

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

**TROY R. PENNY
1424 Washington Avenue, Suite 210
St. Louis, MO 63103**

Respondent.

)
)
)
)
)
)
)

Supreme Court No. SC96248

INFORMANT'S BRIEF

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel

MAIA BRODIE #38442
Special Representative, Division 4
222 S. Central, Suite 708
St. Louis, MO 63105
(314) 726-5155 – Telephone
Email: mbrodie@keefebrodie.com

**ATTORNEYS FOR INFORMANT
CHIEF DISCIPLINARY COUNSEL**

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES..... 2

STATEMENT OF JURISDICTION 3

STATEMENT OF FACTS 4

KEY DATES 4

BACKGROUND..... 5

THE DISCIPLINARY HEARING PANEL’S DECISION..... 7

POINTS RELIED ON

 I. 8

 II..... 9

ARGUMENT

 I. 10

 II..... 13

CONCLUSION 18

CERTIFICATE OF SERVICE..... 19

CERTIFICATION: RULE 84.06(C) 19

TABLE OF AUTHORITIES

CASES

In re Coleman, 295 S.W.3d 857 (Mo. banc 2009) ----- 8, 9, 11, 15, 16, 17
In re Farris, 472 S.W.3d 549 (Mo. 2015)----- 9, 16
In re Kazanas, 96 S.W.3d 803, 807-08 (Mo. banc 2003) ----- 9, 13
In re Littleton, 719 S.W.2d 772, 777 (Mo. banc 1986)----- 9, 13

OTHER AUTHORITIES

ABA Standards for Imposing Lawyer Sanctions ----- 9, 13, 14, 18

RULES

Rule 4-1.15 ----- 8, 10, 11, 12, 14, 16, 18

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

KEY DATES

June 10, 2011 Respondent was issued a cautionary letter from the Office of Chief Disciplinary Counsel (“OCDC”) for overdrafting his attorney trust account.

November 20, 2013 Respondent paid his tax preparer \$3,260.00 using earned fees left in his trust account.

December 2, 2013 Respondent made three payments to the Missouri Department of Revenue using earned fees left in his trust account.

December 9, 2013 Respondent again paid his tax preparer using earned fees left in his trust account.

March 21, 2014 OCDC received another overdraft report from PNC Bank for Respondent’s trust account.

March 31, 2014 OCDC again received an overdraft report from PNC Bank for Respondent’s trust account.

April 8, 2014 A letter was issued to Respondent requesting records from his trust account.

May 8, 2014 Respondent provided copies of records of his trust account statements from January 1, 2013 to April 1, 2014.

BACKGROUND

On or about June 2011, Informant received an overdraft report regarding Respondent's attorney trust account in the name of Penny Law Group ("trust account"). **App. 5.** Informant determined that the overdraft occurred when Respondent failed to deposit a settlement check prior to disbursing the funds for the same. **App. 5.** On June 10, 2011, Respondent received a cautionary letter from Informant regarding the overdraft and encouraged Respondent to attend a CLE regarding ethical management of lawyer trust accounts. **App. 200-01.** Respondent did not participate in the CLE. **App. 141.** On May 4, 2012, Informant sent Respondent another letter which encouraged Respondent to attend the CLE course previously recommended by Informant. **App. 203.** Respondent did not attend the CLE course. **App. 141.**

On March 21, 2014, Informant received another overdraft report from PNC Bank concerning Respondent's trust account; this time indicating the trust account was overdrawn by \$1,461.67. **App. 189.** On March 31, 2014, Informant received yet another overdraft report from PNC Bank reporting that Respondent's trust account was overdrawn by \$540.48. **App. 189.** Informant requested records of the trust account from Respondent for the twelve month period from April 2013 to April 2014. **App. 189.**

On September 29, 2015 Respondent testified before the Disciplinary Hearing Panel regarding the March 2014 overdraft notices. **App. 90-102; 126-163.** Respondent testified those overdrafts were the result of a stopped check sent from an insurance company for damages owed to one of his clients. **App. 95-96.** The insurance company

had sent an initial check in settlement of damages to Respondent which was not received. **App. 96.** Respondent informed the insurance company that the check had never arrived. **App. 96.** The company stopped payment on the initial check and issued another one. **App. 96.** According to his testimony, Respondent eventually received the initial check, which by this time had been cancelled, and deposited it in the trust account assuming that this was the new check issued by the insurance company. **App. 97.** After depositing said check, Respondent disbursed funds from his trust account based on the assumption the check's amount had been deposited to his account. **App. 97.** Respondent did not wait to verify the funds were properly collected by the financial institution before disbursing funds from the account, and as a result the trust account was over drafted. **App. 97.**

The trust account records evidenced several other issues related to Respondent's management of the trust account. The records indicated Respondent had paid his own tax preparer \$3,260 using earned fees left to linger in his trust account. **App. 7.** Additionally, on December 2, 2013, Respondent made three payments (for his own tax obligation) directly from the trust account to the Department of Revenue totaling \$708. **App. 7.** On December 9, 2013, Respondent made another payment of \$6,110 directly from the trust account to his own tax preparer. **App. 7.** Respondent testified these payments were made using his earned funds from his trust account and he did not know he needed to transfer these funds out of the trust account before making payments. **App. 95.**

THE DISCIPLINARY HEARING PANEL'S DECISION

The DHP found Respondent had committed three separate acts of misconduct, each of which is a violation of Rule 4-1.15. First, the panel found Respondent's trust account had two separate overdrafts in violation of subsection (a)(6) of Rule 4-1.15. These overdrafts primarily occurred because of a stop-payment check comprising damages due to one of Respondent's clients. **App. 252.** Second, the panel found Respondent had three direct-check payments to the Department of Revenue to pay for Respondent's owed taxes, in violation of subsection (c) of Rule 4-1.15. **Id.** Finally, the panel found Respondent made two direct-check payments from his trust account to his tax preparer also in violation of subsection (c) of Rule 4-1.15. **Id.**

On November 23, 2016, the Disciplinary Hearing Panel ("DHP") issued its decision recommending that Respondent be publicly reprimanded pursuant to Rule 5.16(d)(1). The DHP recommended no further monitoring or conditions be imposed on Respondent. **App. 255.**

On December 30, 2016, Informant rejected the written decision of the DHP. **App. 256.** On January 5, 2017, Respondent accepted the decision of the DHP. **App. 258.**

POINT RELIED ON

I.

**RESPONDENT VIOLATED THE RULES OF PROFESSIONAL
CONDUCT BY:**

**(A) ALLOWING TWO OVERDRAFTS OF HIS
TRUST ACCOUNT IN VIOLATION OF RULE 4-
1.15(a)(6);**

**(B) MAKING FIVE PAYMENTS OF PERSONAL
EXPENSES FROM HIS TRUST ACCOUNT USING
EARNED FEES IN VIOLATION OF RULE 4-1.15(c).**

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

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

POINT RELIED ON

II.

PREVIOUS MISSOURI SUPREME COURT DECISIONS AND THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST STAYED SUSPENSION WITH PROBATION IS THE APPROPRIATE SANCTION IN THIS CASE WHERE RESPONDENT:

- (A) ALLOWED EARNED FUNDS TO LINGER IN HIS TRUST ACCOUNT;**
- (B) PAID PERSONAL EXPENSES USING EARNED FUNDS FROM THE TRUST ACCOUNT.**

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

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

In re Kazanas, 96 S.W.3d 803, 807-08 (Mo. banc 2003)

In re Littleton, 719 S.W.2d 772, 777 (Mo. banc 1986)

ABA Standards for Imposing Lawyer Sanctions 4.12 (1991 ed.) (p.10)

ARGUMENT

I.

**RESPONDENT VIOLATED THE RULES OF PROFESSIONAL
CONDUCT BY:**

**(A) ALLOWING TWO OVERDRAFTS OF HIS
TRUST ACCOUNT IN VIOLATION OF RULE 4-
1.15(a)(6);**

**(B) MAKING FIVE PAYMENTS OF PERSONAL
EXPENSES FROM HIS TRUST ACCOUNT USING
EARNED FEES IN VIOLATION OF RULE 4-1.15(c).**

Violation of Rule 4-1.15(a)(6): Respondent admits that he twice over drafted his Attorney trust account. **App. 95.** By that conduct, Respondent violated Rule 4-1.15 (Safekeeping Property).

Rule 4-1.15(a)(6) provides in pertinent part that:

No disbursement shall be made based upon a deposit:

(B) 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. Rule 4-1.15 (a)(6)(B).

Respondent testified that the overdrafts were a result of a stop-payment check of funds from an insurance company that were due to one of his clients. **App. 95.** He did not receive the initial check after it was sent by the insurance company. **App. 96.**

Another check was sent in its place and a stop-payment was placed on the initial check. Respondent later received the initial check and deposited it, confusing it for the new check. **App. 96.** He made disbursements from his trust account as he believed the check was deposited correctly. This resulted in overdrafts on his trust account. **App. 97.** Respondent violated Rule 4-1.15(a)(6) when he did not wait the proper amount of time to ensure the funds deposited were actually collected by the financial institution.

Violation of Rule 4-1.15(c): Respondent admits that he used earned funds from his Attorney trust account in order to pay for some of his personal expenses. **App. 95-7.** These expenses included three payments to his tax preparer and two payments of delinquent taxes he owed. **App. 7.** Respondent's conduct violated Rule 4-1.15 (c) (Safekeeping Property).

Rule 4-1.15 provides in pertinent part that:

A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred. Rule 4-1.15(c).

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(c). 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. 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.** Here, Respondent admitted to paying his personal expenses out of his trust account while client funds were in the account, in violation of this Rule 4-1.15 (c). **App. 95-97.**

ARGUMENT

II.

PREVIOUS MISSOURI SUPREME COURT DECISIONS AND THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST STAYED SUSPENSION WITH PROBATION IS THE APPROPRIATE SANCTION IN THIS CASE WHERE RESPONDENT:

- (A) ALLOWED EARNED FUNDS TO LINGER IN HIS TRUST ACCOUNT;**
- (B) PAID PERSONAL EXPENSES USING EARNED FUNDS FROM THE TRUST ACCOUNT.**

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)).

The Court may refer to the American Bar Association’s Standards for Imposing Lawyer Sanctions (1991 ed.) (“ABA Standards”) in determining appropriate discipline. The ABA Standards take into account the duty violated, the lawyer’s mental state, and the extent of the injury or potential injury. Once the baseline discipline is known, the

ABA Standards allow consideration of aggravating and mitigating circumstances. ABA Standards (p.6).

Respondent repeatedly allowed his earned fees to linger in his trust account with his client's funds. Additionally, he paid the Department of Revenue to cover his delinquent taxes using earned funds in his trust account, and paid his personal tax preparer using earned funds left to linger in his trust account. Improper dealing with client property is addressed in ABA Standard 4.1, and Respondent's conduct most closely resembles that addressed in 4.12: "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."

Despite his testimony that he did not know he was incorrectly managing his trust account and improperly dealing with his clients' property, Respondent should have known that he was. Respondent obtained his Missouri Bar license almost fifteen years ago, in 2002, and has been practicing law in the state of Missouri ever since. **App. 60-61.** In addition, Respondent has been a solo practitioner for all but four of the years he has been practicing law. **App. 61.** The proper handling of an Attorney trust account is addressed in Missouri Supreme Court Rule 4-1.15, which is one of the rules tested on the Multistate Professional Responsibility Examination (MPRE) all law school graduates must take prior to receiving a bar license. Respondent not only should have been aware of this Rule from his preparation for the MPRE, but also should have taken the time to understand it based on his many years of managing his own law firm and trust account.

In addition to the clear language of the Rule, Respondent was strongly advised on multiple occasions by OCDC to attend a CLE providing the proper methods of managing a client trust account.

By allowing his earned fees to linger in the trust account, Respondent caused potential injury to his clients by exposing client money to Respondent's creditors. By using his trust account to pay his creditors, including the Department of Revenue, he potentially opened up other clients' funds held in his trust account to those creditors because of a piercing of the trust account veil. After receiving the overdraft reports from PNC Bank in 2014, Ms. Kelly Dillon, a Certified Fraud Examiner for Informant, discussed with Respondent the possibility the trust account veil could be pierced as a result of his conduct and the liabilities it could cause. (**App. 174:24-25**). Despite this warning, Respondent continued to use that trust account until September 2015, when he opened a new one with Bank of America well after this Information was filed. **App. 140.**

Mitigating factors are present in this case. Respondent admitted his wrongdoing, and his payments for personal expenses came from his earned funds which were in the trust account and should have been transferred, rather than coming from his clients' funds. Additionally, while the potential for injury existed, no clients were injured by Respondent's actions.

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. *Coleman*, 295 S.W.3d 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 facts that Coleman did not intentionally try to violate the Supreme Court Rules and there was no dishonest motive. **Id.** at 877. Despite these mitigating factors, Coleman still received the punishment of a one year stayed suspension with probation. **Id.**

Respondent's case does not rise to the level of misconduct found in *In re Farris*, 472 S.W.3d 549 (Mo. 2015) where the discipline was disbarment. In that case, Farris also violated Rule 4-1.15(c). However, Farris transferred funds belonging to his clients and their creditors from his trust account to his operating account and then spent the money. That is far different than the current respondent using his own earned fees in making payments from his trust account. Additionally, Farris lied to his clients about paying off their creditors, did not disburse funds they were owed, and instead converted those funds by transferring them to himself. Further, Farris did not maintain adequate files for the clients involved. In the instant case, Respondent's misconduct does not rise to the level of severity as that in the *Farris* matter.

In the instant case, the DHP recommended Respondent receive a public reprimand pursuant to Rule 5.16(d)(1). **App. 255.** Informant respectfully disagrees with the DHP's recommendation. Respondent should have been cognizant of the mismanagement of his

clients' property and that due to his mismanagement he was opening his clients to the risk of possible injury. Respondent had previously been warned that he was not correctly managing his trust account, and despite these warnings he did not try to change his trust account practices. The factors in Respondent's case coincide with the ABA Standard recommendation for suspension. In addition, a reprimand with no continued monitoring of Respondent is not keeping with other decisions by this Court, and does not protect the public by educating the Respondent about proper trust account usage. Respondent's misconduct is congruous with the conduct in *Coleman*, where the appropriate punishment was a stayed suspension. Therefore, Informant requests Respondent receive a one year stayed suspension with a one year probation term.

CONCLUSION

Respondent committed professional misconduct by violating Rule 4-1.15 (c). Such misconduct rises to the level of suspension according to the suggested discipline of the ABA Standards for Imposing Lawyer Sanctions. The Court's prior decisions also suggest the appropriate punishment is suspension. Due to the lack of actual injury and other mitigating factors; however, Informant respectfully requests the Court impose an indefinite suspension with leave to apply for reinstatement after one year, with the suspension stayed and Respondent placed on a one year probation term.

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel



MAIA BRODIE #38442
Special Representative, Division 4
222 S. Central, Suite 708
St. Louis, MO 63105
(314) 726-5155 – Telephone
Email: mbrodie@keefebrodie.com

**ATTORNEYS FOR INFORMANT
CHIEF DISCIPLINARY COUNSEL**

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March 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.

Troy R. Penny
1424 Washington Avenue, Suite 210
St. Louis, MO 63103
Respondent

Sara Rittman
1709 Missouri Blvd., Suite 2 #314
Jefferson City, MO 65109
Counsel for Respondent



Maia Brodie

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 3,071 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Maia Brodie