IN THE SUPREME COURT
STATE OF MISSOURI

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

RESPONDENT'S BRIEF

Diane C. Howard #27929

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF FACTS

Respondent graduated from law school at the University of Missouri in 1982 and was licensed by the State of Missouri to practice law that year. He joined the firm of Bradshaw, Steele, Cochrane, and Berens, commonly known as The Bradshaw Firm, in Cape Girardeau one week after his graduation and remained with that firm until December of 2015. Respondent became a member of the firm in 1987. Because the income of the firm members fluctuated on a monthly basis, Respondent chose in 2007 or 2008 to relinquish his membership status in the LLC and become a salaried member of the firm. On December 28, 2015, Respondent left The Bradshaw Firm and joined Drury Southwest Inc. as an in-house counsel. **App. 5, 41-43 (Tr. 20-22)**.

At the time the Respondent switched from being a member of the firm to an employee he was going through a period of financial difficulties to the point that federal tax liens had been assessed against him. The Respondent was still making payments to the IRS at the time of the hearing before the Disciplinary Hearing Panel (DHP). **App. 60-61 (Tr. 39-40)**.

The Respondent's change from a member of the firm to an employee did not ease his financial situation, but instead aggravated his difficulties. At the time the Respondent relinquished his membership in The Bradshaw Firm he was making approximately $89,000 per year. In 2015, his annual salary was $54,000 a year. **App. 43-44 (Tr. 22-23)**. The reduction in the Respondent's salary was based on the Respondent's

productivity and how much money he contributed to the firm. At the hearing before the DHP, the Respondent did not blame the firm for any of the actions taken by him. Both the Respondent and the members of the firm who testified at the DHP hearing confirmed that the Respondent left The Bradshaw Firm on good terms. **App. 62 (Tr. 41)**.

As admitted by the Respondent in response to the Information filed by the Office of the Chief Disciplinary Counsel, in 2014 and 2015 Respondent took payments from firm clients and utilized them for his own benefit rather than depositing those payments into the firm's general operating account. **App. 15, 44-45, 135 (Tr. 23-24)**. Respondent admitted that his taking of those funds was against his former employer's firm policy. **App. 44 (Tr. 23)**. Respondent admitted that his taking of the funds demonstrated dishonesty, a lack of integrity, harmed his former firm, and was a serious violation of the disciplinary rules. **App. 53 (Tr. 38)**.

Respondent was contacted in January 2016, a month after he had left the firm, because his former employer could not account for a $1,500 payment that had been made by a client of the firm. **App. 46 (Tr. 25)**. Respondent met with members of the firm during which he admitted taking the $1,500. He made restitution to the firm shortly after that meeting. **App. 47 (Tr. 26)**. Respondent initially denied having taken any other client funds. However, through a series of email exchanges between Respondent and firm member Paul Berens, Respondent told Mr. Berens, that he would like to meet to discuss the final resolution of this matter, telling Mr. Berens that he had to "get this off my conscience." **App. 129**.

A meeting was scheduled for March 2016, attended by members of the firm, to which Respondent brought a list of other clients whose fees he recalled having taken for his own benefit totaling $3,000. He also brought with him a check already written in the amount of $3,000 made payable to his former employer. **App. 49-50, 66-68, 134-135 (Tr. 28-39, 45-47)**. After receiving the Information in which it was alleged that another $400 in client payments could not be located by the Respondent's former employer, the Respondent made restitution to the firm in the amount of an additional $400. The Respondent could not recall taking that client money but wanted to accept responsibility for any allegations made by his former employer and to make his former employer whole. **App. 50-54, 136 (Tr. 29-33)**.

All clients of The Bradshaw Firm received the services associated with the payments that were made to the Respondent and retained by him. No harm was suffered by any clients of The Bradshaw Firm because of the Respondent's acts. **App. 30-33 (Tr. 9-10)**.

The Respondent provided evidence before the DHP to support his character and reputation. Seasoned attorney Jonah (Ted) Yates submitted a letter of support recognizing the significance of the Respondent owning up to his misconduct and being forthright with those who knew him. **App. 137**. Attorney Kevin Spaeth who has known the Respondent since they were both freshmen in high school testified at length regarding his personal and professional relationship with the Respondent. Mr. Spaeth testifed not only that the Respondent's conduct was inappropriate, but that it was dishonest. He

testified that he did not consider the Respondent to be a fundamentally dishonest person based upon their many interactions over the years, as well as the Respondent's willingness to admit his misconduct and accept the results of his misconduct. **App. 80-84 (Tr. 59-63)**.

The Respondent has enjoyed other activities outside of his work life. He is married, has a grown daughter who is married with two children, as well as a son who he described as a "late in life" child who remains in the home. **App. 58 (Tr. 37)**. The Respondent has enjoyed being active in Bar activities, including having served as President of the Circuit's Young Lawyer Section when he was younger and served as Secretary, Treasurer and then Vice-president of the Circuit's Bar Association. **App. 55 (Tr. 34)**. Respondent has been a supporter of both Southeast Missouri State University and especially to the University of Missouri. In 2004 he was responsible for reactivating the local University of Missouri Alumni Association and has since served as President of that organization. **App. 56 (Tr. 35)**. The Respondent has been a life-long member of St. Mary's Cathedral Parish which he described as "a very important part of my life." In addition to attending church and school there, he served on the parish council, the school board, and has been active in matters involving the liturgy, and has served as a grade school sports coach. **App. 56-57 (Tr. 35)**.

The admissions made by the Respondent supported the DHP's decision that the Respondent violated Rule 4-1.15 and Rule 4-8.4(c). **App. 142**. Based upon the evidence presented to the Panel, the Panel determined that the Respondent was eligible for

probation pursuant to Rule 5.225. **App 142**. The Panel then recommended based on the evidence heard by the Panel an indefinite suspension with no leave to apply for reinstatement for three years, with the suspension to be stayed and the Respondent to be placed on three years' probation. The Panel set out detailed recommended conditions regarding the terms of that probation. **App. 143-146**.

ARGUMENT

APPELLANT'S POINT 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.

I. Response to Appellant's Point I

A. Standard of Review

The DHP's Findings of Fact and Conclusions of Law are advisory. *In re Belz*, 258 S.W. 3d 38, 41 (Mo. banc 2008). The review by this Court of the evidence presented before the DHP is *de novo* and this Court must independently determine all issues pertaining to the credibility of the witnesses who appeared before the DHP, the weight of the evidence, and thereafter draw its own conclusions of law. *In re Snyder*, 35 S.W. 3d 380-382 (Mo. banc 2000). Whether professional misconduct has been committed must

be proven by a preponderance of the evidence before this Court may impose discipline. *In re Madison*, 282 S.W. 3d 350-352 (Mo. banc 2009).

B. Factors Governing Discipline

This matter arises from Respondent's admitted violations of Rule 4-1.15 on safe-keeping law firm property and Rule 4-8.4(c) by engaging in conduct involving dishonesty. Respondent admitted that he took for his personal use $4,900 of funds that belonged to his former employer. Those funds were taken over a two (2) year period of time. Since that conduct was admitted by the Respondent, the only issue before this Court is the appropriate sanction. This Court must rely on the *ABA Standard*s when imposing sanctions to achieve the goals of attorney discipline. *In re Coleman*, 295 S.W. 3d 857, 869 (Mo. banc 2009). The law has long recognized that the purpose of imposing discipline through this Court's inherit authority to regulate the practice of law and the administration of attorney discipline is not to punish an attorney, but to protect the public and to maintain the integrity of the legal profession. *In re Stewart*, 342 S.W. 3d 307, 308 (Mo. banc 2011). This is to be achieved through the review of past cases, disciplinary rule and the *ABA Standard* to determine what discipline is appropriate. *Stewart*, 342 S.W. 3d at 310.

C. Case Law Relating to Dishonesty

The Informant has drawn this Court's attention first to the cases of *In re Cupples*, 952 S.W. 2d 226 (Mo. banc 1997) (hereinafter "*Cupples I*") and *In re Cupples*, 979 S.W. 2d 932 (Mo. banc 1998) (hereinafter "*Cupples II*") as past cases of significance to this

matter. Although both *Cupples I* and *Cupples II* are relevant to the instant case, the distinctions are also important.

In the *Cupples I* case cited by the Informant, Mr. Cupples took client files from his firm with the intention of taking those client files with him upon leaving the firm to establish his own practice. Mr. Cupples in *Cupples I* was found by this Court not only to have violated Rule 4-8.4(c) as to his duty to the firm, but that his conduct also constituted misconduct and a violation of his duty to his clients. This Court recognized that since clients are not merchandise and the attorney-client relationship is personal and confidential, the actions on the part of Mr. Cupples were in violation of the fiduciary duty that he owed to his clients and the client's rights.

The Court further held that Mr. Cupples' violation of his duties to his firm directly affected and endangered the quality of the representation that the firm provided to its clients. Although this Court held that clients were directly affected and endangered by the conduct of Mr. Cupples, he received a reprimand. 952 S.W. 2d 237. In the instant case, the Respondent has taken no action adverse to his fiduciary duty to any clients. The misconduct that has been admitted by the Respondent did not adversely impact the representation of any clients of his former employer.

This Court was no doubt displeased when one year later Mr. Cupples was before this Court facing another Information for a violation of Rule 4-8.4(c). When Mr. Cupples associated with a subsequent firm he encountered difficulties similar to the problems he had encountered when associated with his prior firm.

In *Cupples II* Mr. Cupples' new firm learned that he was operating a separate practice, maintaining a separate office, using firm resources to represent private clients, representing those private clients during regular business hours, not maintaining separate malpractice insurance for his separate practice thus relying on the firm's malpractice insurance, and collecting fees from cases to which the firm had committed assets without advising the firm of the fees or paying the firm any part of the fees. This Court found that these actions constituted professional misconduct under Rule 4-8.4(c). 979 S.W. 2d at 936.

Very significantly, in addition to Mr. Cupples' dishonest relationship with his former employer and his clients, this Court stated that it had "no confidence in Cupples' word" when appearing before this Court. This Court acknowledged that the facts were in dispute, but found that the Mr. Cupples and his representations of the facts were not credible. 979 S.W. 2d at 936. This Court further found that in determining the proper sanction under the *ABA Standard*s, the Court must consider that Mr. Cupples had refused to admit the wrongful nature of his conduct and had been indifferent to making restitution. This Court found that these factors fortified a finding that suspension was mandated if not disbarment. 979 S.W. 2d at 937.

Contrast these findings with the instant case in which the Respondent admitted to his former employer the wrongful nature of his conduct and made restitution prior to the involvement of the Office of the Chief Disciplinary Counsel. The Respondent in the instant case has taken every action he can to make whole his former employer. The

evidence presented to the DHP consisted of the testimony of the Respondent admitting his wrongful conduct as well as the evidence that he made professional colleagues aware of his misconduct and its wrongful nature without excuse.

The case of *In re Kazanas*, 96 SW. 3d 803 (Mo. banc 2003) cited by the Informant is so factually distinguishable from the instant case that it is of little benefit. Mr. Kazanas was involved in a complicated scheme through which he diverted $169,172.17 in fees from his employer. Mr. Kazanas' actions resulted in a federal conviction for tax fraud which was the primary basis for his subsequent disbarment.

This Court was recently faced with the issue of alleged law firm dishonesty in the recent case of *In re Hoefle*, SC 96110 (Mo. banc May 2017). This Court overturned a recommendation of an admonition in favor of an indefinite suspension with leave to apply for reinstatement after six months for a violation of Rule 4-8.4(c). Again, the instant case can be distinguished from the *Hoefle* decision.

The *Hoefle* decision deals with an iPad that was never stolen, but Mr. Hoefle reported in October 2013 that it had been stolen. It was replaced by his firm in November of 2013. Insurance claims were submitted to Mr. Hoefle's firm's insurance carrier as a result of the reported theft. Mr. Hoefle was terminated by his former employer in August 2014 for concerns regarding the deletion of computer files, but unrelated to the missing iPad.

Weeks after his termination, Mr. Hoefle delivered to his former employer the iPad that had allegedly been stolen a year before. Mr. Hoefle claimed that he found the iPad

in his vehicle when preparing to leave for a Thanksgiving 2013 a year previously, but without explanation had never returned it to the firm. Mr. Hoefle's former employer became aware that days after the device was allegedly stolen Mr. Hoefle took actions to disable features that were designed to help locate the lost or stolen device such as the "lost mode" and "find my iPhone" features. Mr. Hoefle's testimony before the DHP as to why he would have disabled these features was less than credible.

Mr. Hoefle is another example of a Respondent who lacked credibility and showed an unwillingness to take responsibility for his false statements. We would suggest to this Court that in fashioning an appropriate discipline, that lack of credibility, lack of appreciation for honesty and lack of remorse was considered by this Court.

The decision rendered by the DHP in the instant case is consistent with this Court's recent decision in the case of *In re Krigel*, 480 S.W. 3d 205 (Mo. *banc* 2016). Following the hearing, a DHP found that Mr. Krigel had violated four rules of professional conduct, Rule 4-3.3(a)(3), Rule 4-4.1(a), Rule 4-4.4(a), and Rule 4-8.4(d) in association with an adoption matter.

Mr. Krigel misled an opposing attorney regarding an adoption proceeding by informing the opposing counsel that he would not proceed with an adoption without the consent of the father who she represented. Mr. Krigel also counseled his client, the birthmother, to misrepresent to the father that the child was to be born a month later than the due date in hopes that the father would be lulled into inaction until after the birth of the child. Mr. Krigel further filed false documents with the court falsely representing a

lack of knowledge or information as to the existence of the birth father. Mr. Krigel also counseled his client to testify at a hearing evasively regarding the birth father and his intentions which was false testimony by omission.

This Court found that Mr. Krigel had committed multiple acts of professional misconduct and further found that Mr. Krigel had failed to "grasp the severity of these charges." 480 S.W. 3d at 301. Without regard to the "egregious act of misconduct" of lack of candor toward the tribunal, this Court found that suspension was appropriate. 480 S.W. 3d at 302. However, no actual suspension was imposed. The suspension was stayed for a period of two years. This Court held that doing so was consistent with the practice of applying progressive discipline when imposing sanctions upon attorneys who are before this Court for the first time for misconduct in accord with the *ABA Standard*s. 480 S.W. 3d at 302.

D. Probation Is Appropriate

Although the Respondent in the instant case does not minimize the seriousness of his misconduct, it has not been considered by this Court to be as egregious as the filing with the court a false pleadings or facilitating the intentional misrepresentation of evidence before the Court. This Court found in the *Krigel* case that the imposition of a suspension with a stay would still maintain the public's trust, protect the integrity of the legal system, and was supported by the prior disciplinary proceeding. Citing *In re Ver Dught*, 825 S.W. 2d 847 (Mo. *banc* 1992).

We argue that the same is the case as to this Respondent. The Respondent does

not argue against the Informant's position that both case law and the *ABA Standard*s suggest that suspension is the appropriate sanction. Respondent's position is that a stay of that suspension is both allowed by the Rules of this Court and appropriate. Respondent did receive an admonition years ago for conduct not involving dishonesty, but he has never been before this Court in association with a disciplinary action. The Respondent's motivation of financial need does not provide an excuse for his conduct and he has sought no excuse. The Respondent appreciates that the takings, even of small sums of money, occurred over a two year period of time. He also appreciates that his maturity and experience should have steered him from his misconduct, increasing his embarrassment and remorse.

The DHP had the opportunity to meet and hear the Respondent and appreciate his testimony in a way that may not be able to be fully appreciated through a transcript. These words expressed acknowledgement of his misconduct, remorse, and lack of excuse. Genuineness is better judged by those who have the opportunity to see and hear the testimony that is presented. A full and free disclosure was made by the Respondent, both to his former employer and to the Informant with complete cooperation.

The Informant argues that an "actual suspension," and that is one that is served and stayed, must be imposed by this Court because "dishonesty is dishonesty." The Informant argues that no terms can be fashioned during a term of suspension to address dishonesty. On behalf of the Respondent, our response to that argument is that such is not the case. Mr. Krigel was involved in misconduct that involved dishonesty on several

levels. This Court found that he had committed dishonesty as to his opponent, as to the tribunal, and as to the filing of a false pleading. Regardless, this Court did design terms of probation that this Court felt suitably addressed Mr. Krigel's conduct and protection against further misconduct.

As is the case with Mr. Krigel, the integrity of the legal system can be protected by the imposition of a suspension with an extended period of probation in the instant case. The Respondent in this case would be subject to having his probation revoked or a further discipline imposed should he violate the terms of his probation. As this Court is aware, Rule 5.225(a)(2) with the lawyer is a) 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. The Informant implies that an additional requirement to that rule is that the misconduct cannot involve dishonesty. Rule 5.225(a)(2) does not so provide and case law does not support such an argument.

CONCLUSION

Respondent has admitted that he engaged in misconduct in relationship with his former law firm in the handling of fees which should have been deposited into the firm's operating account. There are substantial mitigating factors in this case, including the Respondent's reputation, demeanor, remorse, cooperation, restitution, and most significantly willingness to acknowledge his misconduct. The Respondent asks that should this Court impose a period of suspension, that such suspension be stayed subject to the Respondent's completion of a term of probation in accordance with terms to be imposed by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE
AND OF COMPLIANCE WITH RULE 84.06(b) AND (c)

The undersigned hereby certifies that on this 23rd day of October, 2017, a true and correct copy of the foregoing brief was served on the attorneys for Chief Disciplinary Counsel via the Missouri Supreme Court electronic filing system pursuant to Rule 103.08:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), includes the information required by Rule 55.03, and that the brief, according to Microsoft Word, which is the word processing system used to prepare this brief, contains 3533 words.

Diane C. Howard