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IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
TROY R. PENNY,	)	**Supreme Court # SC96248**
	)	
Bar No. 53921	)	
	)	
Respondent.	)	

RESPONDENT'S BRIEF

Respectfully submitted,

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STATEMENT OF FACTS

Respondent graduated from the Thurgood Marshall School of Law in 2002. (A120). He has not been disciplined previously.

Prior to the hearing, Respondent had purchased the Ethics School webinars from the previous year and had viewed those webinars. He had also attended the Solo and Small Firm Conference and another trust account CLE session. (A142-A145). Respondent's violations of the trust account rule occurred in two unique situations and involved two very specific types of violations.

Checks Written on Trust Account

In the fall of 2013, Respondent was dealing with numerous personal and business issues. His marriage was going sour. He was relocating his office. He was preparing for trial. (A97–A98). He had also been contacted about the failure to file taxes for 2007-2009, with the possibility of suspension of his license to practice law. His failure to file had resulted from two difficulties: 1) lack of cooperation of his law partners in an LLC that had dissolved, and 2) lack of cooperation from his estranged wife related to the returns she had filed for those years. When he received the notice, he hired a company to get returns filed with what information he had, to avoid suspension. (A98-A99).

Prior to moving offices, Respondent printed his own checks using a blank check form and software program that printed all of the account information in addition to the information for the specific check. When Respondent moved offices, Respondent encountered another problem, resulting from the move. The printer at the new location would not work with the software to print the checks. Respondent was unable to print

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checks for his trust account or operating account. However, Respondent had pre-printed some check forms for his trust account.

Respondent hand wrote the payee information and amounts on trust account checks. From November 20 through December 9, 2013, Respondent wrote trust account checks 622, and 625-629 to Scarborough for tax preparation and to the Department of Revenue to pay taxes. Respondent wrote these checks on earned fees that were in the trust account. (A281; A100-A101; Exh. 8 (A218)). Respondent received funds for a couple of clients in September and November 2013. He had not left those funds to linger in the trust account but had left some of the funds for one client in the trust account because of new information that raised concerns about outstanding liens. (A132-A134). Respondent did not wait until he got his check printing issue resolved because the threat of suspension made it a pressing matter. (A135). Informant acknowledges that Respondent used earned fees for these checks.

Informant conducted an examination of Respondent's trust account and summarized it in Exhibit 8. (A216-219). Informant subpoenaed Respondent's bank records from January 1, 2012, through June 10, 2014. Informant only identified these five checks Respondent wrote on the trust account using earned fees. All of these checks were written within a nineteen-day time frame.

Respondent did not know it was improper to leave funds in a trust account but knew it was improper to deposit his own funds in a trust account. That was his understanding of commingling. (A95). Respondent did not leave earned funds to linger in the trust account. He left funds in the trust account that he thought might be needed to

pay unresolved liens. (A132-A134). The Information did not allege that Respondent left earned fees in his trust account for an inappropriate period.

Overdrafts

Respondent settled a personal injury case on or about February 13, 2014. Although the defendant's insurance company had issued a check on February 13, 2014, Respondent had not received it several weeks later. The insurance company representative told Respondent he would cancel the original check and issue a replacement. The insurance company issued a new check on March 5, 2013. A few days later, on March 11, 2013, Respondent received a check, and deposited it in his trust account the next day. Respondent wrote checks on March 13, 2014, based on that deposit. Respondent did not realize that the check he deposited was the original check from February 13th that had finally arrived on March 11th but on which payment had been stopped. (A208-A209; A95-A97).

Respondent now follows the ten-day rule that Kelly Dillon advised. He waits ten days before disbursing funds based on a deposit. (A145-146).

New Trust Account

Once Respondent was aware that OCDC believed he had made his trust account vulnerable, he opened a new trust account that would be free of such concerns. (A161). There is no evidence that Respondent had outstanding debts that creditors could have sought to satisfy using trust account funds. Nevertheless, once Respondent realized that OCDC believed he had made his trust account vulnerable, he opened a new trust account that would be free of such concerns. (A161).

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Procedural History

Informant received notice of the overdraft on April 4, 2014. (A195). Informant filed the Information on January 20, 2015. (A188). The Disciplinary Hearing Panel (DHP) conducted the hearing in this matter on September 29, 2015. On November 23, 2016, the Panel issued its decision with a recommendation that Respondent be issued a Public Reprimand. (A241-A255). Informant rejected the recommendation. (A256). Respondent accepted the recommendation. (A257-A258).

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POINTS RELIED ON

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

(A) ALLOWING TWO OVERDRAFTS OF HIS TRUST ACCOUNT, WITHIN A FEW DAYS TIME, IN VIOLATION OF RULE 4-1.15(a)(6);

(B) MAKING FIVE PAYMENTS OF PERSONAL EXPENSES FROM HIS TRUST ACCOUNT, WITHIN A NINETEEN-DAY PERIOD, USING EARNED FEES IN VIOLATION OF RULE 4-1.15(c).

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

Rule 4-1.15(c)

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POINTS RELIED ON

II.

REPRIMAND OR ADMONITION IS THE APPROPRIATE SANCTION IN THIS CASE WHERE RESPONDENT PAID PERSONAL EXPENSES USING EARNED FUNDS FROM THE TRUST ACCOUNT AND DISBURSED FUNDS BASED ON A DEPOSIT THAT HAD NOT BECOME GOOD FUNDS.

In re Coleman, 295 S.W.2d 857 (Mo. banc 2009)

In re Sheth, SC95382 (March 15, 2016)

Rule 4-1.15(e)

ABA Standards for Imposing Lawyer Sanctions, Standard 4.1

ABA Standards for Imposing Lawyer Sanctions, Standard 2.7

ABA Standards for Imposing Lawyer Sanctions, Definitions

ABA Standards for Imposing Lawyer Sanctions, Standard 9.32

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ARGUMENT

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

(A) ALLOWING TWO OVERDRAFTS OF HIS TRUST ACCOUNT, WITHIN A FEW DAYS TIME, IN VIOLATION OF RULE 4-1.15(a)(6)(B);

(B) MAKING FIVE PAYMENTS OF PERSONAL EXPENSES FROM HIS TRUST ACCOUNT, WITHIN A NINETEEN-DAY PERIOD, USING EARNED FEES IN VIOLATION OF RULE 4-1.15(c).

Overdrafts

Respondent deposited a check in his trust account and disbursed funds based upon that deposit the next day. Respondent did not realize that the check he deposited was the first settlement check that had been issued approximately one month earlier but that had not reached Respondent within a reasonable period. Because the check did not get to Respondent in a timely manner, the issuer of the check had stopped payment on the first check and issued a second check. After waiting so long to receive the check, Respondent disbursed funds based on that check the next day. Because payment on the first check had been stopped, the disbursement checks were not honored and the bank reported two overdrafts to OCDC. Respondent was unaware that he needed to wait an extended period

after his bank showed the funds as available before disbursing on the deposit. He now follows the ten-day rule advised by OCDC's trust account paralegal. (A114-A115). Respondent now understands that Rule 4-1.15(a)(6)(B) requires a waiting period.

Checks Written on Trust Account

Respondent wrote five checks on his trust account from November 20, 2013, through December 9, 2013, based on earned fees in the trust account. Contrary to Informant's assertions, these earned fees had not been left to linger in the trust account. In fact, the Information does not allege that Respondent commingled by leaving earned fees to linger in the trust account.

Respondent acknowledges that writing checks on the trust account for personal or firm expenses is considered commingling. Although Respondent did not know it was improper, the evidence shows that Respondent engaged in this activity only during this limited period, due to unique circumstances he was facing.

Prior to moving offices, Respondent used a program that printed his checks, including the account number, etc. When Respondent moved, the new printer would not work with that program. Respondent was facing an urgent situation. He needed to get his tax returns filed to avoid suspension. His failure to file his taxes previously was the result of lack of cooperation from his former law partners and his estranged wife. In order to have his taxes prepared and paid, he needed to use earned fees that were in his trust account. He had pre-printed some checks for his trust account, with the payee and

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amount left blank. He hand wrote the information for these five checks to pay the tax preparer and the Department of Revenue.

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ARGUMENT

II.

REPRIMAND OR ADMONITION IS THE APPROPRIATE SANCTION IN THIS CASE WHERE RESPONDENT PAID PERSONAL EXPENSES USING EARNED FUNDS FROM THE TRUST ACCOUNT AND DISBURSED FUNDS BASED ON A DEPOSIT THAT HAD NOT BECOME GOOD FUNDS.

Informant argues that Respondent allowed earned funds to linger in his trust account. Informant's arguments regarding funds left to linger must be disregarded because the Information contains no such allegations. Furthermore, such an argument is contrary to the evidence. Respondent testified that the funds were funds that he could have taken as fees but were in the trust account because of potential liens of which he was not aware when he had disbursed funds to the client. He testified that he planned to pay any such liens out of his earned funds, in effect reducing his fee, rather than trying to get funds back from the client. (A132-A133). Rule 4-1.15(e) supports Respondent's conduct in keeping funds in his trust account in which he believed a third party may claim an interest.

MPRE

Informant makes much of the fact that Respondent took the MPRE to get admitted to practice. While the MPRE has its place in the admissions process, it is irrelevant after

that. First, it is a test based on the ABA Model Rules of Professional Conduct, not the Missouri rules. Second, there is no evidence in the record that the MPRE covers the two very specific trust account issues involved in this case. Third, the MPRE has no precedential value. The undersigned has participated in discussions of MPRE questions with legal ethics attorneys from around the country in which there was very significant disagreement as to the correct answer, in an actual practice situation.

Recommendation to Take CLE

OCDC sent a letter to Respondent on June 10, 2011, regarding its conclusions following an overdraft inquiry. OCDC's letter indicated that OCDC concluded that Respondent had "inadvertently" made an error resulting in that overdraft and closed the inquiry without disciplinary action. (A200; A141-A142). In that letter, Informant addressed trust account issues that were irrelevant to Respondent's error. Informant further recommended that Respondent attend a specific CLE on trust accounting. Respondent did not attend the CLE recommended by OCDC because he did not believe he had problems with his trust account management. An inadvertent mistake does not indicate a need for education.

This Court should disregard all of the evidence and all of Informant's arguments on this issue. Informant now seeks to elevate its recommendation to the level of a mandate and use it as an aggravating factor in determining the appropriate discipline. Informant seeks to convert "should" into "must," with no authority to do so. This letter was a unilateral recommendation by OCDC without any finding that Respondent had committed any violation of the Rules of Professional Conduct. While it is reasonable for

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OCDC to consider such prior interactions in determining how to exercise prosecutorial discretion, this type of unilateral action by OCDC should not be considered in a disciplinary proceeding to establish cause for discipline or to affect the level of discipline.

To allow OCDC's unilateral recommendation to be treated in the manner argued by Informant would create an authoritarian regime in which OCDC can essentially unilaterally mandate action by attorneys without due process or oversight. The Chief Disciplinary Counsel, his staff, and the Regional Disciplinary Committees would be anointed as autocrats who could, by saying "should," impose requirements on attorneys in the form of "recommendations." What would limit these "recommendations?" In this case, Informant makes much ado about the decision not to attend one CLE. What would stop OCDC from "recommending" multiple CLE's? What would stop OCDC from "recommending" periodic reporting to OCDC, similar to probation, or even cessation of practice for a period of time?

Even if it were appropriate for this Court to take OCDC's recommendation regarding the CLE into consideration, Informant produced no evidence of the content of this CLE beyond the name. Exhibit 4 indicates that the length of the CLE was 60 minutes (1.2 CLE credits). Respondent's violations fall in two very specific categories. First, he wrote checks on the trust account for personal or firm purposes, using earned funds. Second, he failed to wait long enough after depositing a check in the trust account to be sure it was good funds before disbursing funds based on that deposit. The general title of the recommended CLE is not sufficient to establish that these very specific topics would have been covered. Trust accounting is very complex and the mindset required is

quite foreign for most attorneys. As a result, there are many, many trust account topics that could be covered in such a one hour CLE, without ever touching on the specific issues involved in this case.

Piercing the Veil

Informant apparently argues that Respondent caused potential injury to his clients by continuing to use his trust account from 2014 to 2015, because of any commingling that had occurred. Respondent set up a new trust account in September 2015. There was no evidence that, despite OCDC's other recommendations to Respondent, that OCDC had ever recommended that Respondent open a new trust account. However, once he understood that there was a concern about the continued use of the prior account, he opened a new account, which has benefited him because he has a better ability to monitor his account because he now has online access. (A140-A141).

Informant's evidence about piercing the veil of the trust account is simply that Ms. Dillon knows of cases in which it has occurred. There is no evidence of what defenses were raised in those cases. (A175-A177). Informant has presented no cases that establish the circumstances in which an attorney's creditor could obtain funds from a trust account. Ms. Dillon didn't really know detailed information about the three instances of which she was aware. For all we know, the attorneys' creditors in those cases may not have obtained any funds belonging to clients. Client funds may not have been realistically at risk.

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REPRIMAND OR ADMONITION IS APPROPRIATE DISCIPLINE

Informant argues that this Court should suspend Respondent indefinitely, stay the suspension, and place Respondent on probation for one year. Informant primarily relies on *In re Coleman,* 295 S.W.2d 857 (Mo. banc 2009), for this argument. While *Coleman* is the case that establishes that writing a check out of the trust account on earned fees is commingling, that case has many differences from the instant case when it comes to appropriate discipline. As the DHP found, to discipline Mr. Penny at the same level as the Supreme Court disciplined Mr. Coleman is neither right nor necessary:

> *In Coleman, id*., the attorney was found to have aggravating circumstances consisting of three (3) prior violations, and numerous direct disbursements from his trust account in the case under consideration and ruled by the Court. The Court, in rejecting OCDC's recommendation for disbarment, considered Coleman's behavior as not intentional in reducing the recommended sanctions. Mr. Coleman was suspended with leave to reapply in ·one year; thereafter suspension being stayed and placed on probation.
>
> 26. In the present matter, Respondent had: (a) two (2) overdrafts to his trust account within a few days, all due to a single stop payment check from insurance company which was immediately replaced, and for which his client suffered no loss of benefit of funds; and, (b) five (5)

direct disbursements from his trust account from funds that were fees earned, without first transferring the funds to his operating account.

(A253-A254).

In *In re Sheth*, SC95382 (March 15, 2016), this Court issued a reprimand with requirements for an attorney who had an overdraft on his trust account because he used the funds of other clients to advance costs on a case by writing a check from his trust account, in addition to several other violations. The *Sheth* reprimand Order dated March 15, 2016, found that Sheth violated Rule 4-1.15(a), 4-1.15(b), 4-1.15(f) and 4-8.4(d). That case involved more violations than the instant case and the violations were ongoing. Nevertheless, *Sheth* is much closer than *Coleman*, upon which Informant relies. As in *Sheth,* Respondent's conduct was, at most, negligent.

In addition to considering its prior decisions, this Court frequently looks to the ABA Standards for Imposing Lawyer Sanctions (Standards). *Coleman* at 869. Under those Standards, this Court should consider four questions. First, what duty (or rule) did the attorney violate. Second, what was the attorney's mental state? Third, what was the extent of the actual or potential injury caused by the violation? Fourth, are there any aggravating or mitigating circumstances?

Respondent's conduct violated rules relating to preserving client's property. The Standards generally address the analysis of the first three questions in relation to this type of violation in ABA Standard 4.1**Error! Bookmark not defined.**. (A269). Informant is arguing for a stayed suspension. Before the DHP, Respondent argued for an admonition. Respondent still believes that is the appropriate discipline. However, if an admonition is

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no longer an option, Respondent argues for a reprimand, consistent with the recommendation of the DHP. Unfortunately, the Standards do not include a similar analysis for probation. Therefore, the relevant portions of ABA Standard 4.1 are:

> 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.
>
> 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.
>
> 4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

The Standards address probation. ABA Standard 2.7, Probation states:

> Probation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be imposed alone or in conjunction with a reprimand, an admonition or immediately following a suspension. Probation can also be imposed as a condition of readmission or reinstatement.

The ABA Standards Definitions define "knowledge" and "negligence" as:

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> "Knowledge" 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.
>
> "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

(A266).

Respondent was negligent in handling his trust account. He failed to wait a sufficient period to disburse funds based on a deposited check. No clients were harmed. Although this conduct had the potential to cause clients harm, the harm would have been very short lived. The funds were coming and even the premature disbursements would most likely have been honored but for the mix-up with the settlement checks.

In an urgent situation, Respondent wrote checks, using earned fees, directly from his trust account. No clients were harmed. The potential for harm comes from the speculative risk posed by the commingling. While Respondent does not justify his mistake in taking action that constitutes commingling, there was no viable risk to his clients. Despite Informant's best efforts, Informant was unable to establish that Respondent had any established debts, in the form of judgments, that creditors might seek to satisfy from his trust account. Further, as noted previously, Informant did not establish the criteria under which the risk to the trust account would become viable. This was an isolated circumstance that occurred over nineteen days.

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Based on the fact that Respondent's conduct was negligent and no harm came to Respondent's clients, the appropriate discipline under the Standards is an admonition. There is no rule that prohibits this Court from remanding to the DHP with instructions to issue an admonition. If admonitions are considered discipline, they should be a disciplinary option available to this Court. In the absence of admonition as an option, the appropriate discipline is a reprimand.

MITIGATING FACTORS

Even if a suspension with probation were the appropriate discipline indicated by the Standards, the fourth question is whether there are mitigating or aggravating factors. Many mitigating factors apply in this case. The Standards set forth the mitigating factors in ABA Standard 9.32. The following mitigating factors apply in this case:

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems;

*   *   *   *

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

*   *   *   *

(g) character or reputation;

*   *   *   *

(l) remorse;

(A277).

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Standard 9.32(a). Respondent has no disciplinary history.

Standard 9.32(b). Respondent did not have a selfish or dishonest motive. He wrote the checks on his trust account using earned fees. The overdrafts occurred because he was too prompt in disbursing funds that he believed had been safely deposited into his account.

Standard 9.32(c) provides for mitigation due to personal or emotional problems. Respondent's marriage had gone sour and he had many difficulties with his estranged wife and his former partners as he was trying to file his taxes. By the fall of 2013, these difficulties had culminated in impending suspension by the Supreme Court related to those tax issues. This impending disaster coupled with his technology problems led him to take the shortcut of writing checks on his trust account for personal or firm expenses, using earned fees. His marital problems were significant – his marriage ultimately ended in divorce. (A136).

Standard 9.32(e). Respondent explained that he thought he was very cooperative with disciplinary authorities throughout this proceeding and explained the basis for that belief. (A136-A137).

Standard 9.32(g) relates to character or reputation. Four attorneys testified in support of Respondent's character and reputation.

Michael Walton has known Respondent for 10-12 years as a friend and colleague. He holds Respondent in high esteem and admires Respondent's professionalism. He has never heard a bad word about Respondent with in the legal community or outside the legal community. Respondent is well respected. (A105-A106).

Jerryl Christmas has known Respondent since 1994. Mr. Christmas knows Respondent as a colleague and formerly shared office space with Respondent. He believes Respondent has excellent morals and ethics. He would hire Respondent if he needed representation. He has heard people speak highly of Respondent and has never heard any negative remarks about Respondent. (A108-A111).

Brendan Roediger is a clinical professor at St. Louis University Law School. He knows Respondent as a fellow attorney, including as opposing counsel in some extensive real estate litigation. He testified:

> This was the best experience that I had. We lost, but it was the best experience that I've had in all my years of clinical teaching in terms of having an opposing attorney who was zealous, who was good at what they did, who didn't play games, and who was willing to talk to students about why they made decisions, to talk after trial. So it was a really wonderful experience.

Respondent's reputation in the community is phenomenal among young lawyers. He's on time and he's on top of things. Professor Roediger holds Respondent in the highest regard. (A114-A117).

Derrick King is an attorney and pastor. He went to law school with Respondent and has known him since 1999. He genuinely respects Respondent. He would trust Respondent to represent him, including handling funds. Respondent's reputation in the legal community is stellar. Respondent would hurt himself before he would hurt someone else. (A119-A122).

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Standard 9.32(l). Respondent is remorseful. As the DHP stated: "The Respondent openly expressed to the Panel his substantial remorse for his conduct." He has acknowledged that he should not have written those checks out of the trust account. (A137). Respondent has taken remedial actions on his own. He has set up QuickBooks in his office. He has set up a practice management system. (A137-A139). He has attended the Ethics School webinars as self-study. He has attended the Solo and Small Firm Conference. He also attended another CLE on trust accounts. (A142-A145).

CONCLUSION

The most appropriate discipline in this case would be an admonition. The second most appropriate discipline would be a reprimand, as recommended by the DHP.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify I signed the "original" in accordance with Rule 103.04 and that this 17th day of April, 2017, I have served a true an accurate copy of the foregoing via efiling to: Maia Brodie, Attorney for Informant.

Sara Rittman

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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 4291 words, exclusive of the cover, certificate of service, Rule 84.06 certificate, and signature block, according to Microsoft Word, which is the word processing system used to prepare this brief.

Sara Rittman