period of successful rehabilitation," and hence, it is impossible to say whether the misconduct has been "arrested." Respondent's medical evidence should not be considered in mitigation of sanction.

It is impossible to foresee whether Mr. Andre has corrected the character deficit that prompted him, on multiple occasions over six months, to pocket cash or write checks from money belonging to other people. Attorney discipline should not rest on the vagaries of a crystal ball. The fact of misappropriation demonstrates Respondent no longer deserves the trust invested in him by the awarding of the privilege of a law license. As this Court said in *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 against an unsafe member of a privileged class. Nor does it deprive the courts of their right to have attorney officers who are conscious of their high duty to the public, to the courts and to their profession. 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. As members of this Court we cannot, without being derelict in the duty we owe the public and the profession, directly or indirectly certify to the honesty of an attorney whose conduct has been such as to render him an unfit member of an honorable profession. The good repute of the judicial system and the legal profession greatly suffers by indulgence in mistaken lenity when the courts approve the unjust and plainly dishonest withholding of money by an officer of the court.

Mr. Andre's license to practice should be canceled. The flimsy evidence offered by him in mitigation of sanction does not overcome the outcome intuitive to a case of this nature: a lawyer who steals property entrusted to his possession should be disbarred. Mr. Andre knowingly abused the trust reposed in him by both the Court, which extended to him a privileged license to practice law, and Ms. Rosen and the Coastal Trust beneficiaries.

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,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2006, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

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_____
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 3,398 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

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