IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
THAYER LANCE WEAVER	)	**Supreme Court No. SC99805**
3216 Locust Street	)	
St. Louis, MO 63103	)	
	)	
Missouri Bar No. 48128	)	
	)	
Respondent.	)	

INFORMANT'S BRIEF

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ATTORNEY FOR INFORMANT
CHIEF DISCIPLINARY COUNSEL

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STATEMENT OF JURISDICTION

This action is one in which Informant, the Chief Disciplinary Counsel, is seeking to discipline an attorney licensed in the State of Missouri for violations of the Missouri Rules of Professional Conduct. 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 (2016).

STATEMENT OF FACTS

Background and Disciplinary Hearing

Respondent, whose bar number is 48128, was licensed as an attorney in Missouri on or about October 10, 1997, and is currently in good standing. **R. at Vol. 1, p. 68, p. 93**. He has a law practice in St. Louis comprised of primarily civil trial litigation, personal injury, and medical malpractice. **R. at Vol. 1, p. 621 (Tr. 118:9-16)**. Respondent does business under the name, "TLW & Associates." **R. at Vol. 1, p. 336 (Tr. 168:1-3)**

Respondent was admonished in 2006 for a violation of Rule 4-1.1 (competence) and for a violation of Rule 4-1.15 (safekeeping property). **R. at Vol. 1, pp. 893-94**. In 2010, Respondent was admonished for a violation of Rule 4-1.15 as the result of an overdraft in his client trust account. The Admonition suggested Respondent review the provisions of Rule 4-1.15 and the Missouri Bar/IOLTA Trust Accounting Manual. Included with the Admonition was a copy of Formal Opinion 128 issued by the Missouri Supreme Court Advisory Committee in May 2010, addressing the topic of earned fees. **R. at Vol. 1, pp. 895-96**.

Additionally, the Admonition provided information regarding the CLE titled Fundamentals of Trust Accounting; suggested to Respondent that he should register for the CLE; and told Respondent that his attendance and participation in this CLE would be considered favorably should he be the subject of similar disciplinary investigations by the Office of Chief Disciplinary Counsel (OCDC) in the future. Respondent never reported

back to the OCDC as requested, though he apparently did attend the CLE in 2010. **R. at Vol. 1, p. 275 (Tr. 107:1-8); Vol. 4 at pp. 1334-38**.

On September 30, 2021, Informant filed an Information alleging that Respondent had violated the Rules of Professional Conduct. **R. at Vol. 1, pp. 1-26**. An Amended Information was filed on March 25, 2022, alleging in Count I several violations of Rule 4-1.15 (safekeeping property) and violations of Rule 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation). Count II alleged a violation of Rule 4-1.4(a) (communication).[1] **R. at Vol. 1, pp. 68-90**. Respondent filed his Answer to the Amended Petition on March 30, 2022. **R. at Vol. 1, pp. 91-133**.

The Disciplinary Hearing Panel conducted a hearing, beginning on March 31, 2022. Informant was represented by Michael J. Sudekum, and Respondent was represented by Michael P. Downey. The hearing was resumed and then concluded on April 21, 2022. Over the course of both hearing dates, Informant's Exhibits 1-35 were admitted without objection as were Respondent's Exhibits A-D, E1, E2, F, H-I, K-N, O1, O2, and P. Informant called two witnesses in addition to Respondent. Respondent testified on his own behalf and called six character witnesses. **R. at Vol. 1, pp. 168-73, pp. 503-508**.

Trust Account Audit

Kelly Dillon, Investigator and Certified Fraud Examiner for the OCDC, testified regarding her audit of Respondent's trust account with Busey Bank ending in 0930. **R. at**

[1] The Disciplinary Hearing Panel found there was no violation of Rule 4-1.4(a), and in light of the evidentiary record, Informant is not pursuing Count II at this time.

Vol. 1, p. 184 (Tr. 16:20-23); Vol. 2 at p. 919. The audit originated due to a complaint that referenced finances. **R. at Vol. 1, p. 184 (Tr. 16:24-17:11)**. The audit covered the activity in Respondent's client trust account for the time period from January 2, 2018, to June 30, 2020. **R. at Vol. 2, pp. 901-918**.

Respondent generally provided documents and information when requested. There were, however, some problems. For example, Respondent produced client ledgers with conflicting and inaccurate information, leading Ms. Dillon to conclude that those ledgers had been created in response to her requests and not in the regular course of business. The resulting inaccuracies led to unnecessary work for the OCDC. In another example, Respondent provided the incorrect check number for a third-party lienholder payment early in the audit process. The inaccurate information was not corrected until Respondent filed his answer to the amended information the night before the hearing started. Finally, Respondent undertook an effort to reconcile the trust account in late 2019 or early 2020, but, to the extent he discovered errors, he did not share that information with Ms. Dillon during his sworn statement in November of 2020. **R. at Vol. 1, pp.194-96 (Tr. 26:5-28:7), pp. 281-83 (Tr. 113:8-115:23), p. 307 (Tr. 139:9-15), pp. 313-14 (Tr. 145:25-146:9), pp. 432-35 (Tr. 264:11-267:20)**.

Count I of the Information details the alleged violations uncovered during the trust account audit. **R. at Vol. 1, pp. 69-86.**

Allegations of Receipt and Misappropriation of Funds

On July 26, 2018, Respondent was in receipt of a $1,700.00 check issued by the Cleveland Indians baseball franchise and payable to Supreme Warehousing. Respondent

knew that he had no case or relationship with either entity, and that the funds were not intended for Respondent. Respondent deposited the check into his client trust account on July 26, 2018, and then withdrew those funds on the same day by making a cash withdrawal from the client trust account. No attempt was made to return these funds to the rightful owner until after the transaction was brought to Respondent's attention by the OCDC in November 2020. **R. at Vol. 1, pp. 204-07 (Tr. 36:22-39:3); pp. 374-76 (Tr. 206:17-208:19); Vol. 3, pp. 1044-45.**

On May 3, 2018, Respondent transferred $13,674.17 in earned fees to his Busey Bank client trust account from another IOLTA that was maintained at Bank of America. The associated client was Go Properties or GVA & Associates. Although Respondent did not produce a client ledger, he did represent to the OCDC during the audit that his records show he made the following withdrawals against this deposit:

a) $500.00 on May 30, 2018;

b) $1,000.00 on June 29, 2018;

c) $10,000.00 on February 19, 2019; and

d) $2,500.00 on August 22, 2019.

These withdrawals total $14,000.00, which is $325.83 more than the initial deposit. **R. at Vol. 1, pp. 228-30 (Tr. 60:20-62:14), pp. 415-17 (Tr. 247;3-249:18); Vol. 3, pp. 1070-1076**.

On January 31, 2020, Respondent caused earned fees in the amount of $843,923.00 to be wired into the client trust account. These fees came from a class action involving the Los Angeles Rams. Respondent admitted that he withdrew $846,000.00, or

$2,077.00 more than was deposited. **R. at Vol. 2, p. 224 (Tr. 56:2-12), p. 405-07 (Tr. 237:11-239:20)**.

The review of the client trust account activity also showed that Respondent paid personal and firm expenses out of the Busey Bank client trust account. **R. at Vol. 3, pp. 1054-67**. For example, on June 29, 2019, Respondent made a $10,000.00 payment to his American Express credit card account with a check drawn on the client trust account. **R. at Vol. 1, p. 220-21 (Tr. 52:10-53:12), p. 393-94 (Tr. 225:17-226:18)**. On September 11, 2019, Respondent wired $1,000.00 from the client trust account to an individual to pay for the purchase of a dog. **R. at Vol. 1, p. 222 (Tr. 54:14-20), p. 397-99 (Tr. 229:18-231:5)**. Respondent also made frequent cash withdrawals from the client trust account during the audit time period, January 2018 to June 30, 2020. **R. at Vol. 1, pp. 368-74 (Tr. 200:22-206:16); Vol. 2, pp. 901-18, pp. 936-59.** Respondent is the only authorized signer on this client trust account. **R. at Vol. 1, p. 349 (Tr. 181:9-11)**.

Allegations of Dishonesty, Fraud and/or Deceit

During the trust account audit period, Respondent employed an office manager, P.H. She and her husband, C.H., hired Respondent to assist with the collection of an inheritance. On or about September 5, 2019, a check for $64,202.70 payable to C.H. was deposited into Respondent's client trust account. C.H. was suffering from Alzheimer's and receiving income-based government benefits that could have been affected by the receipt of this income, and his wife was his power of attorney. Respondent held these funds in his client trust account, and he disbursed them to P.H. incrementally as she made requests:

a) $9,000.00 on September 25, 2019;

b) $9,000.00 on September 30, 2019;

c) $9,000.00 on October 9, 2019;

d) $9,000.00 on October 31, 2019;

e) $28,203.42 on February 27, 2019.

R. at Vol. 1, pp. 207-22 (Tr. 39:33-44:2), pp. 378-84 (Tr. 210:6-216:15); Vol. 3, pp. 1046-53.

Allegations of Commingling: Improper Deposits to the Client Trust Account

Respondent routinely deposited personal funds, including earned fees, directly into the Busey Bank client trust account. These deposits were not always related to client matters, and they were not made to account for service charges imposed by the financial institution as is authorized by Rule 4-1.15(b). **R. at Vol. 3, pp. 1054-67**. For example, on March 9, 2018, Respondent deposited two gift checks from relatives totaling $110.00. **R. at Vol. 1, pp. 215-16 (Tr. 47:18-48:17); Vol. 2, pp. 901-02.**

On June 29, 2018, Respondent deposited into his Busey Bank client trust account an $8,000.00 check drawn on a firm petty cash account. Credit card payments and other types of electronic payments from clients were deposited directly into this petty cash account, so the $8,000.00 transfer was apparently a mixture of earned fees and unearned fees. **R. at Vol. 1, pp. 385-86 (Tr. 217:22-218:15); pp. 689-90 (Tr. 186:15-187:4)**.

On August 14, 2018, Respondent deposited a $32,000.00 check from Morgan Stanley into the client trust account. The funds came from a special needs trust and Respondent was the trustee. On August 15, 2018, those funds were withdrawn from the

client trust and used to purchase a cashier's check, which was intended to pay for a specialized van for the beneficiary of the special needs trust. **R. at Vol. 1, pp. 386-387 (Tr. 218:16-219:9); Vol. 2 at p. 904**.

On September 19, 2018, Respondent deposited two personal checks into his client trust account. One check was from Ameren for $108.91. The other check, from Bank of America, was payable to Respondent and his wife for $1,418.97. The Ameren check was later determined to be a utility refund, but Respondent never could identify the purpose of the check from Bank of America. Respondent testified that it was his practice to deposit checks into the client trust account if the source or purpose was not immediately known. **R. at Vol. 1, pp. 387-88 (Tr. 219:10-220:18); pp. 692-93 (Tr. 189:6-190:13)**.

On February 21, 2019, Respondent deposited a $3,400.00 check into his client trust account. The check represented proceeds from the sale of kitchen equipment related to his mother's estate. Respondent testified that he was "actively involved in his mother's estate" but there was no client ledger produced and this check was the only estate asset. **R. at Vol. 1, p. 218 (Tr. 50:9-25), p. 389 (Tr. 221:8-25)**.

On February 28, 2019, Respondent deposited an insurance check for $27,153.44 into the client trust account. At his sworn statement, Respondent testified that he believed those funds were not client funds, but rather personal funds related to a business loss. At the hearing, Respondent testified that these funds belonged to the estate of V.D., the bulk of which was maintained in a separate bank account. This deposit reflected a consolidation of the V.D. estate funds. **R. at Vol. 1, p. 219 (Tr. 51:2-16), p. 390-93 (Tr. 222:1-225:5)**.

On March 6, 2019, Respondent deposited a $83,609.00 check from State Farm into his client trust account. Respondent explained that these were funds related to an insurance claim resulting from damage to his office building. Respondent admitted that this check should not have been deposited into the client trust account. **R. at Vol. 1, pp. 221-22 (Tr. 53:13-54:7), pp. 394-95 (Tr. 226:19-227:12)**.

On July 30, 2019, Respondent deposited a check for $343.00 into his client trust account. The check was drawn on the Bar Plan Surety & Fidelity, and Respondent testified that, when depositing these funds, he thought this check might be related to a surety bond for a client matter. Later, Respondent determined that this check was a refund related to his professional responsibility insurance. He admitted that, at the time of the deposit, he did not determine whether the check should be deposited into the client trust account. **R. at Vol. 1, p. 222 (Tr. 54:8-13), p. 395-96 (Tr. 227:13-228:17)**.

On September 20, 2019, Respondent deposited $113.43 into the client trust account. This deposit was a check from Xcellence, Inc. At the time of the deposit, Respondent was not certain of the purpose of the payment. It was later determined that the funds represented a refund for document copies related to a client matter. **R. at Vol. 1, p. 222 (54:21-25), p. 400-03 (Tr. 232:15-235:8)**.

On December 20, 2019, Respondent caused earned fees totaling $71,446.66 to be wired into the client trust account. These fees were associated with an NCAA Medical Monitoring matter. Four days later, on December 24, 2019, Respondent withdrew $70,000.00 of these funds. **R. at Vol. 1, pp. 403-05 (Tr. 235:16-237:13)**.

Bulk Sweep of Attorney Fees

Respondent routinely swept funds, presumably earned fees, out of the client trust account in round dollar amounts. He did not reconcile individual client ledgers or prepare specific accountings of fees for client matters to ensure that the funds being transferred were drawing against earned fees for the appropriate client(s). **R. at Vol. 1., p. 350-01 (Tr. 82:12-83:25); Vol. 2, pp. 1002-03 (Tr.166:23-167:6, 171:3-11).**

Payroll Paid Directly from Client Trust Account

In 2020, Respondent made two payroll payments out of the client trust account. One payment went to his office manager, P.H., for $500.00. The other payment was to another employee, S.P., for $1,200.00. The audit did not find where these funds were specifically reimbursed to the client trust account. **R. at Vol. 1, pp. 224-26 (Tr. 56:22-58:18), pp. 407-08 (Tr. 239:25-240:17); Vol. 3, pp. 1068-69.**

Client K.H.

On December 10, 2018, Respondent received and deposited two settlement checks on behalf of client K.H. and her son. The combined total was $13,548.60. Respondent disbursed a total of $5,083.74 to the clients on December 13, 2018, and disbursed his fees and expenses, $5,126.47, on December 17, 2018. There remained a balance of $2,538.39 in the client trust account, which accounts for a Medicaid lien of $450.00, and the rest, $2,088.39, was owed to a medical provider. Respondent testified that at some point in time, he had paid $1,600.00 in cash to the medical provider in partial satisfaction of the medical liens for these clients. And, apparently, Respondent was able to negotiate a reduction in those liens because his records establish that the difference ($488.39) was

disbursed to the clients in March of 2019. The purported cash payments to K.H.'s medical provider, however, are not reflected on the settlement sheets for these clients. Additionally, the Medicaid lien was not satisfied until January of 2021. Respondent testified that he was not aware of the outstanding lien until it was brought to his attention by the OCDC as part of the client trust account audit. **R. at Vol. 1, pp. 232-34 (Tr. 64:2-66:12), pp. 420-26 (Tr.252:7-258:25); Vol. 3, pp. 1077-83, pp. 1198-1206**.

Client C.L.

On or about October 5, 2018, Respondent deposited a settlement check of $7,001.28 for C.L. into his client trust account. While at the bank making that deposit, Respondent also withdrew $1,000.00 in cash, a draw against the fees owed to him by C.L. Respondent testified during his sworn statement that as a matter of "practice" he would withdraw some cash right after depositing a settlement check, and that he considered those funds his "cash reserve." On October 9, 2018, Respondent disbursed $5,264.94 to the client and disbursed to himself his total fees and expenses of $1,034.32, failing to account for the $1,000.00 that had previously been paid. As a result, Respondent overpaid himself by $1,000.00 and drew against the funds of other clients to account for the negative balance of $297.98 in the client trust account for this client. **R. at Vol. 1, pp. 234-38 (Tr. 66:13-70:23), pp. 426-31 (Tr. 259:11-263:13); Vol. 2, p. 968 (Tr. 30:2-5).p. 995 (Tr. 139:24-140:2); Vol. 3, pp. 1084-1088**.

Client D.F.

On or about October 18, 2018, Respondent deposited a settlement check of $23,000.00 for D.F. While at the bank making that deposit, Respondent also withdrew

$1,000.00 in cash, a draw against the fees owed to him by D.F. On October 18, 2018, Respondent disbursed $10,636.21 to the client, paid a third-party lien of $2,500.00, and disbursed to himself his total fees and expenses of $9,863.79. Respondent failed to account for the $1,000.00 that had previously been paid. As a result, Respondent overpaid himself by $1,000.00 and drew against the funds of other clients to account for this negative balance of $1,000.00 in the client trust account for this client. **R. at Vol. 1, pp. 238-40 (Tr. 70:24-72:18),431-32 (Tr. 263:14-264:2); Vol. 2, pp. 995-96 (Tr. 141:17-143:17); Vol. 3, pp. 1089-96**.

Client C.H.

On July 5, 2018, Respondent deposited a settlement check in the amount of $14,000.00 into the client trust account for the benefit of C.H. On July 12, Respondent disbursed funds to the client of $5,994.33 and $5,205.67 to himself for fees and expenses. There remained $2,800.00, which was to be paid to a third-party medical provider. The documentation provided to OCDC by Respondent reflected that check number 1467 had been issued to the provider for the full amount, but according to the bank records, that check had never been presented for payment. At the time of the sworn statement in November of 2020, Respondent said that he was not aware of this outstanding check, because he had not been properly reconciling the client trust account. By the time of the hearing, Respondent had figured out that the medical provider had been paid via check number 1468. **R. at Vol. 1, pp. 242-43 (Tr. 74:1-75:8), pp. 325-26 (Tr. 48:4-158:13), p. 436 (Tr. 268:3-8); Vol. 3, pp. 1096-101**.

Client S.W.

On May 15, 2019, Respondent deposited into the Busey Bank client trust account a $7,905.21 settlement check for client S.W. While at the bank making this deposit, Respondent withdrew $1,000.00 in cash from the client trust account, a draw against the fees owed to him by S.W. On May 15, 2019, Respondent disbursed $3,594.72 to the client, leaving a balance of $4,310.49 for attorney fees and expenses. The documentation provided by Respondent to the OCDC in conjunction with the client trust account audit did not reflect the $1,000.00 cash withdrawal. That documentation showed a disbursement to Respondent for the full $4,310.49; however, no such payment was ever made. In fact, Respondent explained during his sworn statement that he left his earned fees in the client trust account as a "cushion" because he knew that the account was not being reconciled. **R. at Vol. 1, pp. 243-45 (Tr.75:9-77:16), pp. 436-38 (Tr. 268:9-270:18); Vol. 2, p. 997 (Tr. 147:10-149:13); Vol. 3, pp. 1102-06**.

Client M.T.

On or about February 6, 2018, Respondent deposited a settlement check of $20,000.00 into the client trust account for the benefit of client M.T. At the same time, Respondent withdrew $1,000.00 in cash, a draw against the fees owed to him by M.T. That same day, he disbursed $13,795.32 to the client. On February 9, 2018, Respondent disbursed to himself his total fees and expenses of $6,204.68 without accounting for the $1,000.00 that had previously been withdrawn. As a result, Respondent overpaid himself by $1,000.00 and drew against the funds of other clients to account for this negative balance of $1,000.00 in the client trust account for this client. **R. at Vol. 1, pp. 245-48**

(Tr. 77:17-80:1), pp. 438-40 (Tr. 270:23-272:1), p. 529 (Tr. 26:1-5); Vol. 3, pp. 1107-12).

Client C.T.R.

On February 14, 2019, Respondent deposited a check of $7,500.00 into the Busey Bank client trust account. This check represented settlement proceeds for C.T.R. On February 20, 2019, Respondent disbursed $2,500.00 to the client. The documentation provided by Respondent to the OCDC reflected a payment of $2,875.28 for attorney fees and expenses. One ledger shows this payment was made on February 19, 2019, and a different ledger shows the payment was made on September 3, 2019. According to the bank records, there was no disbursement for $2,875.28. There was, however, a $5,000.00 bulk sweep out of the client trust account on September 3, 2019. According to Respondent's testimony at the sworn statement, half of that $5,000 sweep is attributed to this client and the other half to another client (A.T.). After payment of $1,550.00 to a medical provider, in March of 2020, $574.72 was still owed to the client. Those funds were not disbursed until April of 2020, presumably leaving a balance in the client trust account of $375.28 of earned fees. **R. at Vol. 1, pp. 248-53 (Tr. 80:16-85:4), p. 324 (Tr. 156:14-24), pp. 440-44 (Tr. 272:8-276:8); Vol. 3, pp. 1113-20**.

Client A.T.

On February 14, 2019, Respondent deposited a check of $7,500.00 into the Busey Bank client trust account. This check represented settlement proceeds for A.T. On February 20, 2019, Respondent disbursed $2,500.00 to the client. The documentation provided by Respondent to the OCDC reflected a payment of $2,879.64 for attorney fees

and expenses. One ledger shows this payment was made on February 19, 2019, and a different ledger shows the payment was made on September 3, 2019. According to the bank records, there was no disbursement for $2,879.64. There was, however, a $5,000.00 bulk sweep out of the client trust account on September 3, 2019. According to Respondent's testimony at the sworn statement, half of that $5,000 sweep is attributed to this client and the other half to another client (C.T.R.). After payment of $1,550.00 to a medical provider, in March of 2020, $570.36 was still owed to the client. Those funds were not disbursed until April of 2020, presumably leaving a balance in the client trust account of $379.64 of earned fees. **R. at. Vol. 1, pp. 253-56 (Tr. 85:21-88:7), pp. 445-46 (Tr. 277:19-278:3); Vol. 3, pp. 1121-28**.

Client A.W.

On May 15, 2019, Respondent deposited a $4,500.00 settlement check into his Busey Bank client trust account. The client was A.W. Two days later, on May 17, 2019, Respondent disbursed $1,500.00 to the client. Payment of $1,200.00 was made to a third-party lienholder in February of 2020. Documentation provided by Respondent to the OCDC in connection with the client trust account audit includes a client ledger showing a May 17, 2019 disbursement to Respondent of $1,837.34 for fees and expenses. However, no such disbursement was ever made from the client trust account. Respondent testified during his sworn statement that he took these fees out of the client trust account at a different time as part of a bulk sweep of fees. It is not clear whether Respondent took $1,800.00, the amount remaining in the client trust account, or whether Respondent took

the full $1,837.34. **R.at Vol. 1, pp. 256-57 (Tr. 88:8-89:13), pp. 446-47 (Tr. 278:4-279:8); Vol. 3, pp. 1129-34)**.

Client K.L.

On May 31, 2019, Respondent deposited K.L.'s settlement funds of $17,750.00 into his client trust account. While at the bank making this deposit, Respondent withdrew $1,250.00 in cash, presumably a draw against the attorney fees owed to him by K.L. On June 10, 2019, Respondent disbursed $8,931.61 to the client, and he transferred $5,517.65 to his operating account on June 10, 2019, to account for the remainder of his fees. Seven months later, in January of 2020, Respondent paid $1,000.00 to a third-party lienholder. Documentation provided by Respondent includes a client ledger showing the balance, $1,050.74, was disbursed to the client on January 10, 2020. However, Respondent testified that those were actually fees owed to him for other matters handled on behalf of this client. In any event, there was no debit for $1,050.74 in the bank records. Respondent testified that he believes those fees would have probably been swept out of the client trust account in a subsequent bulk sweep. **R. at Vol. 1, pp. 257-59 (Tr. 89:17-91:11), pp. 316-17 (Tr. 148:10-149:10), pp. 447-50 (Tr. 279:9-282:10); Vol. 3, pp. 1135-41**.

Client T.R.

On September 20, 2019, Respondent deposited, for the benefit of T.R., a $6,000.00 settlement check. While at the bank making that deposit, he also withdrew $500.00 in cash, presumably a draw against the fees owed to him by T.R. That same day, Respondent disbursed $1,000.00 to the client as a partial distribution. Then, on October 2,

2019, he disbursed an additional $1,000.00 to the client. Records produced by Respondent show that on February 14, 2020, he paid a third-party lien of $1,775.00 and transferred the balance, $2,225.00 to himself. However, no such transfer was found in the bank records. Additionally, Respondent's records failed to include any reference to the $500.00 cash withdrawal from September 20, 2019. **R. at Vol. 1, pp. 259-61 (Tr. 91:12-93:20), p.533 (Tr. 30:17-20); Vol. 3, pp. 1142-49**.

Client R.P.

On May 24, 2019, Respondent deposited a $5,000 settlement check into his Busey Bank client trust account. The client was R.P., who had already received a distribution out of the client trust account. In fact, a check had been issued to him on May 23, 2019, for $2,825.00. At the time of the deposit, Respondent withdrew $1,000.00 in cash, presumably as an advance on the fees owed to him by this client. Then, on June 10, 2019, Respondent transferred his total fees of $2,175.00 from the client trust account to his operating account. As a result, Respondent overpaid himself by $1,000.00 and drew against the funds of other clients to cover the negative balance of $1,000.00 in the client trust account for this client. **R. at Vol. 1, pp. 261-63 (Tr. 93: 22-95:15), pp. 451-52 (Tr. 283:11-284:12), pp. 1150-55; Vol. 3, p. 532 (Tr. 29:10-25)**.

Trust Account Deficit

The audit of the client trust account revealed that Respondent's cash withdrawals and electronic transfers took the balance of his client trust account below the amount needed to account for all client funds that should be in the account at any given moment. For example, on October 31, 2019, the balance in the client trust account was $25,929.17.

To account for all of the funds owed to clients and third-party lienholders as of that date, the account balance needed to be at least $54,412.75: there was a deficit of $28,483.58. The account was not actually overdrawn because Respondent continued to deposit settlement checks from new clients and because he allowed earned fees to remain in that account. Additionally, there were extra funds in the account because Respondent did not always promptly disburse funds to clients and third-party lienholders. **R. at Vol. 1, pp. 275-80 (Tr. 109:9-112:4), pp. 301-03 (Tr. 133:3-135:3), pp. 1165-97; Vol. 3, pp. 1077-83, pp. 1090-96, pp. 1097-101, pp. 1113-20, pp. 1121-28, pp. 1129-34, pp. 1135-41, pp. 1142-49; Vol. 4, p. 1333.**

Respondent admits that he was not reconciling the client trust account until he was prompted to do so by the OCDC's audit, however the efforts to reconcile the trust account did not begin until the early part of 2020. Respondent brought in a bookkeeper to help him, and even though that person had a master's degree in business, she did not have any experience with reconciling lawyer trust accounts. By referencing client settlement sheets, she was able to identify specific circumstances where Respondent had withdrawn too much in fees or too little in fees from the client trust account. No effort was made to determine whether the clients and third-party lienholders had received all they were entitled to. And, despite this reconciliation effort, Respondent was still keeping a fluctuating $150.00 to $200.00 of his own money in the client trust account at the time of the hearing, according to the bookkeeper's testimony. Respondent testified that he had no personal funds in the trust account. In light of this conflicting testimony, and the incompleteness of the audit due to the lack of accurate client ledgers, it seems likely that

the client trust account is still not being reconciled properly. **R. at Vol. 1, p. 58, p. 409 (Tr. 241:5-18), pp. 512-60 (Tr. 9:13-57:25); Vol. 4 at p. 1333.**

Even before Respondent undertook his own reconciliation, he had already made some effort to address the deficit that he knew existed in the client trust account. On November 1, 2019, he deposited $25,000.00 to replace funds associated with "two errant withdrawals." A second deposit of $25,000.00 was made on March 3, 2020, again "to correct errant transfers taken because the Trust Account was not reconciled from December 2019 to March 2, 2020." **R. at Vol. 1, pp. 263-69 (Tr. 95:18-101:23), pp. 355-59 (Tr. 187:12-191:24), pp. 454-60 (Tr.286:2-292:18); Vol. 3, pp. 1156-64.**

Background, Community Involvement, and Character Witness Testimony

Six individuals testified with respect to Respondent's good character and excellent reputation. They all stated that they found Respondent to be of very strong moral character, honest, and trustworthy. In addition, all six witnesses testified that they had either engaged him for legal services for themselves and/or referred others to him. None, however, testified to any firsthand knowledge regarding the matters alleged in the Amended Information. **R. at Vol. 1, pp. 736-69 (Tr. 233:6-266:10)**. Respondent testified that he volunteers a considerable amount of time to charities and nonprofit organizations and is very active in his church. **R. at Vol. 1, pp. 625-38 (Tr. 122:2-135:15)**.

Disciplinary Hearing Panel's Decision

On July 29, 2022, the Hearing Panel issued its decision and concluded that Respondent had violated 4-1.15(a), Rule 4-1.15(a)(5), Rule 4-1.15(a)(6), Rule 4-

1.15(a)(7), Rule 4-1.15(b), Rule 4-1.15(c), Rule 4-1.15(d), Rule 4-1.15(f), and Rule 4-8.4(c). **R. at Vol. 1, pp. 156-63**. ABA Standard 4.1 provides that, "[a]bsent aggravating or mitigating circumstances . . . the following sanctions are generally appropriate in cases involving the failure to preserve client property."

- ABA Standard 4-11 provides: "Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.
- ABA Standard 4-12 provides: "Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

The Panel found that Respondent knew that he was dealing improperly with client property and caused injury or potential injury to his clients. Applying ABA Standard 4.12, the Hearing Panel recommended that Respondent be suspended indefinitely with no leave to apply for reinstatement for a period of one year. The Hearing Panel did not consider the mitigating factors or the aggravating factors sufficiently compelling to justify a departure from its recommended discipline. **R. at Vol. 1, p. 158-65**.

Informant filed its letter of rejection of the decision with the Advisory Committee on August 8, 2022. **R. at Vol. 1, p. 166.** Respondent filed his letter of rejection with the Advisory Committee on September 1, 2022. **R. at Vol. 1, p. 167.**

POINTS RELIED ON

I.

RESPONDENT VIOLATED RULES 4-1.15 (a), (b), (c), (d), and (f), and 4-8.4(c) AS ALLEGED IN THE INFORMATION.

In re Shelhorse, 147 S.W.3d 79 (Mo. banc 2004)

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

Rule 4-1.15

Rule 4-8.4

POINTS RELIED ON

II.

UPON CONSIDERATION OF THIS COURT'S DECISIONS IN PREVIOUS ATTORNEY DISCIPLINE CASES, AND THE ABA SANCTION GUIDELINES, RESPONDENT SHOULD BE DISBARRED.

In re Farris, 472 S.W.3d 549 (Mo. banc 2015)

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010)

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

ABA Standards for Imposing Lawyer Sanctions (1992)

ARGUMENT

I.

RESPONDENT VIOLATED RULES 4-1.15(a), (b), (c), (d), and (f), and 4-8.4(c) AS ALLEGED IN THE INFORMATION.

Standard of Review

Professional misconduct is established by a preponderance of the evidence. *In re Crews*, 159 S.W. 3d 355, 358 (Mo. banc 2005). This Court reviews the evidence *de novo*, independently determining all issues pertaining to the credibility of witnesses and the weight of the evidence and reaches its own conclusion of law. *Id.* In matters of attorney discipline, the disciplinary panel's decision is advisory. *In re Farris*, 472 S.W.3d 549, 557 (Mo. banc 2015).

An attorney must comply with the Rules of Professional Conduct as set forth in Supreme Court Rule 4 as a condition of retaining his license. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004). Violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *Id.*

Violation of Rule 4-1.15(a)

Rule 4-1.15(a) provides, in relevant part, that a lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Respondent violated Rule 4-1.15(a) when he repeatedly deposited earned fees and other personal funds directly into the client trust account and when he routinely allowed earned fees to remain in that account for an unreasonably long period of time.

Rule 4-1.15(a)(5) requires withdrawals from the client trust account to be made only by check payable to a named payee, and not to cash, or by authorized electronic transfer. Respondent violated Rule 4-1.15(a)(5) every time he made a cash withdrawal from the client trust account.

Rule 4-1.15(a)(6) provides that no disbursement shall be made based upon a deposit until a reasonable period of time has passed for the funds to be actually collected by the financial institution in which the trust account is held. Respondent violated Rule 4-1.15(a)(6) when he made cash withdrawals representing earned fees immediately after depositing a client's settlement funds. Additionally, Respondent routinely disbursed settlement funds to clients on the same day of the deposit and made final disbursements to clients without waiting a reasonable time for the funds to be collected.

Rule 4-1.15(a)(7) provides that a reconciliation of a trust account shall be performed reasonably promptly each time an official statement from the financial institution is provided or available. Respondent violated Rule 4-1.15(a)(7) and admitted that he had not reconciled the client trust from at least January of 2018 until February of 2020.

Violation of Rule 4-1.15(b)

Rule 4-1.15(b) prohibits lawyers from depositing personal funds into the client trust except as needed to pay financial institution service charges. Respondent violated Rule 4-1.15 by depositing earned fees and other personal checks into the client trust account.

Violation of Rule 4-1.15(c)

Rule 4-1.15(c) requires lawyers to deposit advance fees and expenses into the client trust account, to be withdrawn by the lawyer only when the fees have been earned or the expenses incurred. Respondent violated Rule 4-1.15(c) when he deposited funds from a petty cash account into the client trust account. Respondent knew that some of those funds represented earned fees and some of those funds were unearned fees, but he claimed to be unable to identify how much of those funds were unearned fees. Additionally, Respondent frequently made large bulk transfers out of the client trust account without documenting that those funds represented earned fees from specific clients.

Violation of Rule 4-1.15(d)

Rule 4-1.15(d) requires a lawyer to promptly notify the client or third person of receipt of funds in which the client or third person has an interest and to promptly deliver to the client or third person funds that the client or third person is entitled to receive. Respondent violated Rule 4-1.15(d) when he failed to realize he was holding funds belonging to K.H. and did not promptly deliver funds those funds to her. Similarly, Respondent, for over a year, failed to pay lienholders related to clients C.T.R. and A.T.

Violation of Rule 4-1.15(f)

Rule 4-1.15(f) requires a lawyer to maintain and preserve complete trust account records for at least six years to include receipt and disbursement journals containing a record of deposits to and withdrawals from the client trust account, specifically identifying the date, source, and description of each item deposited as well as the date,

payee, and purpose of each disbursement. Further required are reconciliations of the client trust account. Respondent admitted that he did not perform reconciliations. Likewise, Respondent admitted that he regularly made cash withdrawals from the client trust account without making a corresponding entry on a client ledger or disbursement journal, and he regularly swept fees out of the client trust account without making a corresponding entry on a client ledger or disbursement journal.

Misappropriation and Violation of Rule 4-4.8(c)

Rule 4-8.4(c) defines professional misconduct as engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Respondent violated Rule 4-8.4(c) when he deposited into his client trust account a check from the Cleveland Indians that was not payable to him nor intended for him. He kept that money for more than two years and did not attempt to return those funds until the matter was brought to his attention by the OCDC. Respondent violated Rule 4-8.4(c) when he willingly held his office assistant's husband's money in the client trust account thereby assisting them in maintaining their government (income-based) benefits. Respondent violated Rule 4-8.4(c) when he withdrew so much money out of the trust account that the balance fell below the amount needed to pay combined undisbursed client funds, on October 31, 2019, as shown in Informant's Exhibit 33. Respondent violated Rule 4-8.4(c) when he withdrew a total of $14,000.00 out of the client trust account, for fees associated with client Go Properties of GVA & Associates, when there was only $13,674.17 available. Respondent violated Rule 4-8.4(c) when he withdrew $846,000.00 out of the client trust account, for fees associated with the Los Angeles Rams class action, when there was only $843,923.00 available.

And finally, Respondent violated Rule 4-8.4(c) when he paid $10,000.00 on his American Express account with a check drawn on the client trust account and when he used funds in the client trust account to purchase a $1,000.00 dog.

Respondent used the client funds in the trust account as his own. More importantly, he knew he was withdrawing too much for his personal uses – more than the earned fees he was entitled to – because he would occasionally have to leave some earned fees in there as a "cushion." He admits to commingling his own funds with client funds, but denies there was any misappropriation. However, "[w]hen an attorney deposits the client's funds into an account used by the attorney for his own purposes, any disbursements from the account for purposes other than those of the client's interests has all the characteristics of misappropriation, particularly when the disbursement reduces the balance of the account to an amount less than the amount of the funds being held by the attorney for the client." *In re Schaeffer,* 824 S.W.2d 1, 5 (Mo. banc 1992).

II.

UPON CONSIDERATION OF THIS COURT'S DECISIONS IN PREVIOUS ATTORNEY DISCIPLINE CASES AND THE ABA SANCTION GUIDELINES, RESPONDENT SHOULD BE DISBARRED.

The purpose of attorney disciplinary proceedings is "to protect the public and maintain the integrity of the legal profession." *In re Ehler,* 319 S.W. 3d 442, 451 (Mo. banc 2010). When determining an appropriate sanction for violations of the Rules of Professional Conduct, this Court assesses the gravity of the misconduct, as well as mitigating or aggravating factors that tend to shed light on Respondent's moral and intellectual fitness as an attorney. *In re Wiles,* 107 S.W.3d 228, 229 (Mo. banc 2003).

This Court has consistently turned to the ABA Standards for Imposing Lawyer Sanctions (ABA Standards) for guidance in deciding what discipline to impose. *In re Storment,* 873 S.W.2d 227 (Mo. banc 1994). Per ABA Standard 3.0, when imposing a sanction, a court should consider the: (1) duty violated, (2) lawyer's mental state, (3) potential or actual injury caused by the lawyer's misconduct, and (4) the existence of aggravating and mitigating factors. When an attorney has committed multiple acts of misconduct, the ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct. *In re Ehler,* 319 S.W.3d at 451.

ABA Sanction Analysis for Cases Involving Misappropriation

Here, the duty violated was Respondent's duty to protect his clients' money. It is among the highest duties the rules address. *In re Ehler*, 319 S.W.3d at 451. Respondent's mental state with regard to his failure to preserve client property was knowing. "Knowledge" as defined by the ABA Standards, is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." A person's knowledge may be inferred from the circumstances. Rule 4-1.0(f).

Respondent certainly knew he was not caring for his client's property when he failed to reconcile his trust account and regularly removed his fees in large, round, transfer amounts and not based on exact fees earned. *See In Re Farris,* 472 S.W.3d 549, 568 (Mo. banc 2015) (by requiring lawyers to keep complete trust account records, Rule imposes affirmative duty to inquire and understand information in those records; failure to do so does not protect the lawyer; it creates an inference that the lawyer knew all that those records would have shown). Similarly, Respondent knew that he was not caring for his client's property when – on two separate occasions – he made a $25,000.00 deposit into the client trust account to replace funds that he had improperly withdrawn. Respondent was not caring for his client's property when he used those funds as his own to pay his personal expenses and to provide him with a "cash reserve."

As to the third consideration, injury, it is undisputed that Respondent converted funds that were to be preserved for the listed clients, and all clients and third parties were eventually paid. But the ABA Standards address both injury and potential injury, or

"harm to the client that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." ABA Standards (Definitions). The Hearing Panel's recommendation suggests there was potential injury to clients but never directly addresses the actual injury. Each time Respondent's client trust account held less that it should to account for all liabilities to clients and third-parties, clients were injured. Respondent's subsequent deposits to account for these deficits were mere restitution for the injury he had already caused.

In Missouri, the standard for the most serious violation is the starting place for analysis. *In re Ehler,* 319 S.W.3d 442, 451 (Mo. banc 2010). Standard 4.11 serves as the baseline this Court routinely applies in misappropriation cases: "Absent aggravating or mitigating circumstances, upon application of the factors set out in [Standard] 3.0, … disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client." *In re Farris,* 472 S.W.3d at 563.

Applicable Mitigating Factors

Upon finding the applicable baseline standard, aggravators and mitigators are considered. The following mitigating factors apply:

ABA Standard 9.32(g) (character or reputation). Evidence was presented of Respondent's character and reputation in the community. Six individuals testified that Respondent is well-regarded in the community; however, their testimony did not address the specific allegations against Respondent.

ABA Standards 9.32(l) (remorse). Respondent testified he was remorseful for placing his clients, himself, and his organization in this predicament.

Non-applicable Mitigating Factors

The Panel erroneously concluded there was an absence of dishonest or selfish motive, relying upon Respondent's testimony that his failure to follow acceptable trust account procedures was not the result of financial difficulties. **R. at Vol. 1, p. 164**. But application of this mitigating factor, **ABA Standard 9.32(b)** is inconsistent with the Panel's numerous factual findings demonstrating that Respondent was using the client trust account for his personal transactions and that, as a result, he frequently was spending his client's money. **R. at Vol. 1, pp. 137-54**.

Likewise, the Hearing Panel mistakenly concluded that Respondent was cooperative with the trust account audit by providing information. **ABA Standard 9.32(e)** requires "full and free disclosure to disciplinary board." Respondent provided information to OCDC, but even the Panel noted that at the time of the sworn statement, Respondent failed to disclose that he had attempted to reconcile the client trust account and as part of that process created amended ledgers relating to client transactions. **R. at Vol. 1, p. 164**. Respondent was cooperative, but his efforts fell short of the "full and free disclosure" contemplated by this ABA standard.

Applicable Aggravating Factors

When the court finds mitigators, "they must be weighed against the seriousness of the offenses and the evidence in aggravation." *In re Kayira,* 614 S.W.3d 530, 539 (Mo. banc 2021). The following aggravating factors apply:

ABA Standard 9.22(a) (prior disciplinary offenses). Respondent was twice previously admonished for trust account practices. Even though he attended the recommended CLE in 2010, his subsequent conduct, as demonstrated by the trust account audit, shows a a similar casual approach to the handling of client property. *See In re Ehler*, 319 S.W.3d at 452 (discussing the applicability of progressive discipline when a lawyer repeats the same acts of misconduct).

ABA Standards 9.22(d) (multiple offenses). The violations herein consist of multiple offenses, including a number of admitted violations. These violations represent a pattern of misconduct that extended through the time period of the audit.

ABA Standards 9.22(i) (substantial experience in the practice of law). Respondent has been engaged in the practice of law for over twenty years and had been operating his own firm for fifteen years at the beginning of the audit period.

Based on previous rulings from this Court and the ABA Sanction Standards, disbarment is the appropriate sanction. The mitigating and aggravating circumstances do not suggest that deviation from that sanction is warranted in this case. Lawyer Discipline is intended to protect the public and preserve the integrity of the legal profession. In regards to safeguarding property, this Court has recognized that its "obligation to protect the public and the profession from attorneys who violate this trust is as important today as ever. There simply is no room in this profession for attorneys who take property held in trust for others and use it as their own." *In re Farris*, 472 S.W.3d 549, 562 (Mo. banc 2015).

CONCLUSION

For the reasons set forth above, Informant respectfully requests this Court:

(a) find that Respondent is guilty of professional misconduct and find that Respondent has violated Missouri Supreme Court Rules 4.15(a), Rule 4-1.15(a)(5), Rule 4-1.15(a)(6), Rule 4-1.15(a)(7), Rule 4-1.15(b), Rule 4-1.15(c), Rule 4-1.15(d), Rule 4-1.15(f), and Rule 4-8.4(c);

(b) order that Respondent be disbarred;

(c) tax all costs in this matter to Respondent, including the $2,000.00 fee pursuant to Rule 5.19(h); and

(d) require Respondent to comply with Rule 5.27.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2022, a copy of Informant's Brief is being served upon Respondent's counsel through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08.

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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. was served on Respondent through the Missouri electronic filing system pursuant to Rule 103.08;
3. complies with the limitations contained in Rule 84.06(b);
4. contains 8,261 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Laura E. Elsbury