IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
RANDALL DEAN CRAWFORD	)	**Supreme Court No. SC96010**
5950 N. Oak, Suite 202	)	
Kansas City, Missouri 64118	)	
	)	
MO Bar #29443	)	
	)	
Respondent.	)	

INFORMANT'S BRIEF

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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

PROCEDURAL HISTORY

September 24, 2015	Information
October 23, 2015	Respondent's Answer to Information
October 29, 2015	Appointment of Disciplinary Hearing Panel
February 4, 2016	Amended Information
February 20, 2016	Respondent's Answer to Amended Information
February 24, 2016	Disciplinary Hearing Panel (DHP) Hearing
August 16, 2016	DHP Issues Admonition
August 24, 2016	Informant Rejects Admonition
August 26, 2016	Respondent Accepts Admonition
September 27, 2016	DHP Decision Recommending Probation
October 6, 2016	Acceptance of DHP decision by Informant
October 10, 2016	Acceptance of DHP decision by Respondent
November 1, 2016	Statement of Acceptance of DHP Decision Filed
December 20, 2016	Show Cause Order Issued by Court
January 18, 2017	Response to Show Cause Order Filed by Informant
January 20, 2017	Response to Show Cause order Filed by Respondent
January 31, 2017	Court Orders Case Briefed and Argued
March 2, 2017	Record submitted

BACKGROUND AND DISCIPLINARY HISTORY

Respondent Crawford was licensed to practice law in the State of Missouri in September of 1981. Until 1985, Respondent practiced law in Gladstone, Missouri. In 1985, Respondent and Thomas Koelling formed Koelling & Crawford, P.C. and commenced the practice of law in the Kansas City metropolitan area. **App. 252-253, 259 (Tr. 95-96, 102).**[1] Respondent has a general law practice, with an emphasis is domestic relations, traffic cases and wills. **App. 259-260 (Tr. 102-103).**

Respondent's law license is in good standing and he has no disciplinary history.

OVERDRAFT OF TRUST ACCOUNT

At all times relevant herein, Respondent maintained and used an attorney trust account with First Bank of Missouri, Account No. XXXXXXX9683, in the account name

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[1] The facts contained herein are drawn from the testimony elicited and the exhibits admitted into evidence at the trial in this matter conducted on August 26, 2009. Citations to the trial testimony before the Disciplinary Hearing Panel are denoted by the appropriate Appendix page reference followed by the specific transcript page reference in parentheses, for example **"App. ____ (Tr. ____)"**. Citations to the Information, Respondent's Answer to the Information and the trial exhibits are denoted by the appropriate Appendix page reference.

of Missouri Lawyer Trust Account Fund Koelling & Crawford, P.C. (the "Trust Account"). **App. 119, 136.**

On February 9, 2015, First Bank sent Informant an overdraft notification regarding the Trust Account. **App. 193-194 (Tr. 36-37) 357.** In due course, Informant's investigative examiner Kelly Dillon requested that Respondent provide an explanation for the overdraft as well as bank records for the relevant period of time. **App. 194-196 (Tr. 37-39), 358.** Respondent provided a written explanation for the overdraft by letter dated February 12, 2015. **App. 361-369.** In addition, Informant's investigation included the sworn statement of Respondent taken on June 25, 2015. **App. 372-443.**

Informant's investigation found that for the period from January 21, 2014 through March 31, 2015, there were several instances where Respondent commingled personal funds with client funds in the Trust Account by allowing earned legal fees to linger in the Trust Account. **App. 196-210 (Tr. 39-53), 444-450.** These funds were later used to pay Respondent's personal expenses as well as client and third party expenses relating to other matters. In particular:

a. On January 21, 2014, Respondent deposited $486.25 into the Trust Account belonging to Client Ausberger. On February 25, 2014, Respondent disbursed $250 to a third party on behalf of client Ausberger. The remaining funds, $236.25, representing earned fees belonging to Respondent were not promptly distributed and were permitted to remain in the Trust Account. **App. 120, 137.**

b. In July and August 2014, Respondent made deposits totaling $400 into the Trust Account belonging to client C. Johnson. In September 2014, Respondent disbursed $216.50 to a third party on behalf of client C. Johnson. The remaining funds, $183.50, representing earned fees belonging to Respondent were not promptly distributed and were permitted to remain in the Trust Account. **App. 172-173 (Tr. 15-16).**

c. On April 23, 2014, Respondent deposited $669.50 into the Trust Account belonging to client Freeman. On April 23, 2014, Respondent disbursed $419.50 to a third party on behalf of client Freeman. The remaining funds, $250, representing earned fees belonging to Respondent were not promptly distributed and were permitted to remain in the Trust Account. **App. 120, 137.**

d. On October 28, 2014, Respondent deposited $6,561.50 into the Trust Account on behalf of client Hayes. On October 27, 2014, Respondent disbursed $4,261.44 to client Hayes. The remaining funds, $2,300.06, representing earned fees belonging to Respondent, were not promptly distributed and were permitted to remain in the Trust Account. **App. 121, 137.**

e. On January 29, 2014, Respondent deposited $370 into the Trust Account on behalf of client Haynes. On February 6, 2014, Respondent disbursed $276.50 to a third party on behalf of client Haynes. The remaining funds, $93.50, representing earned fees belonging to Respondent, were not promptly distributed and were permitted to remain in the Trust Account. **App. 121, 137.**

f. On September 23, 2014, Respondent deposited $300 into the Trust Account on behalf of client Hernandez. On December 17, 2014, Respondent disbursed $11 to a third party on behalf of client Hernandez. The remaining funds, $289, representing earned fees belonging to Respondent, were not promptly distributed and were permitted to remain in the Trust Account. **App. 121, 137.**

g. On September 19, 2014, Respondent deposited $466.50 into the Trust Account on behalf of client Rangel. On September 16, 2014, Respondent disbursed $316.50 to a third party on behalf of client Rangel. The remaining funds, $130, representing earned fees belonging to Respondent, were not promptly distributed and were permitted to remain in the Trust Account. **App. 121, 137.**

h. On July 10, 2014, Respondent deposited $2,200 into the Trust Account on behalf of client Smith. In July 2014 Respondent made two disbursements to third parties on behalf of client Smith which totaled $1,137.80. The remaining funds, $1,062.20, representing earned fees belonging to Respondent, were not promptly distributed and were permitted to remain in the Trust Account. **App. 121-122, 137.**

i. On September 5, 2014, Respondent deposited $1,405 into the Trust Account on behalf of client Stratton. On September 4, 2014, Respondent disbursed $205 to a third party on behalf of client Stratton. The remaining funds, $1,200, representing earned fees belonging to Respondent, were not promptly distributed and were permitted to remain in the Trust Account. **App. 122, 137.**

In some instances, Respondent deposited earned legal fees into the Trust Account. In particular:

a. On February 26, 2014, Respondent deposited $543.19 into the Trust Account representing fees previously earned from client Braden. **App. 122, 137.**

b. On June 3, 2014, Respondent deposited $200 into the Trust Account representing fees previously earned from client Carter. **App. 122, 137.**

c. On March 6, 2014, Respondent deposited $303 into the Trust Account representing fees previously earned from client Earhart. **App. 122, 137.**

In some instances, Respondent disbursed client funds from the Trust Account by disbursing funds which had yet to be deposited to the Trust Account or had yet to become "good funds" in the Trust Account. In particular:

a. On October 28, 2014, Respondent deposited $6,561.50 into the Trust Account on behalf of client Hayes. However, on October 27, 2014, before the client Hayes funds had been deposited, Respondent disbursed $4,261.44 to client Hayes and that payment was presented for payment on October 29, 2014. **App. 197 (Tr. 40).**

b. On May 5, 2014, Respondent deposited $341 to the Trust Account on behalf of client Oliphant. That same date, Respondent disbursed $341 to a third party on behalf of client Oliphant and that disbursement was presented for payment on May 7, 2014. **App. 204 (Tr. 47).**

In some instances, Respondent paid client expenses on behalf of clients whose funds had not yet been deposited into the Trust Account, thereby drawing against other

funds, most probably Respondent's earned fees that had been permitted to remain in the Trust Account. In particular:

a. On September 9, 2014, Respondent disbursed $316.50 from the Trust Account on behalf of client D. Johnson. No funds belonging to client D. Johnson were present in the Trust Account on that date. **App. 123, 138.**

b. On September 25, 2014, Respondent disbursed $15 from the Trust Account on behalf of client Hasler. No funds belonging to client Hasler were present in the Trust Account on that date. **App. 124, 138.**

c. On December 4, 2014, Respondent disbursed $223.50 from the Trust Account on behalf of client Rastofer. No funds belonging to client Rastofer were present in the Trust Account on that date. **App. 124, 138.**

d. Respondent made two disbursements from the Trust Account on behalf of client LeFever. On October 8, 2014, Respondent disbursed $130. On November 21, 2014, Respondent disbursed $105. No funds belong to client LeFever were present in the Trust Account on those dates. **App. 124, 138.**

e. On October 30, 2014, Respondent disbursed $223.50 from the Trust Account on behalf of client Ferguson. No funds belonging to client Ferguson were present in the Trust Account on that date. **App. 124, 138.**

f. On May 22, 2014, Respondent deposited $12.50 to the Trust Account on behalf of client Lager. On July 14, 2014, Respondent disbursed $250 from the Trust Account on behalf of client Lager. Client Lager only had $12.50 in the Trust

Account when the $250 was disbursed on client Lager's behalf. **App. 124-125, 138.**

g. On September 16, 2014, Respondent disbursed $316.50 from the Trust Account on behalf of client Rangel. No funds belonging to client Rangel were present in the Trust Account on that date. **App. 125, 138.**

In addition, Respondent paid personal expenses and law firm operating expenses from the Trust Account by writing checks directly to payees, including payments to First Bank of Missouri, Chase Bank and by withdrawing funds by ACH processing to Cabela's Visa. **App. 125, 138.**

Respondent failed to maintain full records of Trust Account activity or necessary documentation that would provide support and explanation for the withdrawal or disbursement of funds from the Trust Account. **App. 188 (Tr. 31), 294 (Tr. 137).**

Since the Informant's investigation began in this matter, Respondent voluntarily attended "Ethics School", including the webinars and in-person session conducted at the Informant's office in Jefferson City, Missouri. **App. 284-286 (Tr. 127-129).** In addition, Respondent established a new trust account and began winding down the subject Trust Account in order to ensure proper handling of future financial transactions on behalf of clients. **App. 272-274 (Tr. 115-117), 496-511.**

Linda Crawford, Respondent's wife, is an accountant and has practiced accounting for many years in various responsible positions. Ms. Crawford handled the accounting for the Koelling and Crawford law firm in the early years of the partnership. Over time,

her full time job and the couple's children required time such that Ms. Crawford was unable to continue handling the accounting for the law firm. In 2015, Ms. Crawford resumed handling the accounting for the law firm and till do so on an ongoing basis. **App. 303-310 (Tr. 146-153)**.

Respondent called character witnesses on his behalf at the DHP hearing:

a. The Honorable Steven D. Hudson has been the Associate Circuit Judge for Grundy County, Missouri for 18 years. Judge Hudson testified that he has known Respondent since childhood. He knows Respondent personally and Respondent appears before Judge Hudson on occasion. Judge Hudson testified that he believes that Respondent has outstanding character and that he has always found Respondent to be professional in his conduct. Respondent has handled matters for some of Judge Hudson's family. **App. 240-249 (Tr. 83-92)**

b. Gary Robb is an attorney and has known Respondent since 1975 when they were undergraduates together. For approximately the last 11 years, Mr. Robb and Anita Robb, his wife and law partner, have worked closely with Respondent on a complex case. Mr. Robb testified that Respondent always conducted himself with integrity and professionalism. Mr. Robb testified that it is unimaginable to him that Respondent would ever intentionally or consciously violate any ethical rule. **App. 235-239 (Tr. 78-82).** Anita Robb also wrote a letter in support of Respondent. **App. 512.**

c. J.R. Hobbs is an attorney and has known Respondent since UMKC law school, from which they both graduated in 1981. Mr. Hobbs has known Respondent personally and professionally since that time. Mr. Hobbs testified that he believes Respondent is of the highest integrity and of the highest ethics. **App. 249-252 (Tr. 92-95).**

d. Thomas Koelling is Respondent's law partner. Mr. Koelling also graduated from UMKC law school in 1981. Mr. Koelling testified that he believes Respondent is a very ethical attorney who would not intentionally violate the Rules of Professional Conduct. **App. 252-254 (Tr. 95-97).**

POST-DHP HEARING PROCEDURE

On August 16, 2016, following the DHP hearing, the Panel initially voted to issue an admonition to Respondent for violating various provisions of the safekeeping property rule, Rule 4-1.15. **App. 579-580.** The Informant rejected the admonition. **App. 581.** The Respondent accepted the admonition. **App. 582.**

Due to Informant's rejection of the admonition, the Panel was required to render a written decision pursuant to Rule 5.16(b)(4).

THE DISCIPLINARY HEARING PANEL'S DECISION

The Disciplinary Hearing Panel filed its Findings of Fact, Conclusions of Law and Recommendation on September 27, 2016. The Panel made the following significant findings of fact:

a. The overdraft of the Trust Account was caused by online payments to a credit card for Respondent's personal expenses from the trust account by Respondent's wife. The Panel found that Respondent's wife did not realize that account information for the trust account had been tied to the credit card online account and that, as a result, online payments were coming from the trust account

b. Respondent used earned fees in his trust account to pay law firm expenses.

c. Respondent did not always promptly remove earned fees from the trust account. Specifically, the Panel noted nine (9) instances where Respondent failed to promptly distribute earned fees from the trust account to his operating account.

d. On three occasions, due to poor trust account management or poor office practices, Respondent deposited earned legal fees into his trust account.

e. Respondent occasionally may have drawn on funds in the trust account prior to those funds becoming "good funds" under the Rules.

The Panel concluded that the foregoing conduct by Respondent violated Rule 4-1.15(a) by failing to promptly remove earned fees from the trust account, Rule 4-1.15(b) by depositing earned fees into the trust account, and Rule 4-1.15(f) by failing to maintain complete records of his trust account transactions.

With regard to Respondent's state of mind, the Panel found that Respondent did not intentionally or knowingly violate the trust account rules and that the misconduct resulted from a lack of knowledge of the requirements and interpretations of the rules.

In mitigation, the Panel found (i) no evidence of any prior disciplinary record, (ii) that Respondent was cooperative throughout the OCDC's investigation, (iii) that Respondent is remorseful regarding his misconduct, and (iv) that he has an excellent character. The Panel found no aggravating factors.

Based upon the foregoing, the Panel found that leniency was appropriate when considering discipline and recommended that Respondent be placed on probation for a period of one (1) year. **App. 584-601.**

POST-DHP DECISION PROCEDURE

Both the Informant and the Respondent accepted the DHP recommendation for probation. **App. 602, 603.** On December 20, 2016, the Court issued a Show Cause Order requiring the parties to show cause "why the Court should not issue an order of suspension with no leave to reapply for a period of six months, with said suspension stayed and Respondent placed on probation for one year with the conditions of probation to be those set forth in the decision of the disciplinary hearing panel filed herein." **App. 645.**

On January 18, 2017, Informant filed his Response to Show Cause Order stating that the Court's suggested sanction was appropriate. **App. 646-650.** On January 20, 2017, Respondent filed his Response to Show Cause Order stating that stand-alone probation was the appropriate sanction. **App. 651-661.**

By Order dated January 31, 2017, the Court ordered that the record in the case be filed and that the case be briefed and argued to the Court. **App. 662.**

POINT RELIED ON

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

(A) FAILING TO PROMPTLY REMOVE EARNED FEES FROM HIS TRUST ACCOUNT IN VIOLATION OF RULE 4-1.15(a);

(B) DEPOSITING EARNED FEES INTO HIS TRUST ACCOUNT IN AN AMOUNT IN EXCESS OF WHAT WAS NECESSARY TO PAY BANK SERVICE CHARGES IN VIOLATION OF RULE 4-1.15(b);

(C) PAYING PERSONAL AND LAW FIRM EXPENSES FROM HIS TRUST ACCOUNT USING EARNED FEES IN VIOLATION OF RULE 4-1.15(a);

(D) BY DISBURSING CLIENT FUNDS FROM THE TRUST ACCOUNT PRIOR TO SAID FUNDS BEING COLLECTED BY THE FINANCIAL INSTITUTION IN VIOLATION OF RULE 4-1.15(a); AND

(E) FAILING TO MAINTAIN COMPLETE RECORDS OF HIS TRUST ACCOUNT TRANSACTIONS IN VIOLATION OF RULE 4-1.15(f).

Rule 4-1.15, Rules of Professional Conduct (2013)

In re Farris, 472 S.W.3d 549 (Mo banc 1915)

In re Coleman, 295 S.W.3d 857 (Mo banc 2009)

POINT RELIED ON

II.

PREVIOUS MISSOURI SUPREME COURT DECISIONS AND THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST THAT AN INDEFINITE SUSPENSION, STAYED, WITH PROBATION IS THE APPROPRIATE SANCTION IN THIS CASE.

Rule 4-1.15, Rules of Professional Conduct (2013)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

In re Farris, 472 S.W.3d 549 (Mo banc 1915)

In re Coleman, 295 S.W.3d 857 (Mo banc 2009)

ARGUMENT

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

(A) FAILING TO PROMPTLY REMOVE EARNED FEES FROM THE TRUST ACCOUNT IN VIOLATION OF RULE 4-1.15(a);

(B) DEPOSITING EARNED FEES INTO THE TRUST ACCOUNT IN AN AMOUNT IN EXCESS OF WHAT WAS NECESSARY TO PAY BANK SERVICE CHARGES IN VIOLATION OF RULE 4-1.15(b);

(C) PAYING PERSONAL AND LAW FIRM EXPENSES FROM THE TRUST ACCOUNT USING EARNED FEES IN VIOLATION OF RULE 4-1.15(a);

(D) BY DISBURSING CLIENT FUNDS FROM THE TRUST ACCOUNT PRIOR TO SAID FUNDS BEING COLLECTED BY THE FINANCIAL INSTITUTION AND BECOMING "GOOD

FUNDS" IN THE TRUST ACCOUNT IN VIOLATION OF RULE 4-1.15(a);

(E) PAYING CLIENT EXPENSES ON BEHALF OF CLIENTS WHOSE FUNDS HAD NOT YET BEEN DEPOSITED INTO THE TRUST ACCOUNT AND

(F) FAILING TO MAINTAIN COMPLETE RECORDS OF HIS TRUST ACCOUNT TRANSACTIONS IN VIOLATION OF RULE 4-1.15(f).

Violations of Rule 4-1.15(a): Respondent admits, and the Panel properly found, that on nine occasions, Respondent failed to promptly remove earned fees from the Trust Account. **App. 585-587.** By that conduct, Respondent violated Rule 4-1.15(a) (Safekeeping Property).[2]

In addition, Respondent admits that he paid personal expenses and law firm operating expenses from the Trust Account using earned fees by writing checks directly to payees, including payments to First Bank of Missouri and Chase Bank, and by withdrawing funds by ACH processing to Cabela's Visa. **App. 125, 138.** The Panel found that these payments were "unintentional" and consequently did not violate the

[2] All references to Rule 4-1.15 relate to the version that became effective July 1, 2013.

safekeeping property rules. **App. 589.** Informant respectfully disagrees. Such payments, intentional or not, were impermissible and violated Rule 4-1.15(a).

In some instances, Respondent disbursed client funds from the Trust Account by disbursing funds which had yet to be deposited to the Trust Account or had yet to become "good funds" in the Trust Account. **App. 197 (Tr. 40), 204 (Tr. 47).** The Panel acknowledged that such conduct may have occurred, but noted that a "lack of complete records and a lack of a clear standard for defining 'good funds' makes this situation difficult to address and does not allow us to reach a definite conclusion." **App. 588.** The lack of records is no defense to the charge. To the contrary, this Court has found that the failure to maintain required trust account records cannot work to the lawyer's benefit and gives rise to an inference of knowledge. *In re Farris*, 472 S.W.3d 549, 561 (Mo banc 2015). Likewise, the fact that the Court chose not to define "good funds" in the safekeeping property rule does not relieve the attorney of the obligation to ensure that any disbursements from the trust account are backed by funds actually collected by the financial institution and located in the account. Respondent violated Rule 4-1.15(a) by disbursing funds from the Trust Account that had either not yet been collected or were not yet "good funds" in the Trust Account

Violation of Rule 4-1.15(b): Respondent admits, and the Panel properly found, that Respondent deposited earned fees into the Trust Account, possibly due to poor trust account management or poor office practices. **App. 122, 137, 588.** By that conduct, Respondent violated Rule 4-1.15(b) (Safekeeping Property).

An attorney's personal funds should only be deposited for the "sole purpose of paying financial institution service charges on that account, but only in an amount necessary for that purpose." Rule 4-1.15(b). Any funds owed to [the lawyer] should have been transferred into a personal account before the money was withdrawn via a check. *In re Coleman*, 295 S.W.3d 857, 866 (Mo banc 2009). Withdrawing money via check from a Trust Account while there is client money in it is a "classic example of prohibited commingling of attorney and client funds." *Id.*

In this case, the result of this misconduct was that Respondent, on at least seven occasions, paid client expenses on behalf of client whose funds had not yet been deposited into the Trust Account. **App. 123, 138.** Most probably, the payments were drawn against Respondent's earned fees that had been permitted to remain in the Trust account in violation of Rule 4-1.15(b).

Violation of Rule 4-1.15(f): Respondent admits, and the Panel properly found, that Respondent failed to maintain full records of Trust Account activity or necessary documentation that would have provided support and explanation for the withdrawal or disbursement of funds from the Trust Account. **App. 188 (Tr. 31), 294 (Tr. 137), 593.** By that conduct, Respondent violated Rule 4-1.15(f) (Safekeeping Property).

ARGUMENT

II.

PREVIOUS MISSOURI SUPREME COURT DECISIONS AND THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST THAT AN INDEFINITE SUSPENSION, STAYED, WITH PROBATION IS THE APPROPRIATE SANCTION IN THIS CASE.

The purpose of discipline is not to punish the attorney, but to protect the public while maintaining the integrity of the legal profession. *In re Kazanas*, 96 S.W.3d 803, 807-08 (Mo. banc 2003). Those twin purposes may be achieved both directly, by removing a person from the practice of law; and indirectly, by imposing a sanction which serves to deter other members of the bar from engaging in similar conduct. *Id.* (citing *In re Littleton*, 719 S.W.2d 772, 777 (Mo. banc 1986)).

Sanction analysis commonly derives from several sources, including the *ABA Standards for Imposing Lawyer Sanctions* (1991 ed.) (the "*ABA Standards*"), this Court's prior decisions, and the hearing panel's recommendation. The *ABA Standards* examine the duty violated, the lawyer's mental state, and the extent of the injury or potential injury and the presence of any aggravating or mitigating circumstances. *ABA Standards,* at 6.

The *ABA Standards* state: "In determining the nature of the ethical duty violated, the standards assume that the most important ethical duties are those obligations which a lawyer owes to clients. These include: (a) the duty of loyalty which (in terms of the Model Rules and Code of Professional Responsibility) includes the duties to: (i) preserve

the property of a client [Rule 1.15/DR9-102]." *ABA Standards* at 6. Respondent's trust account violations in this case constitute an abrogation of his duty to preserve the property of his clients.

ABA Standard 4.12 indicates that suspension is generally appropriate when a lawyer knows or should have known that he is dealing improperly with client property and causes injury or potential injury to a client. In the *Commentary* to Section 4.12 it is noted, "Suspension should be reserved for lawyers who engage in misconduct that does not amount to misappropriation or conversion. The most common cases involve lawyers who commingle client funds with their own, or fail to remit client funds promptly."

Respondent admits that he did not manage the Trust Account in accordance with the Rules and that he did not maintain sufficient records with regard to the Trust Account. Respondent testified that he was unaware of the requirements for properly handling client and personal funds in the Trust Account. In other words, Respondent asserts that the various violations of the safekeeping property rule arose out of ignorance rather than from a selfish motive.

While the record is bereft of any indication that Respondent *intentionally* intended to violate the Rules relating to preservation of client property, that does not mean that Respondent did not know or *should have known* that he was dealing inappropriately with client funds by commingling personal and client funds in the Trust Account. See, for example, *In re Coleman*, 295 S.W.3d 857 (Mo. 2009) where Respondent admitted during a seven month period to regularly depositing settlement proceeds into his IOLTA

account, leaving the earned fee portion of those proceeds in that account to pay personal obligations but argued that it was his belief and understanding that this was not a violation under Rule 4-1.15 because only his funds remained in the trust account. *Id. at 866*. Notwithstanding Coleman's assertion that he did not intend to violate the Rules of Professional Conduct, the Court nevertheless found his misunderstanding of Rule 4-1.15 to be a violation and "knowing conduct". *Id. at 870*.

In this case, Respondent is a seasoned attorney with a long career in the practice of law prior to the overdraft. Over an extended period of time, Respondent violated Rule 4-1.15 on numerous occasions by (i) failing to promptly remove earned fees from the Trust Account, (ii) depositing earned fees into the Trust Account in an amount in excess of what was necessary to pay bank service charges, (iii) paying personal and law firm expenses from the Trust Account using earned fees, (iv) disbursing client funds from the Trust Account prior to said funds being collected and becoming "good funds", (v) paying client expenses on behalf of clients whose funds had not yet been deposited into the Trust Account, and (vi) failing to maintain complete records of his Trust Account transactions.

Even if the various violations admitted and proven in this case arose out of ignorance of the requirements of Rule 4-1.15, Respondent had a clear responsibility to assure compliance with the Rule and should have known that his use, management and supervision of the Trust Account was not in accordance with the Rule. The misconduct meets the standard for suspension under ABA Standard 4.12.

The *ABA Standards* 9.0 provide that once misconduct has been established, as in this case, aggravating and mitigating circumstances may be considered in deciding what sanction to impose. In this case, both aggravating and mitigating circumstances exist. Under *ABA Standard* 9.22, the applicable aggravating factors include: (c) a pattern of misconduct; (d) multiple offenses; and (i) substantial experience in the practice of law. Under *ABA Standard* 9.32, the applicable mitigating factors include: "(a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (e) cooperative attitude toward the disciplinary proceedings; (g) good character and reputation; and (l) remorse.

This Court's decisional law supports an indefinite suspension, stayed, with probation. The facts of Respondent's case are closely aligned with those in *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009). In that case, Coleman frequently paid his own personal expenses using his earned funds left in his IOLTA account. *Id.*at 862. As in this case, Coleman did not spend any of his clients' funds on his own personal expenses, but rather left his own funds in his trust account in violation of the Rules. *Id.* The Court noted that Rule 4-1.15(c) explicitly required separate accounts for client and third-party funds and an attorney's own funds. *Id.* at 866. *Coleman* includes several of the same mitigating factors present in this case, including the fact that Coleman did not intentionally violate the Rules of Professional Conduct and there was no dishonest motive. *Id.* at 877. Despite these mitigating factors, the Court sanctioned Coleman by issuing a stayed suspension with probation. *Id.*

The case at bar does not rise to the level of misconduct found in *In re Farris*, 472 S.W.3d 549 (Mo. 2015), which resulted in a disbarment. In that case, Farris violated Rule 4-1.15(c) by misappropriating client funds. Farris transferred funds belonging to his clients and their creditors from his trust account to his operating account and then spent the money. That misconduct is distinguishable from this case where the Respondent used his own earned fees in making payments from his trust account. Additionally, Farris lied to his clients, to the disciplinary authority and to the Court about paying the clients' creditors, did not disburse funds they were owed, and converted those funds by transferring them to himself. Respondent's misconduct in this case does not rise to the level of severity as that involved in *Farris*.

While any violation of the rules governing trust account and safekeeping property is serious, the record evidence suggests that this is not a matter that warrants disbarment or an actual suspension. Respondent did not misappropriate client funds and his mishandling of trust account transactions was not intentional or willful. The facts of this case suggest that Respondent's misconduct was unintentional and resulted in large part from "…Respondent's longtime, uninformed, practice of retaining earned fees in the trust account and drawing against those fees for personal or client needs." **App. 595.**

The purpose of probation is to educate, rehabilitate, and supervise the attorney in order to enable the attorney to modify his or her professional behavior. *In re Ehler*, 319 S.W.3d 442 (Mo. banc 2010); *In re Coleman*, 295 S.W.3d 857, 871 (Mo. banc 2009). Under the factual circumstances of this case, Informant believes that a period of

probation, during which the OCDC can closely monitor Respondent's trust account activity and provide needed education to Respondent regarding appropriate trust account practices, will sufficiently protect the public and the integrity of the bar.

Combining a period of probation with a stayed suspension in this case is within the applicable sanction guidelines established by the Court and the *ABA Standards for Imposing Lawyer Sanctions*. In addition, a stayed suspension will serve to provide an appropriate mechanism to address any future violations of the safekeeping property rules by Respondent during the period of probation.

CONCLUSION

Respondent committed numerous violations of the safekeeping property rule, Rule 4-1.15, in his use, management and supervision of the Trust Account. Based upon a review and analysis of this Court's decisions, the *ABA Standards*, the record evidence, and the Disciplinary Hearing Panel's decision, Informant submits that an order of indefinite suspension with no leave to apply for reinstatement for a period of six months, with said suspension stayed, and with Respondent placed on probation for one year with the conditions of probation to be those set forth in the Panel's decision, is appropriate.

Respectfully submitted,

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INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2017, a copy of Informant's Brief is being served upon Respondent and 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. Complies with the limitations contained in Rule 84.06(b);
3. Contains 5,465 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

_____

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