IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
ROBERT B. LEGGAT, JR.,	)	**Supreme Court No. SC96271**
112 S. Hanley Road	)	
St. Louis, MO 63105-3418	)	
	)	
Missouri Bar No. 23780	)	
	)	
Respondent.	)	

INFORMANT'S BRIEF

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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 this Court's inherent authority to regulate the practice of law, Supreme Court Rule 5, this Court's common law and Section 484.040 R.S.Mo. 2000.

STATEMENT OF FACTS

Background

Respondent is a principal of the law firm of Ottsen, Leggat & Belz, L.C. (the "Law Firm") along with Timothy Belz ("Belz") and Lamar Ottsen (Ottsen").The Law Firm maintained a trust account at Commerce Bank, account number XXXXXX0259 ("Trust Account"). Respondent, Belz and Leggat are the signatories on the Trust Account and responsible for the maintenance of that account.[1] **App. 199, para. 7; App. 204, para. 7.** The investigation into this matter began as a result of an overdraft in the Trust Account and the subsequent investigation revealed that Respondent had left earned fees in the Trust Account, failed to promptly refund client funds and that Respondent had failed to reconcile, or have others reconcile, the bank statements for the account for approximately a forty month period prior to the overdraft. Respondent has been practicing law for 47 years **App. 173 (l.20-22)** and has not previously been disciplined.

On March 18, 2015, Commerce Bank sent an overdraft notification to the Office of Chief Disciplinary Counsel ("OCDC") informing OCDC that an overdraft had occurred in the Trust Account. **App. 12 (l.14-23); App. 313-315**. This notice was provided in accordance with the amended Missouri Supreme Court Rule 4-1.15.

[1] There are related disciplinary actions arising out of these same facts currently pending before this Court concerning Belz (*In re Timothy Belz*, Supreme Court #SC96268) and Ottsen (*In re Lamar E. Ottsen Jr., Supreme Court #SC*96272).

As a result of OCDC's receipt of the initial overdraft OCDC, through its investigative examiner, Kelly Dillon ("Dillon"), began its investigation and audit of Respondent's Trust Account by writing to Respondent and asking him to produce certain bank records and for an explanation of the overdraft. **App. 316-321.** Respondent was cooperative with OCDC throughout its investigation. **App. 27 (l.17)–App. 28, (l.2).**

Following the completion of OCDC's audit of Respondent's Trust Account with Commerce Bank an Information was filed in this matter on January 4, 2016. The Information asserted, *inter alia*, that Respondent is guilty of professional misconduct as a result of violating: (a) Rule 4-1.15(b) and (c) by failing to timely withdraw earned fees from the Trust Account resulting in commingling of personal funds and client funds in the Trust Account; (b) Rule 4-1.15 (b) and (c) by depositing payments for earned fees into the Trust Account resulting in commingling of personal funds and client funds in the Trust Account; (c) Rule 4-1.15(d) by failing to promptly deliver to client funds that the client was entitled to receive; and (d) Rule 4-1.15(a)(7) by failing to reconcile the Trust Account following receipt of bank statements from Commerce. **App. 196-202.**

A Disciplinary Hearing Panel ("DHP") was appointed and a hearing held on April 21, 2016. **App. 340** Prior to the April 21 DHP hearing Respondent and OCDC stipulated to many of the facts discovered during the course of OCDC's audit of Respondent's Trust Account. **App. 334-338.**

RESPONDENT'S MANAGEMENT OF TRUST ACCOUNT

It is undisputed that the overdraft of the Commerce Bank Trust Account was caused because of a series of unauthorized withdrawals from the trust account by a member of the Law Firm's landlord's cleaning staff. **App. 334.** OCDC's audit of the Trust Account revealed that the unauthorized withdrawals began on August 12, 2014 when the first item was misappropriated from the Trust Account. **App. 30, (l.25)-App. 31, (l.16); App. 292-301.** On March 13, 2015 the last of the unauthorized withdrawals occurred. Between August 2014 and March 2015 approximately $22,500.00 was improperly withdrawn from the Trust Account by the cleaning staff member. **App. 334, para. 3.** The overdraft occurred on March 12, 2015 when Belz attempted to withdraw $1,039.72 of earned fees from the Trust Account and, as a result of the unauthorized withdrawals, less than that amount was present in the Trust Account. **App. 31 (l.8-13); App. 301.** Client funds were in the Trust Account and included in the misappropriation of funds but within a couple of weeks of the overdraft Commerce Bank restored enough money to the account that all of the clients of the Law Firm were made whole. **App. 257 (l. 8-14).**

Prior to October of 2011 Respondent, Belz and Ottsen had authorized an associate of the Law Firm, Thomas Pulliam ("Pulliam"), to handle the day to day administration of the Trust Account **App. 117, (l. 18)-App. 118, (l.17)**. Pulliam left the Law Firm in October of 2011 and at that time the management of the Trust Account was delegated to the Law Firm's office manager. **App. 118, (l. 20)-App. 119, (l.11); App. 121 (l.22-24).** From October of 2011 until the time of discovery of the unauthorized withdrawals in March of

2015, a period of more than 40 months, the Trust Account bank statements were not being reconciled and in fact no one was looking at the Trust Account bank statements. **App. 121, (l.25)-App. 122, (l.7).** The bank statements for the Trust Account reflect little activity in the account prior to October of 2014, when the misappropriation of funds began, to significant activity in the account because of the multiple unauthorized withdrawals of funds thereafter. If Respondent, Belz or Ottsen had been reconciling the Trust Account bank statements the unauthorized withdrawals from the Trust Account that began in October of 2014 and continued for approximately six months, would have been discovered much earlier. **App. 16, (l. 15)-App. 17, (l.8), App. 122, (l.24)-App. 123, (l.8); App. 153, (l.19)-App. 154, (l.9).**

RESPONDENT'S USE OF THE TRUST ACCOUNT

Respondent stipulated to the following instances of earned fees remaining in the Trust Account, and client funds not being promptly refunded, prior to the discovery of the misappropriation:

a) On March 20, 2006, Respondent Leggat deposited a $500 retainer fee into the Trust Account. Leggat subsequently provided legal fees to the client which generated earned fees of $180. The $180 earned fee was not withdrawn from the Trust Account, nor was the remaining portion of the retainer fee refunded to the client, until the overdraft occurred.

b) In February of 2014 Respondent Leggat deposited a client's $500 check into the Trust Account representing the client's prepayment of the estimated cost

of a court bond. The premium of the bond was $100 but the remaining portion of the client funds were not returned to the client until the overdraft occurred.

App. 334-337.

In addition, the OCDC audit of the Trust Account revealed approximately 200 instances of earned fees being deposited into the Trust Account between January of 2013 and March of 2015 by Belz and Ottsen. **App. 25, (l.2)-App. 26, (l.24); App. 308-312; App. 326-331; App. 332-333.**

DISCIPLINARY HEARING PANEL DECISION

On December 14, 2016 the Disciplinary Hearing Panel issued an admonition against Respondent, Belz and Ottsen[2]. **App. 340-341.** On December 28, 2016 OCDC rejected the admonition issued by the Disciplinary Hearing Panel. **App. 342.** Thereafter, the Disciplinary Hearing Panel issued its written decision on January 11, 2017. In that decision the Disciplinary Hearing Panel unanimously concluded that "Respondents failed to timely withdraw earned fees from Respondents' law firm trust account in violation of Rule 4-1.15(b) and (c); Respondents deposited attorneys' fees that had already been earned into the law firm trust account in violation of Rule 4-1.15(b) and (c); Respondents failed to deliver clients' funds to clients within a reasonable time in violation of Rule 4-1.15(d); and,

[2] The proceedings against Respondent, Belz and Ottsen were consolidated before the Disciplinary Hearing Panel.

Respondents failed to personally reconcile or adequately supervise the reconciliation of the law firm trust account within a reasonable time of the law firm's receipt of bank statements for the law firm trust account in violation of Rule 4-1.15(a) and (7)." **App. 344-348.**

Finding that Respondent had violated the Rules of Professional Conduct as charged in the Information, the Disciplinary Hearing Panel recommended that Respondent be publicly reprimanded. **App.348.**

On January 18, 2017, OCDC rejected the Disciplinary Hearing Panel's decision. **App. 349.**

POINT RELIED ON

IN CONSIDERATION OF THE AGGRAVATING AND MITIGATING FACTORS PRESENT, AS WELL AS THE ABA SANCTION STANDARDS, A STAYED SUSPENSION OF RESPONDENT'S LICENSE WITH A PROBATIONARY PERIOD IS APPROPRIATE WHERE RESPONDENT HAS ENGAGED IN MULTIPLE OFFENSES AND VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT AND AT A MINIMUM HAS BEEN GROSSLY NEGLIGENT IN HIS MAINTENANCE, SUPERVISION AND USE OF HIS CLIENT TRUST ACCOUNT.

Supreme Court Rule 4-1.15

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

In re Crews, 159 S.W.2d 355 (Mo. banc 2005)

Florida Bar v. Weiss, 586 So.2d 857 (Fla. 1991)

ARGUMENT

IN CONSIDERATION OF THE AGGRAVATING AND MITIGATING FACTORS PRESENT, AS WELL AS THE ABA SANCTION STANDARDS, A STAYED SUSPENSION OF RESPONDENT'S LICENSE WITH A PROBATIONARY PERIOD IS APPROPRIATE WHERE RESPONDENT HAS ENGAGED IN MULTIPLE OFFENSES AND VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT AND AT A MINIMUM HAS BEEN GROSSLY NEGLIGENT IN HIS MAINTENANCE, SUPERVISION AND USE OF HIS CLIENT TRUST ACCOUNT.

In his Answer to the Information, the Joint Stipulation of Facts submitted in this matter and his testimony before the Disciplinary Hearing Panel Respondent has admitted to facts supporting a finding of violations of Rule 4-1.15 (a)(7), (b), (c) and (d).

There is no dispute that from October of 2011 until March of 2015, a period of approximately forty months, neither Respondent, the other signatories to the Trust Account nor any of his law firm's support staff reviewed or reconciled the Trust Account bank statements. Further, Respondent has admitted to leaving earned fees in the Trust Account, thereby commingling his personal funds with client funds, and failing to promptly return to his client a refund of unearned fees. **App. 334-337.**

It is well established that "The fundamental purpose of an attorney disciplinary proceeding is to 'protect the public and maintain the integrity of the legal profession.'" *In*

re Crews, 159 S.W.3d 355, 360 (Mo. banc 2005). The Court regularly relies on the ABA Standards for Imposing Lawyer Sanctions (the "*ABA Standards")* when determining appropriate sanction to achieve the goals of attorney discipline. *In re Coleman*, 298 S.W.3d 857, 869 (Mo. banc 2009).

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* p.6. Respondents' failure to review and reconcile Trust Account bank statements and their commingling of personal funds with client funds in the Trust Account was an abrogation of their duty to preserve the property of a client.

SANCTION ANALYSIS UNDER THE ABA STANDARDS

Once the violation of the rule of professional conduct has been established an analysis of what level of sanction to impose is appropriate. *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." [3]

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 and for over forty months allowing the bank statements to be left unattended. See, for example, *In re Coleman*, 295 S.W.3d 857 (Mo. 2009) where Coleman 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 and 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*. While Coleman's argument indicated he did not intend to violate the Rules of Professional Conduct the Court

[3] Suspension is typically warranted in cases involving commingling even in the absence of the client suffering a loss because of the potential injury to client's property that occurs. The *Commentary* to ABA Standard 4.12 notes, "Because lawyers who commingle client's funds with their own subject the client's funds to claims of creditors, commingling is a serious violation for which a period of suspension is appropriate even in cases when the client does not suffer a loss".

found his misunderstanding of Rule 4-1.15 to nonetheless 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. Respondent has admitted to facts reflecting that he failed to timely withdraw fees once earned from the Trust Account and to promptly refund to his client unearned fees despite his obligation to do so. In addition, for approximately forty months the bank statements of the Respondent's Trust Account went unviewed and unreconciled. Had Respondent been timely reconciling the Trust Account bank statements, or supervising law firm staff to assure that those statements were being timely reconciled, it is likely that the misappropriation would have been discovered much earlier preventing much of the harm caused and also may have discovered the depositing of earned fees into the Trust Account. This Court has clearly stated that the duty to safeguard and properly distribute trust account funds is non-delegable. Respondent cannot merely rely on a law firm staff member or other third party to satisfy this obligation and Respondent bears the risk of the staff member's non-performance. *In re Farris*, 472 SW3d 549, 560 (Mo. 2015). Respondent knew that he was not supervising the reconciliation of the bank statements, knew that he was not withdrawing fees from the Trust Account once earned and should have known that this conduct was improper.

Even if Respondent's acts and omissions in this case do not rise to the "knows or should have known" standard, suspension is still the appropriate sanction under the ABA analysis. The Commentary to ABA Standard 4.13 notes that "Suspension or disbarment as

applicable under Standards 4.11 or 4.12 and the commentary thereto are appropriate for lawyers who are grossly negligent. For example, lawyers who are grossly negligent in failing to establish proper accounting procedures should be suspended." At a minimum the mostly undisputed facts establish that Respondent was grossly negligent in his use, management and supervision of the Trust Account. [4]

The *ABA Standards* 9.0 indicate 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 Standards* 9.22, the applicable aggravating factors here include: "(c) a pattern of misconduct; (d) multiple offenses ;…(i) substantial experience in the practice of law."

Mitigating factors also are present in our case. Per *ABA Standards* 9.32, mitigating factors include: (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; … (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; …(g) character or reputation…(l) remorse."

Other Courts have imposed a suspension in instances where funds were commingled as a result of the lawyer's misunderstanding or lack of knowledge of the rules relating to

[4] See, for example, *Florida Bar v. Weiss*, 586 So.2d 1051 (Fla. 1991) where the Court found the Respondent to be grossly negligent for his failure to properly supervise the accounting firm managing his trust account.

trust accounts. The New Jersey Court in *In re Gallo*, 568 A.2d 522 (N.J. 1989) suspended a lawyer for three months where the lawyer routinely commingled client funds with his own in a trust account because he thought that practice was appropriate. The Court noted that the commingling was not an intentional violation but that lawyers have a duty to assure that their accounting practices are sufficiently rigorous to prevent misappropriation of trust funds and suspension was appropriate. 568 A.2d at 373. In *In re Konopka*, 596 A.2d 733 (N.J. 1991) the Court imposed a six month suspension for a lawyer violating the rule on safekeeping client's property as well as recordkeeping requirements for his trust account. The Court noted that the lawyer did not knowingly misappropriate funds but his conduct was extremely careless, with a lack of knowledge of the rules relating to maintaining trust accounts. The suspension was imposed although numerous mitigating factors were considered, including a previously unblemished record after twenty years of practice, the absence of financial injury to a client, and the lawyer's quick remedial measures upon discovering his violation, which included the retention of an accounting firm to handle his trust account. 596 A.2d at 238-240.

In cases such as the present case, the sanction of suspension is warranted. In consideration of the aggravating and mitigating factors, probation should be considered in this case and Respondent meets the requirements for eligibility for probation pursuant to

Missouri Supreme Court Rule 5.225(a)(2).[5] Considering all the factors under the *ABA Standards* analysis and prior case law, a stayed suspension with probation is an appropriate discipline in this matter.

[5] Pursuant to Supreme Court Rule 5.225(a)(2) a lawyer is eligible for probation if the lawyer: (A) is unlikely to harm the public during the period of probation and can be adequately supervised; (B) is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; and (C) has not committed acts warranting disbarment.

CONCLUSION

Based upon the facts of this matter Informant requests this Court enter an Order finding that Respondent violated Rule 4-1.15(b) and (c) when he failed to timely withdraw earned fees from the account; violated Rule 4-1.15(d) when they failed to deliver clients' funds to clients within a reasonable time and violated rule 4-1.15(a)(7) when he failed to reconcile or adequately supervise the reconciliation of the law firm trust account within a reasonable time of the Law Firm's receipt of bank statements for the Trust Account.

Based upon the referenced violations, and the presence of aggravating and mitigating factors, Informant requests this Court order a stayed suspension of Respondent's license, with probation, as appropriate discipline in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2017, the Informant's Brief was sent to Respondent and Respondent's counsel via the Missouri Supreme Court e-filing system to:

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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 3,274 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

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Barry J. Klinckhardt