IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
DALE EDWARD GERECKE,	)	**Supreme Court #SC96571**
	)	
Respondent.	)	

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Procedural History

This matter was heard by a Disciplinary Hearing Panel on April 27, 2017 in St. Louis, Missouri. It was a one Count Information. **App. 4-7.**[1] Respondent admitted all factual allegations and Rule violations. **App. 28-29, 121-124 (Tr. 7-8)**.

Respondent and one character witness testified at the hearing. **App. 23 (Tr. 2).**

The Disciplinary Hearing Panel recommended that Respondent be suspended indefinitely with no leave to file for reinstatement for three years, that the suspension be stayed and that Respondent be placed on probation for three years with specified terms and conditions of probation. **App. 139-146.** Informant rejected the recommendation. **App. 147.** Pursuant to Rule 5.19, the case has been set for briefing and argument.

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[1] The facts contained herein are drawn from the testimony elicited and the exhibits admitted into evidence at the trial in this matter conducted on April 27, 2017. Citations to the trial testimony before the Disciplinary Hearing Panel are denoted by the appropriate Appendix page reference followed by the specific transcript page reference in parentheses, for example **"App. ____ (Tr. ____)"**. Citations to the Information, Respondent's Answer to the Information and the trial exhibits are denoted by the appropriate Appendix page reference.

Disciplinary History

Respondent had one prior admonition before the filing of the Information in this case. He received an admonition in March of 2010 for violation of Rule 4-1.4, Rule 4-1.15 (f) and Rule 4-1.3. Respondent failed to adequately communicate with the client, provide a full accounting of fees paid and was not reasonably diligent in the representation. **App. 125-126.**

Work History

Respondent graduated from law school and was licensed in 1982. He immediately joined the firm of Bradshaw, Steele, Cochrane and Berens and remained there until December 2015. The firm was a limited liability company and Respondent became a member in 1987. On or about 2007 or 2008 Respondent relinquished his membership status and became a salaried employee of the firm. In December 2015 Respondent joined Drury Southwest, Inc. as in-house counsel. **App. 5, 41-43 (Tr. 20-22).**

Evidence

Informant exhibits A-E and Respondent Exhibits 1-6 were admitted by agreement of the parties. **App. 35, 39, 65-66 (Tr. 14, 18, 44-45).**

Respondent in 2007 or 2008 switched from being a member of the firm Bradshaw, Steele, Cochrane and Berens to an employee because he was going through a difficult financial period and needed stable income. **App. 42-44 (Tr. 21-23).** Federal tax liens had been assessed against him and Respondent needed predictability in income to work out a payment plan with the IRS and otherwise manage his finances. **App. 60-61 (Tr. 39-40).**

From the time Respondent became an employee until 2015 his annual income from the firm gradually was reduced. Initially he had been making approximately $89,000 a year as an employee and by 2015 his annual salary was $54,000 a year. **App. 43-44 (Tr. 22-23).** Each year's salary was based on Respondent's income generated for the firm; Respondent acknowledged the firm treated him fairly. **App. 62 (Tr. 41).**

The income decline resulted in new financial difficulties. In 2014 and 2015, on eight different occasions, Respondent took payments from firm clients and utilized them for his own purposes rather than depositing the funds into the appropriate firm bank account. **App. 15, 44-45, 135 (Tr. 23-24).** The firm policy was for all advance fee payments, fee payments after provision of services, expense payments and any other payments by clients to be deposited into the appropriate firm bank account prior to distribution. **App. 122.** Respondent knew his taking of the funds in the eight cases was wrong and against firm policy. **App. 44, 47, 59 (Tr. 23, 26, 38).**

The sum total taken by Respondent for his personal use in 2014 and 2015 was $4,900.

The 2014 payments were the following:

a) $300 from Blake Musser;

b) $100 from Thomas Holley;

c) $500 from Max Onan;

d) $500 from Raymond Underwood;

e) $500 from Kelsie Nall; and

f) $1,000 from Matthew Sullivan.

The 2015 payments were the following:

a) $500 from Shanda Steinnerd; and

b) $1,500 from Natalie Profilet Jones paid by her mother Debbie Profilet.

App. 123.

Respondent left the firm in December 2015 for an in-house position with Drury Southwest. Other firm members took over Respondent's active files. Respondent was contacted by the firm in January 2016 when the firm could not account for the $1,500 payment from Debbie Profilet. **App. 46 (Tr. 25).** Respondent shortly thereafter admitted taking that money and paid $1,500 in restitution to the firm. At the time of the $1,500 payment Respondent denied there were any other monies taken from the firm. **App. 47, 63 (Tr. 26, 42).** Respondent agreed to let the firm review his personal bank records. **App. 48-49 (Tr. 27-28).**

In February 2016 there was an email exchange between the Respondent and firm member Paul Berens as the firm was doing the review of bank account records and Respondent's history of bank deposits. **App. 49, 64-66, 127-129 (Tr. 28, 43-45).** As a result of those communications a meeting was scheduled in March 2016. At the meeting Respondent disclosed another $3,000 he had withheld from the firm and made restitution of $3,000 at that time. **App. 49-50, 66-68, 134-135 (Tr. 28-29, 45-47).** Later Respondent made an additional and final $400 restitution payment for client matters in which he could

not recall taking client money, but for whom he accepted responsibility to make the law firm whole. **App. 50-54, 136 (Tr. 29-33).**

Services were provided to all clients in the cases where Respondent had kept the fee payments instead of depositing them into firm accounts. There was no harm suffered by clients because of Respondent's acts. **App 30-31 (Tr. 9-10).**

In the course of Respondent's professional career he has been active in a number of professional and service activities. He was the president of the local young lawyers section of the Missouri Bar and has served as secretary, treasurer and vice president of the Thirty-First Circuit Bar Association. Respondent has been a presenter at two Missouri Bar CLEs. He has been active in the Missouri University alumni association and the Southeast Missouri State alumni association. Respondent has been very active in his church, serving on the parish counsel, school board and as a grade school youth sports coach. **App. 55-57, 131-132 (Tr. 34-36).**

Respondent offered character evidence in a letter submitted by attorney Johnna Yates as Exhibit 6 and in the testimony of attorney Kevin Spaeth. **App. 76-84, 137 (Tr. 55-63).** Both found Respondent truthful in his dealings with them. Mr. Spaeth considered Respondent a fundamentally honest person although he acknowledged Respondent's conduct was inappropriate. **App. 81-84 (Tr. 60-63).**

Respondent in both his answer to the Information and in his testimony acknowledged his conduct was wrong and dishonest. **App. 15-16, 59-60 (Tr. 38-39).** At

the time Respondent took the money he was confident he would not be caught. **App. 72 (Tr. 51).**

DHP Decision

The Disciplinary Hearing Panel found that Respondent violated Rules 4-1.15 and 4-8.4(c). **App. 142.** The Panel then determined a stayed suspension was permissible because the Panel believed Respondent eligible for probation. In its opinion:

A. He was unlikely to harm the public during the term of probation;

B. He was able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; and

C. He had not committed acts warranting disbarment.

App. 142.

The Panel recommended an indefinite suspension with no leave to apply for reinstatement for three years, with the suspension stayed and Respondent placed on three years' probation. Among the recommended conditions were quarterly reports, malpractice insurance and a mentor attorney. **App. 143-146.**

POINT RELIED ON

I.

AN ACTUAL SUSPENSION IS WARRANTED FOR MISAPPROPRIATION OF LAW FIRM FUNDS, EVEN IN THE ABSENCE OF CLIENT HARM AND WITH MITIGATING CIRCUMSTANCES, BECAUSE:

A. MISAPPROPRIATION IS INTENTIONAL DISHONESTY AND THIS COURT HAS STATED ACTUAL SUSPENSION OR DISBARMENT IS WARRANTED IN ANY SUCH CASE; AND

B. THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGESTS SUSPENSION AS THE APPROPRIATE SANCTION; AND

C. PROBATION IS NOT APPROPRIATE FOR CASES OF INTENTIONAL DISHONESTY.

Rule 4-1.15, Rules of Professional Conduct

Rule 4-8.4(c), Rules of Professional Conduct

In re Cupples, ("*Cupples I*"), 952 S.W.2d 226 (Mo. banc 1997)

In re Cupples, ("*Cupples II*"), 979 S.W.2d 932 (Mo. banc 1998)

In re Hoefle, SC96110 (May 2, 2017)

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

ABA Standards for Imposing Lawyer Sanctions, (1991 ed.)

ARGUMENT

I.

AN ACTUAL SUSPENSION IS WARRANTED FOR MISAPPROPRIATION OF LAW FIRM FUNDS, EVEN IN THE ABSENCE OF CLIENT HARM AND WITH MITIGATING CIRCUMSTANCES, BECAUSE:

A. MISAPPROPRIATION IS INTENTIONAL DISHONESTY AND THIS COURT HAS STATED ACTUAL SUSPENSION OR DISBARMENT IS WARRANTED IN ANY SUCH CASE; AND

B. THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGESTS SUSPENSION AS THE APPROPRIATE SANCTION; AND

C. PROBATION IS NOT APPROPRIATE FOR CASES OF INTENTIONAL DISHONESTY.

Respondent has admitted he violated Rules 4-1.15 on safekeeping law firm property and 4-8.4(c) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. He took $4,900 for his personal use when those funds belonged to his law firm. Respondent's conduct took place over a two year period and involved eight different takings. There are no factual issues in this case since Respondent has admitted all relevant facts and the rule violations. The only issue is sanction.

When determining an appropriate sanction, Missouri case law is always the first source for analysis. Misappropriation of client property is always a disbarrable offence.

In re Shaeffer, 24 S.W.3d 1, 5 (Mo. banc 1992); *In the Matter of Williams*, 711 S.W.2d 518, 521 (Mo. banc 1986). In *Williams* the Respondent was disbarred over an insufficient funds check of $4,513.36. In *In re Ehler*, 319 S.W.3d 442 (Mo. banc 2010) the Respondent was disbarred for misappropriating money from her client trust account, in that case $2,104.82. 319 S.W.3d at 447.

This case does not involve client misappropriation. Instead the misappropriation was from the law firm. Nonetheless, this Court has very clearly stated over the last two decades that lawyers have a duty to be honest with other lawyers in a firm and the violation of that duty is a breach of the Rules of Professional Conduct. See *In re Cupples*, 952 S.W.2d 226 (Mo. banc 1997) (hereinafter "*Cupples I*"); *In re Cupples*, 979 S.W.2d 932 (Mo. banc 1998) (hereinafter "*Cupples II*"); and *In re Kazanas*, 96 S.W.3d 803 (Mo. banc 2003).

In *Cupples I* the Respondent did not take money belonging to his firm. He hid client files from the firm with the intention of taking those client files with him upon leaving the firm to establish his own practice. The Court's opinion found certain obligations inherent to lawyers practicing law in a firm. "Lawyers within a firm have a duty to treat each other fairly and honestly and to put the interests of the law firm regarding firm business before their individual interests." 952 S.W.2d at 236. The *Cupples I* Respondent received a reprimand because Missouri had no written decision directly addressing lawyer ethical obligations within a firm and because Respondent had no previous disciplinary history. 952 S.W.2d at 237. The *Cupples I* sanction was

a split 4-3 decision and three of the Judges would have suspended the Respondent for six months. 952 S.W.2d at 239.

Like *Cupples I*, this case involved dishonest conduct over a period of time with a deliberate plan, in *Cupples I* to conceal client files and in this case to conceal client payments from the law firm. However, unlike *Cupples I*, there is now established case law regarding attorney obligations within a firm and, in this case, a prior disciplinary history.

The current case is more similar to *Cupples II* in that the dishonest conduct was no longer on a "blank canvas" without precedent. The *Cupples II* Respondent once again concealed client files from his new law firm and kept fees received from certain clients instead of turning them over to the firm. After finding the Respondent had violated Rule 4-8.4(c) on dishonesty, the *Cupples II* Court then analyzed the appropriate sanction. Because the Respondent was a fulltime employee who was expected to devote one hundred percent of his professional time and efforts to the firm, his actions directly contradicted the firm's expectations and constituted an appropriation of firm resources for private gain. 979 S.W.2d at 936. The Court analyzed the various aggravating and mitigating factors and decided an appropriate sanctions would be an indefinite suspension with leave to file for reinstatement no sooner than six months from the date of the opinion. 979 S.W.2d at 937.

In *In re Kazanas*, 96 S.W.3d 803 (Mo. Banc 2003), the Respondent misappropriated more than $169,000 from the law firm where he was employed by

taking client fees that should have gone to the firm and depositing them into his own bank account. The Court found his acts, and the money involved, so repugnant that disbarment was the only appropriate sanction. 96 S.W.3d at 809.

This case has elements more akin to *Cupples II* than to *Kazanas*. There was a much smaller amount of money taken than in *Kazanas*, which involved a more intricate scheme and criminal charges. There was no evidence of client harm in either *Cupples II* or this case. However, case law has been well established from *Cupples I*, *Cupples II* and *Kazanas* that attorneys have a duty of honest dealing within a firm. An actual suspension is warranted by the case law.

Perhaps the most relevant case is the Court's recent decision in *In re Hoefle*, SC96110 (May 2, 2017). The Respondent concealed from his former firm an Apple iPad in his possession at the time he left the firm. Respondent had reported the iPad stolen when the firm was burglarized, but actually had it in his possession all along. There was no question the iPad was firm property. This Court found misappropriation, a violation of Rule 4.84(c), and gave Respondent Hoefle an indefinite suspension with leave to apply for reinstatement after six months.

Like *Hoefle*, in this case the property taken was relatively small in value. Like *Hoefle*, the conduct and concealment went on for a period of months. Like *Hoefle*, the dishonest conduct should result in an actual suspension. Like *Hoefle* and *Cupples II*, an indefinite suspension with leave to apply for reinstatement after six months is an appropriate baseline sanction.

Besides case law, in making discipline and sanction analysis this Court often looks to the *ABA Standards for Imposing Lawyer Sanctions* (1991 ed.) (hereinafter "*ABA Standards*") for guidance when imposing lawyer discipline, but considers the standards advisory. *In re Ehler*, 319 S.W.3d at 442. In this case the *ABA Standards* also demonstrate that suspension is warranted.

The *ABA Standards* are for the violation for a particular rule. In this case the Respondent admitted multiple rule violations and a pattern of misconduct by taking for his own use firm fees on eight separate occasions. The multiple rule violations were 4-1.15 on safekeeping client property and 4-8.4(c) on conduct involving dishonesty, fraud, deceit, or misrepresentation. The most serious of these charges would be 4-8.4(c).

The applicable sanction standard for violation of Rule 4-8.4(c) when involving a duty owed to a firm is sanction standard 7.0 entitled "Violations of Duties Owed the Profession." Judge Covington's opinion in *Cupples II* found that to be the applicable standard; she found Standard 7.2 on suspension to be appropriate under the facts of that case. 979 S.W.2d at 936.

ABA Standard 7.2 states:

> Suspension is generally appropriate when a lawyer knowingly engages in conduct when it is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public or the legal system.

That is the applicable standard in this case. Respondent knowingly took money eight times that should have gone to his firm. It was a violation of the duty owed his firm and a besmirchment to the legal profession.

None of the other 7.0 Standards on violation of duties owed the profession are applicable. Disbarment Standard 7.1 would involve intentional misconduct causing serious or potentially serious injury. While Respondent's actions were intentional (as admitted in his own testimony), there is no evidence of serious injury to the firm financially or to a client. The injury was to the integrity of the profession. That injury, while significant, was alleviated to some extent by Respondent's confession and restitution. The injury to the profession, in these circumstances, would not warrant disbarment.

Reprimand Standard 7.3 is not appropriate because it requires a negligent act or acts by the Respondent and in this case the Respondent has admitted his acts were intentional and dishonest. Admonition Standard 7.4 is for minor negligent misconduct.

Both case law and the *ABA Standards* suggests suspension is the appropriate sanction. The next question is the length of any such suspension. As part of that analysis the *ABA Standards* direct the consideration of aggravating and mitigating factors. *ABA Standards* 9.22 and 9.32. There are a number of both. Aggravating factors include prior disciplinary offenses (Respondent has a prior admonition), a dishonest or selfish motive (Respondent needed money and took it even though he knew

it was wrong to do so), a pattern of misconduct (eight separate takings), and substantial experience in the practice of law (licensed since 1982).

Mitigating factors include a timely good faith effort to make restitution (when confronted by the firm), a full and free disclosure to the Informant and to the Disciplinary Panel, character or reputation, and remorse.

In making a recommendation for the minimum actual suspension of six months, the Informant takes the aggravating and mitigating factors into account. In particular, there is little doubt that Respondent has done much good in his professional and personal life over his career. The charges in this case are inconsistent with what the evidence shows for most of his professional life. There is no doubt from his acknowledgment of his wrong, his testimony at hearing, and his demeanor at hearing that Respondent is remorseful for his acts. He did make full restitution prior to being notified of the disciplinary investigation against him.

What Informant cannot agree to is any disposition not involving an actual suspension. Dishonesty is dishonesty. In this case it was also self-serving. There are no terms of probation that suitably address dishonest conduct. This Court has stated over and over again that the two duties of the discipline system are to protect the public and promote the integrity of the profession. *In re Kazanas*, 965 S.W.3d at 805. Permitting a lawyer to practice without serving a term of actual suspension is inappropriate when there has been a pattern of dishonesty. Probation does not promote the integrity of the profession in such situations. This Court should establish as a

baseline principle that dishonest conduct always warrants at least a minimum actual suspension.

CONCLUSION

Respondent engaged in dishonest conduct in his relationship with his former law firm and his handling of fees which should have been deposited into the firm account. He took firm funds on eight separate occasions and used them for his own purposes. There are substantial mitigating factors in this case. However, dishonesty occurred and that dishonesty warrants an actual suspension. In this case the Informant recommends an indefinite suspension with leave to apply for reinstatement after six months.

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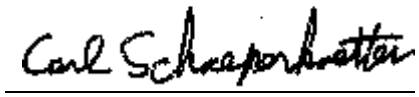
By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2017, a true and correct copy of the Informant's foregoing Brief was served on Respondent's Counsel via the Missouri Supreme Court electronic filing system pursuant to Rule 103.08:

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CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 3,635 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Carl Schaeperkoetter