

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES..... 2

STATEMENT OF JURISDICTION 4

STATEMENT OF FACTS 5

POINT RELIED ON

 I..... 14

 II..... 16

ARGUMENT

 I..... 17

 II..... 21

CONCLUSION 30

CERTIFICATE OF SERVICE..... 31

CERTIFICATION: RULE 84.06(C) 31

TABLE OF AUTHORITIES

CASES

Baldrige v. Revenue, 82 S.W.3d 212, 222-223 (Mo. App. 2002)----- 24

In re Adams, 737 S.W.2d 714 (Mo. banc 1987)----- 25

In re Belz, 258 S.W.3d 38 (Mo. banc 2008) ----- 18, 23, 25

In re Coleman, 295 S.W.3d 857 (Mo. banc 2009) ----- 19, 20, 27

In re Crews, 159 S.W.3d 355 (Mo. banc 2005) ----- 18

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010) ----- 19, 22, 23

In re Farris, 472 S.W. 3d 549 (Mo banc 2015) ----- 20, 22, 23, 25

In re Griffey, 873 S.W.2d 600 (Mo. banc 1994)----- 26

In re Haggerty, 661 S.W.2d. 8 (Mo. banc 1983)----- 20

In re Kazanas, 96 S.W.3d 803 (Mo. banc 2003) ----- 26

In re Maier, 642 S.W.2d. 1 (Mo. banc 1984)----- 20

In re Shelhorse, 147 S.W.3d 79 (Mo. banc 2004)----- 18

In re Staab, 785 S.W.2d. 551 (Mo. banc 1990)----- 20

In re Stewart, 342 S.W.3d 307 (Mo. banc 2011)----- 26

OTHER AUTHORITIES

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)----- 22, 26, 27, 28

RULES

Rule 4-1.3 ----- 15, 18, 30

Rule 4-1.4 ----- 15, 18, 30

Rule 4-1.5 ----- 15, 18, 30

Rule 4-1.15 ----- 14, 17, 18, 19, 20, 21, 22, 23, 24, 30
Rule 4-1.16 ----- 30
Rule 4-8.1 ----- 14, 17, 30
Rule 4-8.4 ----- 14, 17, 24, 30

STATEMENT OF JURISDICTION

This action is one in which 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 RSMo 2000.

STATEMENT OF FACTS

In this attorney disciplinary matter, an Information was initiated against Respondent Ryan J. McMillin (“Respondent”) in October 2015. **App. 4.** The Information alleged multiple violations of the Rules of Professional Conduct, Rules 4-1.3 (diligence); 4-1.4 (communication); 4-1.5 (unreasonable fee); 4-1.15 (commingling); 4-1.15(a)(5) (cash withdrawals from trust); 4-1.15(d) (accounting for fee); 4-1.15(f) (failing to keep records); 4-1.16(d) (failing to refund advanced fee); 4-8.1(c) (failing to cooperate); 4-8.4(c) (conduct involving dishonesty); and 4-8.4(d) (conduct prejudicial to the administration of justice). **App. 4.**

The Information was amended in January 2016 to add an additional client complaint and amended again in August 2016 for the same reason. **App. 45.** The matter was heard by a Disciplinary Hearing Panel in August 2016, upon the Second Amended Information. **App. 117.**

On the record at the hearing, Respondent admitted much of the misconduct except for the allegations that he deposited earned fees into his trust account; that he deposited \$29,000.00 from his personal bank account into his trust account in October of 2014; that he failed to cooperate with The Office of Chief Disciplinary Counsel (OCDC); that his failure to produce trust account records hampered the audit of his accounts; that he failed to act diligently or communicate with a client in a domestic case and charged a fee that was unreasonable; that he act dishonestly or misappropriated funds belonging to clients or third parties from his trust account and that his conduct was prejudicial to the administration of justice. **App. 27, 58, 96, 107.** At various times between 2012 and 2015, OCDC received

six complaints on Respondent which formed the basis for the original Information filed in October of 2015. **App. 4.**

In May and June of 2013 OCDC received notices from First Bank of Missouri that Respondent's trust account was overdrawn. **App 306, 341.** On May 6, 2013, OCDC commenced an investigation requesting an explanation, bank records and supporting documentation. **App 341, 58.** Following a second request, Respondent provided his trust account bank statements for February, March, April and May of 2013. **App. 306.** Following receipt of additional overdraft notices in June of 2013, OCDC requested Respondent appear in Jefferson City for a meeting with the investigative examiner and staff counsel. **App. 306.** OCDC had concerns with regard to his trust accounting practices but the biggest concern was the appearance of a gambling addiction based on the transaction history in his accounts. **App. 130.**

Respondent agreed to participate in a diversionary program offered to him by OCDC in September 2013. **App. 100.** The diversion period was to last for twelve months, beginning September 12, 2013. **App. 100.** The diversion agreement executed by Respondent contained standard terms, including oversight by OCDC, additional CLE requirements, malpractice insurance, and implementation of systems to improve case management, calendaring, and client communications. Among other goals, the purpose of the diversion was to "educate Respondent on the proper use of a trust account and monitor Respondent's use of the same to establish that Respondent is compliant with Missouri Supreme Court Rule 4-1.15". **App. 100.** OCDC believed the Respondent needed to see a professional to address his addiction issues and required that he get an evaluation.

App.100.

Respondent failed to provide a quarterly report of his financial information to the OCDC in December 2013 and failed to respond to inquiries from the division monitor at OCDC. **App. 306. (TR. 17). (TR. 157).** In January, the diversion monitor requested the Respondent return to OCDC for a meeting to discuss the demand and his failure to comply with the terms of the agreement. **App. 306. (TR. 36-37).** In May of 2014, Respondent's trust account was overdrawn again. **App. 345.** OCDC commenced another investigation by requesting an explanation and requesting supporting documentation from Respondent. **App. 345.** Respondent provided four months of trust account bank statements. **App. 422** Respondent's failure to comply with the terms and conditions of his diversion resulted in the termination of the agreement on August 28, 2014 as provided in Rule 5.105(h). **App. 306, 107.**

Following the termination of his diversion agreement Respondent provided additional bank records to OCDC and claimed he had deposited sufficient funds to correct the overdraft. **App. 426.** In May, July, September, November and December of 2014, OCDC received additional notices from First Bank of Missouri that Respondent's trust account was overdrawn. **App. 345, 349, 351.** Respondent failed to produce his trust account records to the OCDC and/or failed to maintain proper trust account records resulting in an audit of his account. **App. 356,138.**

Acting in her capacity as an investigator and paralegal for the OCDC, Kelly Dillon prepared a spreadsheet of the records gathered for a two-year period. **App. 356, 138.** During this period, Respondent used three different trust accounts at First Bank of

Missouri, (“First Bank”), Citizens Bank and Trust, (“Citizens”), and Farmers Bank and Trust, (“Farmers”). **App. 356, 396, 398, 151.** Respondent had a high-volume practice and the lack of records made it difficult for the examiner. **App. 133, 138.** Upon review of the information, Ms. Dillon found many transactions that indicated the accounts were being used inappropriately by commingling personal funds and client funds, making premature withdrawals for earned fees and by making several cash withdrawals from the trust account. **App. 356, 396, 398, 234.** On February 4, 2014, Respondent paid his enrollment fees from his trust account which caused the account to be overdrawn. **App. 356, 142.** Respondent had failed to keep accurate trust account records, including client ledgers, billing statements and receipts. **App. 107.** During this period, Respondent had several judgments outstanding against him for credit card debts, tax liens, and a small claims judgment from a client potentially subjecting the trust account to garnishments by creditors. **App. 399, 154, 156, 158, 237.**

From January 2012, through January 2013, Respondent made numerous cash or internet withdrawals from his First Bank trust account totaling \$150,315.00. **App. 398.** Respondent made cash and ATM withdrawals from his Farmers trust account in the amount of \$94,018.07. **App. 398.** From January 2015, until June 2015, Respondent made cash and ATM withdrawals from his Citizen’s trust account totaling \$12,195.00. **App. 398.** From January 2012, through January 2013, Respondent made numerous cash or internet withdrawals from his trust accounts totaling \$244,362.07. **App. 398, 144, 151, 162.** A number of withdrawal transactions for cash occurred at ATM’s located near gambling facilities. **App.147.**

In October of 2014, Respondent deposited \$26,900.00 from his operating account to his trust account. **App. 356, 165.** On January 9th of 2015, Respondent transferred \$25,000.00 from his personal account to his trust account. **App. 387.** On January 5, 2014, Respondent transferred \$25,000.00 from his personal account to his trust account. **App. 387, 165.**

Respondent admitted his trust account practices were “Awful, I mean really horrible.” **App. 253.** Respondent admitted that he commingled personal funds and client funds in his trust account in violation of Rule 4-1.15. **App. 107, 58.** Respondent admitted that he made premature withdrawals from his trust account for earned fees and failed to hold funds belonging to his clients separate from his own in violation of Rule 4-1.15. **App. 107, 58.** Respondent admitted he made several cash withdrawals from his trust account in violation of Rule 4-1.15(a)(5). **App. 107, 58.** Respondent further admitted that he violated Rule 4-1.15(f) by failing to keep accurate trust account records including client ledgers, billing statement and receipts. Respondent admitted that he failed to cooperate with OCDC by failing to respond to their lawful demands for information in connection with its investigation and therefore violated Rule 4-8.1(c). **App. 107, 58.**

In addition to the complaints arising out of Respondent’s trust account issues the disciplinary hearing also involved complaints from several clients. **App. 107, 203-231.**

Respondent was hired by Natalie Toney Galate to handle a domestic relations case in February, 2012. **App. 107, 58.** She paid an advanced fee of \$1,500.00 on April 19, 2012. In February of 2013, Respondent advised Ms. Galate that he needed an additional \$1,500.00 to finish the case and she paid the requested advanced fee. **App. 107, 58.**

Thereafter, Respondent failed to diligently pursue her case or respond to her requests for information about her case. **App. 205, 244.** Respondent would often communicate with her by text messages many of which were sent late at night and contained inappropriate comments like “Hot Stuff” and “Baby”. **App. 107, 58, 245.** Respondent scheduled meetings on several occasions but would then cancel. **App. 205.** On June 12, 2013, Respondent scheduled a meeting but would not come out of his office. **App. 205.** Ms. Galate terminated his services and hired another attorney to complete her case. **App. 207-209.**

In December of 2013, Jill Havenhill Logan hired Respondent to handle a domestic relations case and paid an advanced fee of \$1000.00. **App. 107, 58, 293.** Over the next several months Respondent did not diligently pursue her case or have any contact with his client. On April 1, 2014, she terminated his services. On June 11, 2014, she filed a complaint with OCDC. **App. 107, 58, 295.** Respondent failed to refund his client’s advanced fee to her. Respondent claims he gave it to her brother. **App. 58, 283, 286.**

Respondent was hired by Charles E. White to handle a domestic relations case in February of 2013. **App. 417, 107.** Mr. White paid an advanced fee of \$1000.00 in February and then a second payment of \$2000.00 in March of 2013. **App. 417, 107, 213-217.** Over the next several months Respondent had little to no communication with this client. **App. 417, 107, 213-217, 220.** Mr. White discovered via Case.Net that his case was dismissed by the court on June 4, 2014. **App. 471, 215.** On September 15, 2014, Respondent met with Mr. White and said that he would refile the case. **App. 417.** On November 11, 2014, Mr. White was provided with a copy of a new responsive pleading. **App. 417.** It contained

several errors. **App. 417.** On March 18, 2015, Respondent advised Mr. White by text message that he was going to speak with the judge and get a court date. **App. 417.** On May 1, 2015, Mr. White filed a complaint with the Office of Chief Disciplinary Counsel. **App. 417, 216.** The Office of Chief Disciplinary Counsel requested a response from Respondent on June 3, 2015 and again on July 9, 2015. Respondent did not respond to either request. **App. 422.**

Respondent was hired by Mr. Larry Oliphant to handle a domestic relations case in Ray County in February of 2014, and received an advanced fee of \$750.00. **App. 107, 222.** The matter was set for hearing on July 4, 2015, and Respondent did not appear in court. **App. 107.** Over the next several months, Mr. Oliphant was unsuccessful in his attempts to reach Respondent by telephone and text messages. **App. 223.** On or about January 8, 2015, he sent a letter advising the court of his failed attempts to reach Respondent. **App. 223.** Respondent called Mr. Oliphant on a Sunday on or after January 9, 2015, and was verbally abusive and used profane language. **App. 223.**

Respondent was hired by Mr. Harold Jordan to handle a traffic case in North Kansas City Municipal Court in June of 2013. **App. 107, 226.** Mr. Jordan paid an advanced fee of \$350.00. **App. 107.** The matter was set for hearing in June of 2013 and Respondent did not appear in court and a warrant was issued for Mr. Jordan's arrest. **App. 107.** On August 3, 2015, Mr. Jordan was stopped and detained in Buckner, Missouri due to the outstanding warrant from North Kansas City, Missouri. He was required to post a bond of \$400.00 for his release from custody. **App. 107, 229.** Respondent admitted that he did not remember the case "probably because of the drinking and drug use or whatever". **App. 250, 258.** He

admitted he failed to act with reasonable diligence and promptness in representing Mr. Jordan in violation of Rule 4-1.3 and that he failed to keep Mr. Jordan reasonably informed about the status of his matter in violation of Rule 4-1.4. **App. 58, 107.**

In mitigation of claims of misconduct against him, Respondent noted the absence of any prior disciplinary record. **App. 58.** He also raised personal or emotional problems, physical disability, remorse and chemical dependency or drug abuse, which may constitute a mental disorder as that term is used in Rule 5.285. **App. 58, 254.** Respondent argued that the mental disorder impaired his judgment, cognitive ability, or volitional or emotional functioning in relation to performance of professional duties and commitments. **App. 58.** Respondent claimed to have a stimulant use disorder arising from the use of cocaine beginning in 2013, as well as an alcohol use disorder. **App. 58, 255.** He claimed that he had stopped using cocaine and had stopped drinking alcohol and was properly taking care of matters entrusted to him by clients. **App. 58.**

At the hearing before the DHP, Respondent offered the testimony of Marilyn Hutchison, PhD, a licensed psychologist, relating to this issue. **App. 166.** Informant's objection to this evidence was overruled by the panel. **App. 166.** The panel examined the evidence and found that Respondent complied with all necessary foundational requirements to permit them to consider the disorder in mitigation of his conduct. **App. 422.** Dr. Hutchison testified that Respondent had a history of alcohol and substance abuse issues and major depression. **App. 175-176.** She believed these conditions were completely responsible for Respondent's professional misconduct. **App. 180.** A written decision of the Disciplinary Hearing Panel was issued in December 2016, sustaining the evidence on all

matters presented at the hearing except as to Count VIII.¹ **App. 422.** The panel recommended Respondent be suspended from the practice of law, with no leave to apply for reinstatement for one year. **App. 422.** The panel found Respondent's conduct "appalling and troubling" but found his problems to be the product of "addictive self-destructive, chemical abuse and gambling." **App. 422.** The panel noted Respondent's "frank" testimony and the fact that he had "been sober since approximately the end of July or first of August, 2015." **App. 422.**

The Disciplinary Hearing Panel determined that Respondent violated Rule 4-1.15 in both commingling personal funds in his client trust account and making premature withdrawals from the trust account for earned fees. **App. 422.** It also found Respondent violated Rule 4-8.1(c) by failing to respond to lawful demands for information from a disciplinary authority. **App. 422.** It found violations of Rules 4-1.3, 4-1.4 and 4-1.5 in connection with several client matters. It did not conclude Respondent had violated Rules 4-8.4(c) or 4-8.4(d).

Informant notified the Missouri Supreme Court Advisory Committee by letter dated January 4, 2017, of its rejection of the written decision of the Disciplinary Hearing Panel. **App. 436.**

¹ Count VIII involved a municipal court case in Gladstone, Missouri and the complainant failed to appear to offer testimony at the hearing.

POINT RELIED ON

I.

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE THE PREPONDERANCE OF EVIDENCE, INCLUDING SEVERAL ADMISSIONS, ESTABLISHES THAT RESPONDENT IS GUILTY OF NUMEROUS INSTANCES OF PROFESSIONAL MISCONDUCT, AS FOLLOWS:

(A) RESPONDENT COMMINGLED PERSONAL FUNDS AND CLIENT FUNDS IN HIS TRUST ACCOUNT; MADE CASH WITHDRAWALS FROM HIS TRUST ACCOUNT AND FAILED TO KEEP ACCURATE TRUST ACCOUNT RECORDS IN VIOLATION OF RULE 4-1.15;

(B) RESPONDENT VIOLATED RULES 4-8.4(c) AND 4-8.4(d) BY INTENTIONALLY MISAPPROPRIATING ADVANCED FEES WHICH IS DISHONEST AND DAMAGES THE INTEGRITY OF THE PROFESSION;

(C) RESPONDENT VIOLATED RULE 4-8.1(c) BY FAILING TO RESPOND TO LAWFUL DEMANDS FOR INFORMATION FROM THE OFFICE OF CHIEF

DISCIPLINARY COUNSEL; AND

(D) RESPONDENT VIOLATED RULES 4-1.3, 4-1.4 AND 4-1.5 IN HIS REPRESENTATION OF SEVERAL CLIENTS BY FAILING TO DILIGENTLY PURSUE THE CASES, COMMUNICATE AND THEREFORE EARN THE FEES THAT HAD BEEN ADVANCED.

POINT RELIED ON

II.

**IN ORDER TO PROTECT THE PUBLIC AND
MAINTAIN THE INTEGRITY OF THE LEGAL
PROFESSION, THE COURT SHOULD REMOVE
RESPONDENT FROM THE PRACTICE OF LAW BY A
THREE-YEAR SUSPENSION OR DISBARMENT.**

ARGUMENT

I.

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE THE PREPONDERANCE OF EVIDENCE, INCLUDING SEVERAL ADMISSIONS, ESTABLISHES THAT RESPONDENT IS GUILTY OF NUMEROUS INSTANCES OF PROFESSIONAL MISCONDUCT, AS FOLLOWS:

(A) RESPONDENT COMMINGLED PERSONAL FUNDS AND CLIENT FUNDS IN HIS TRUST ACCOUNT; MADE CASH WITHDRAWALS FROM HIS TRUST ACCOUNT AND FAILED TO KEEP ACCURATE TRUST ACCOUNT RECORDS IN VIOLATION OF RULE 4-1.15;

(B) RESPONDENT VIOLATED RULES 4-8.4(c) AND 4-8.4(d) BY INTENTIONALLY MISAPPROPRIATING ADVANCED FEES WHICH IS DISHONEST AND DAMAGES THE INTEGRITY OF THE PROFESSION;

(C) RESPONDENT VIOLATED RULES 4-8.1(c) BY FAILING TO RESPOND TO LAWFUL DEMANDS FOR INFORMATION FROM THE OFFICE OF CHIEF

DISCIPLINARY COUNSEL; AND

(D) RESPONDENT VIOLATED RULES 4-1.3, 4-1.4 AND 4-1.5 IN HIS REPRESENTATION OF SEVERAL CLIENTS BY FAILING TO DILIGENTLY PURSUE THE CASES, COMMUNICATE AND THEREFORE EARN THE FEES THAT HAD BEEN ADVANCED.

A disciplinary hearing panel's recommendation is advisory in nature *In re Belz*, 258 S.W.3d 38, 41 (Mo. banc 2008). This Court conducts a de novo review of the evidence and reaches its own conclusions of law. *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). Discipline will not be imposed unless professional misconduct is proven by a preponderance of the evidence. *Id.* Violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004).

Comment 1 of Missouri Supreme Court Rule 4-1.15 states that "all property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts." Rule 4-1.15, Comment [1]. The Rule in effect of the applicable time period also requires that complete records of the client trust account be maintained and preserved for a period of a least five years, and an accounting must be completed promptly on a client's request. Rule 4-1.15(c).

An account registered as a client trust account will be found to contain commingled funds if the attorney uses it to both hold funds related to client settlements or attorney fees

while making expenditures that are personal in nature in the utilization of those funds. *See In re Ehler*, 319 S.W.3d 442, 450 (Mo. banc 2010). It is a violation of Rule 4-1.15(c) to use a trust account to pay personal expenses even when none of the funds remaining in the account are being held for a client's benefit and are instead the fees already earned by the attorney for the services he had performed. *See In re Coleman*, 295 S.W.3d 857, 866 (Mo. banc 2009). In *Coleman*, an attorney who had disbursed all client trust funds from a trust account and had subsequently used the remainder of the funds in the account to pay personal expense erroneously argued that he was not in violation of the Rule because the funds used were not client funds. *Id.*

In this case Respondent committed a number of serious violations with the most egregious being the trust account violations.

Here, the Respondent does not contest the findings from the panel that he improperly used the client trust account and commingled personal funds and client funds. Like the attorneys in both *Ehler* and *Coleman*, the Respondent has used a client trust account to issue personal funds not yet earned by making premature withdrawals and thus failing to hold property of his clients separate from his own.

In another Missouri disciplinary proceeding, an attorney who had three prior incidents of discipline, appeared in front of the disciplinary hearing panel regarding allegations of commingling trust funds belonging to clients in violation of Rule 4-1.15(c). *In re Coleman*, 295 S.W.3d. 857 (Mo. banc 2009). In *Coleman*, the attorney argued that his conduct did not violate the Rules because, even though he paid personal obligations from the trust account, the funds which remained in the account belonged to him. *Id.* at

866. The court noted that, while it may be true that Coleman did not misuse funds or convert any client funds, he did use his IOLTA account for personal use which is strictly prohibited. *Id.*

An attorney who failed to provide financial records or provided tardy and incomplete responses was disbarred. *In re Farris*, 472 S.W.3d. 549 (Mo. banc 2015). Rule 4-1.15(d) requires each attorney to keep detailed records showing, among many other things, the source of every deposit to and the disbursement from that attorney's trust account. *Id.* These records must also show, for each separate client or trust beneficiary, the source of all funds deposited, the identity of the client or third person for whom the attorney is holding those funds, and the date, payee and purpose of each disbursement of those funds. *Id.*

The privilege to practice law is only accorded to those who demonstrate the requisite mental attainment and moral character. *In re Haggerty*, 661 S.W.2d. 8, 10. (Mo. banc 1983). Discipline is intended to protect the public and maintain and preserve the integrity of the legal profession. *In re Maier*, 642 S.W.2d. 1, 2 (Mo. banc 1984). The discipline must be designed to correct any antisocial tendency on the part of the attorney as well as to deter others who might tend to engage in similar violations. *In re Staab*, 785 S.W.2d. 551, 554-55 (Mo. banc 1990).

ARGUMENT

II.

IN ORDER TO PROTECT THE PUBLIC AND MAINTAIN THE INTEGRITY OF THE LEGAL PROFESSION, THE COURT SHOULD REMOVE RESPONDENT FROM THE PRACTICE OF LAW BY EITHER A THREE-YEAR SUSPENSION OR DISBARMENT.

The most significant issue presented in this disciplinary matter involves the imposition of an appropriate disciplinary sanction. Informant can state with confidence that the circumstances presented here mandate that Respondent be removed from the practice of law without delay. Respondent is a threat to the public. The failure of Respondent to comply with his diversion agreement, his ongoing misuse of his trust account, his admitted drug and alcohol addiction considered together with the deficiencies in the representation of several clients involve a combination of lack of diligence and lack of communication. That is enough of a sample size to suggest that there is a palpable problem with the way that Respondent handles client matters.

The evidence also points out troubling shortcomings in Respondent's law practice. Respondent did not have a proper regard for recordkeeping. It is expected that lawyers retain documents, files and information for the client's benefit. A lawyer should be able to organize and manage information related to the law practice, including records created and stored electronically. Financial record-keeping of trust funds is required by Rule 4-1.15(f).

Respondent squandered his diversion opportunity in 2013. Significantly, Respondent did not follow through on the agreement to provide quarterly reports. Respondent's ongoing involvement with OCDC for nearly two years was not sufficient to eliminate additional misconduct or even ensure compliance with basic requirements. There is little hope that a short suspension with stringent reinstatement requirements would produce a more favorable outcome. Even with dedicated staff at OCDC, the ability to adequately supervise Respondent during a period of probation or stayed suspension is a tall order.

Even though the diversion agreement itself is not prior discipline, a comparison of the agreement to the findings of actual misconduct in this case does show an upward trajectory in the seriousness of the misconduct. The diversion was based upon law practice management issues and trust account issues. The current disciplinary proceeding presents far more troubling issues with respect to Respondent's use of his trust account.

Disbarment is the presumptively appropriate discipline for misappropriating client funds. *In re Farris*, 472 S.W.3d 549. (Mo. banc 2015) See ABA standards 4.11 "Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client." Respondent caused injury to several of his clients and exposed his trust account to creditors causing potential injury to the volume of clients he agreed to represent during this period.

An attorney who is found to have violated both 4-1.15(c) and 4-1.15(i) may be disbarred. *In re Ehler*, 319 S.W.3d 442, 453 (Mo banc 2010). In *Ehler*, an attorney that received a prior stayed suspension involving trust account violations had apparently

complied with the probation requirements and had been reinstated. *Id.* at 445. However, new complaints arose including trust account violations and the attorney was later disbarred. *Id.* at 452. The Court noted that the disbarment came about, not only as a result of several prior incidents for which the attorney was cited regarding the misuse and mismanagement of a client trust account, but because the attorney's clients were obviously and significantly harmed by the attorney's conduct, thus resulting in a need to protect the public from the future practice of the attorney. *Id.* at 451-52.

Disbarment constitutes the "baseline sanction" for misappropriation cases. *In re Belz*, 258 S.W.3d at 43. Attorneys today hold just as much (or more) money in trust for their clients and others as in the past. The court rules requiring attorneys to safeguard such property is as stringent now as ever before. *In re Farris*, 472 S.W.3d at 560. There is no room in the profession for attorneys who take property held in trust for others and use it as their own. *Id.*

Mitigation factors do not constitute a defense to a finding of misconduct. *Id.* But, these factors may justify a downward departure from the presumptive proper discipline. *In re Ehler*, 319 S.W. 3d at 452. Here Respondent argues his mental health condition at the time of the misconduct justifies a downward departure. Respondent's claim of his mental state cannot mitigate his knowing and his willful participation in dangerous behavior including alcohol and substance abuse. His gambling addiction put client funds at risk. Early withdrawal of advanced fees is clearly dishonest and misappropriation. This is more than a case of commingling funds. Respondent's admitted failure to comply with Rule 4-1.15(f) by failing to keep accurate trust account records including client ledgers and

receipts creates an adverse inference that he has misappropriated and stolen client funds. *Baldrige v. Revenue*, 82 S.W.3d 212, 222-223 (Mo. App. 2002);

The Court should reject Respondent's argument that his mental health is a mitigating factor weighing against disbarment. Respondent's mental health condition wasn't sufficient to mitigate his conduct to a one-year suspension. He was misappropriating client funds and using them to support his addictive behavior for his own personal satisfaction.

Rule 5.285 was adopted by the Court in February 2010 for the purpose of considering mental disorders in determining discipline and reinstatement. The rule requires two factors be established by any person raising a mitigation claim before the Court will consider it. The Respondent must establish the ability to manage his mental disorder for a meaningful and sustained period of time and that recurrence of his misconduct is unlikely. Respondent admits he has only been sober since approximately the end of July or first of August, 2015. It cannot be said that his condition is in remission to the point that it will protect the public and prevent misconduct in the future.

The panel's recommendation focuses on Respondent's violations of Rule 4-1.15 but this Court should also find he violated Rule 4-8.4(c) and 4-8.4(d) by accepting advanced fees from clients and then immediately withdrawing those funds to support an alcohol, drug and gambling addiction. This conduct is dishonest. Thereafter refusing to perform the work and refusing to refund the advanced fee on request is dishonest. Misappropriation of these funds is a breach of one of the fundamental duties of this profession. The conduct causes injury to the client and the Bar as a whole which relies intrinsically on the trust that clients

are willing to place in their lawyers. Few acts of misconduct have the capacity to erode that trust more quickly and thoroughly than the conversion of a client's funds to one's own use. *In re Belz* 258 S.W.3d at 46-47. *In re Farris*, 472 S.W. 3d 549 (Mo banc 2015). Illegal conduct including the use of controlled substances is an aggravating factor the Court must consider as a reason not to depart from the presumptive discipline of disbarment in this case.

This Court has previously ruled that lawyers do not qualify for probation when they misappropriate client funds, even if they successfully recover from a disease that caused the misappropriation. *In re Adams*, 737 S.W.2d 714 (Mo. banc 1987). Attorney Adams had been addicted to cocaine. In disbaring Adams, the Court announced: "Respondent's success in his battle to defeat the scourge of cocaine may be an issue for consideration should he apply for readmission. Having harmed his client, and brought reproach to his profession, however, respondent cannot invoke Rule 16 to save him from the just fruits of his misdeeds". *Id.* at 718.

Clients seek the advice of attorneys and rely on their expertise. The client entrusts the lawyer with the handling of their hard-earned funds. The client permits the request for advanced fees because of their trust in the particular lawyer's integrity and their faith in the profession as a whole. No other explanation can account for client's customary willingness to entrust their funds to relative strangers simply because they are lawyers. *Farris Id.*

The Court has previously held that misappropriation of client funds "most often" warrants disbarment. See *In re Belz*, *supra*. This Court has also recognized the possibility that "in a rare but appropriate case a sanction other than disbarment may be appropriate for

intentional misappropriation where mental illness is known to have played a role in the misconduct and other substantial mitigating factors are also present.” *Id.* No other substantial mitigating factors are present in this case.

The purpose of imposing discipline is not to punish the attorney but to protect the public and maintain the integrity of the legal profession. *In re Stewart*, 342 S.W.3d 307, 308 (Mo. banc 2011). "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." *In re Kazanas*, 96 S.W.3d 803, 807-08 (Mo. banc 2003). In the present case, both purposes of attorney discipline will be served if Respondent is removed from the practice of law.

In determining a sanction for attorney misconduct, the Missouri Supreme Court historically relies on three sources. First and foremost, the Court applies its own standards to maintain consistency, fairness, and ultimately, to accomplish the well-established goals of protecting the public and maintaining the integrity of the profession.

For additional guidance, the Court frequently relies on the *ABA Standards for Imposing Lawyer Sanctions*. Those guidelines recommend baseline discipline for specific acts of misconduct, taking into consideration the duty violated, the lawyer’s mental state (level of intent), and the extent of injury or potential injury. *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994). Once the baseline guideline is known, the ABA Standards allow consideration of aggravating and mitigating circumstances. *ABA Standards for Imposing Lawyer Sanctions*. The Court also considers the recommendation of the Disciplinary Hearing Panel that heard the case.

The ABA Standards for Imposing Lawyer Sanctions consider the following primary questions:

- (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?);
 - (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?);
 - (3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?);
- and
- (4) Are there any aggravating or mitigating circumstances?

ABA Standards: Theoretical Framework (p. 5).

Application of the ABA Standards requires the user to first analyze the first three questions and then, only after a baseline sanction is apparent, to consider aggravating and mitigating circumstances. ABA Standards, Preface: Methodology (p. 3). The drafters intentionally rejected an approach, however, that focused only on a lawyer's intent. Instead, they recognized that sanctioning courts must consider not only the attorney's intent and damage to his client, but also the damage to the public, the legal system and the profession. ABA Standards Preface: Methodology (p.3). When this Court finds an attorney has committed multiple acts of misconduct, "the ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among the violations." *In re Coleman*, 295 S.W.3d 857, 870 (Mo. banc 2009). In the present case, the most serious instance of misconduct involves the Respondent's violations of duties

owed to his clients by failing to preserve and protect their property.

The potentially applicable ABA Standards are set forth below:

4.1 Failure to preserve the client's property

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failures to preserve client property.

4.11 Disbarment is generally appropriate when a lawyer, knowingly converts client property and causes injury or potential injury to a client.

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.

Ultimately it is up to this Court to determine the most appropriate sanction. In so doing, the Court should consider the following aggravating circumstances.

9.22 Factors which may be considered in aggravation. Aggravating factors include:

- (a) dishonest or selfish motive

Respondent's repeated abuse of his clients by collecting advance fees, completing little or no work and then rewarding himself with early withdrawals of advanced fees to support his substance abuse and gambling addiction is dishonest and selfish conduct.

- (b) a pattern of misconduct

The lack of diligence, communication and competence in handling legal matters for several clients and the lack of communication and abandonment of the clients is clearly a pattern.

(c) multiple offenses

The current disciplinary proceeding involves multiple offenses; trust account violations; lack of diligence, competence and communication; failing to preserve records; and failing to refund advanced fees.

(d) bad faith obstruction of the disciplinary proceeding

Respondent admittedly failed to cooperate with the OCDC in connection with its investigation thereby hampering the office in its efforts to complete its audit of his several bank accounts.

(e) substantial experience in the practice of law

Respondent was licensed in 1998. He is an experienced litigator with considerable trial experience. At the time of the misconduct involved in this case, Respondent had practiced for over fourteen years.

(f) indifference to making restitution

Respondent agreed to return an advanced fee to Jill Havenshill Logan. He has not paid that amount resulting in a judgment against him. Other clients have not been reimbursed for advanced fees paid with little or no work performed to earn the same.

CONCLUSION

For the reasons set forth above, the Chief Disciplinary Counsel respectfully requests this Court:

- (a) to find that Respondent is guilty of professional misconduct with respect to the matters charged in the Information and to find that Respondent has violated Missouri Supreme Court Rules 4-1.3; 4-1.4; 4-1.5; 4-1.15; 4-1.16(d); 4-8.4(c); 4-8.4(d); and 4-8.1(c).
- (b) to remove Respondent from the practice of law either by a three-year suspension or disbarment; and
- (e) to tax all costs in this matter to Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March 2017, a copy of Informant's Brief is being served upon Respondent through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08.



Charles W. Gotschall

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(c);
3. Contains 6,370 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Charles W. Gotschall