

ATTORNEYS FOR INFORMANT

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POINT RELIED ON

I.

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

...

(D) RESPONDENT VIOLATED RULES 4-1.15(i), 4-8.4(d), 4-8.4(c), AND 4-1.5(c) BY FAILING TO PROVIDE THE CLIENT WITH AN ACCURATE AND TRUTHFUL ACCOUNTING OF THE SETTLEMENT FUNDS UPON CONCLUSION OF THE CONTINGENT FEE MATTER IN JUNE / JULY 2012 AND UPON THE CLIENT'S REQUEST IN OCTOBER 2012, AND BY FAILING TO GIVE THE CLIENT AN OPPORTUNITY TO SEEK JUDICIAL REVIEW OF THE FEES BEFORE DISBURSING THE ENTIRE \$25,000 SETTLEMENT PAYMENT INTO HIS OPERATING ACCOUNT; ...

Respondent Violated Rule 4-1.5(c)

The disciplinary hearing panel found that Respondent violated Rule 4-1.5(c) by not

providing the client with a written statement showing the disposition of the settlement proceeds upon the conclusion of the contingency fee matter, notwithstanding a contrary determination by the Kansas disciplinary investigator. By addressing the report from the Kansas investigator in great detail, it appears that Respondent believes the Kansas investigation is relevant to this Court's inquiry. It is unclear whether Respondent has accepted the DHP finding on this specific violation or whether he wishes to contradict the finding by the panel. To the extent that Respondent relies upon the investigator's report to contradict the findings of the DHP below, such reliance is misplaced and misguided.

The report from the Kansas investigator is not binding upon this Court. The Kansas investigator took no live testimony before preparing his report, unlike the two days of testimony considered by the hearing panel below. The Kansas investigator admitted that his conclusions were contrary to the verdicts rendered by a jury in Clay County, Missouri, thus substituting his judgment for that of an entire jury panel. The Kansas investigator evaluated the situation under a higher standard of proof ("clear and convincing") rather than the preponderance of evidence standard set forth in Mo.Sup.Ct.R. 5.15(d).

The results of the Kansas investigation are tainted by Respondent's deception and dishonesty. The investigator has concluded that Respondent's dishonesty constitutes a "meaningful" misstatement of fact, thus a material misrepresentation by Respondent in the course of the investigation. As a result, Kansas has re-opened its investigation. Disbarment in Kansas is a likely outcome for Respondent, according to the Kansas disciplinary representative who testified in this matter.

Respondent continues his strategy of attacking the credibility of his now deceased

former client. Her credibility was never at issue in this case. As she was deceased, the panel never heard her live testimony. She was not a licensed professional. Her law license is not on the line. The excerpts from Ms. Cockrill's deposition support the findings of misconduct and rules violations. The panel understood that Respondent's credibility remained front and center, and expressly noted the shortcomings in Respondent's credibility.

Since Respondent has admitted to all of those violations, it is curious why he would continue to disparage his former client at this stage. Such a tactic is 180 degrees contrary to the feigned "deep remorse" now expressed by Respondent. Respondent never apologized to his former client before she committed suicide. By dragging her memory through the mud before this Court, he does little to demonstrate the type of remorse necessary to mitigate the misconduct. Though she was confronted with many demons and shortcomings, the fact remains that Respondent stole his client's settlement money and then lied for months to many people to conceal his actions. Nothing alters these established facts for any purpose herein.

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
DISBARMENT.**

Since Respondent has admitted all or virtually all of the allegations and findings of professional misconduct, the most important issue for this case involves the appropriate level of sanction to be imposed. At the very least, Respondent acknowledges that the misconduct is worthy of a suspension. Nevertheless, Respondent's sanction analysis is erroneous and unpersuasive in many respects.

First, the testimony of Respondent's supposed good character and reputation is meaningless unless Respondent was willing to provide candid portrayals of the misconduct to his supporting witnesses. If the actual truth were known, the witnesses would have testified differently. As in *In Re Frick*, 694 S.W.2d 473, 480 (Mo. banc 1985), the character witnesses were not familiar with the conduct charged in the Information. This Court noted such testimony was of "little relevance or help in these proceedings." *Id.*

Second, the dismissal of the two legal malpractice actions against Respondent and one of his character witnesses is outside of the scope of this record. Furthermore, the Kansas Supreme Court opinions involving Respondent's representation underlying the

malpractice actions illustrate the faulty assistance provided to a pair of his former clients. *See State v. Shelly*, 303 Kan. 1027, 371 P.3d 820 (2016) (criminal sentencing remanded because the “minimal advice given [by Respondent]—that there was nothing to appeal—unreasonably overlooked at least potentially meritorious grounds for appeal and did not allow Shelly to knowingly and intelligently waive his right to appeal. The consultation was inadequate.”); *State v. Perry*, 303 Kan. 1053, 370 P.3d 754 (2016) (“[Respondent’s failure to advise Perry of the current state of the law so that she could make an informed decision about whether to appeal is sufficiently equivalent to file a failure to file a direct appeal” and satisfies the test for ineffective assistance of counsel).

Third, *In re Coleman*, 295 S.W.2d 857 (Mo. banc 2009) is of no assistance to Respondent. Respondent argues that because Coleman dealt with “improper handling of a trust account,” that he should likewise be bestowed with probation. To label the outright theft of client settlement proceeds as “improper handling” misses the point and undercuts the claim that Respondent is remorseful. Coleman commingled funds, but never misappropriated them. This is a huge distinction in the egregiousness of the violation. Respondent likewise argues that he showed the same “ignorance of the rules” as Coleman. Respondent in the present case, however, testified that he was specifically aware of the trust account rules and that he understood the need to safeguard trust funds, including those which belonged to medical providers. Respondent’s mental state is characterized not by ignorance but by intentional deceit and dishonesty. There is nothing in the DHP decision which suggests a mental state of ignorance or negligence. In fact, the DHP decision was careful to document the many instances of dishonesty. The panel specifically

noted that, based upon Respondent's familiarity with the rules of conduct regarding client trust accounts, Respondent probably knew his conduct was wrong. **App. 651.**

Fourth, Respondent's attempt to distinguish this case from prior Missouri Supreme Court precedent on the sanction of disbarment for misappropriation is misguided. Respondent argues that this Court should not consider any prior Missouri precedent which does not mention the ABA Standards for Imposing Lawyer Sanctions. While the ABA Standards are useful for guidance, they do not supplant the traditional doctrine of *stare decisis*. As noted by Judge Fisher in his dissent in *In Re Eisenstein*: "More persuasive that the ABA Standards, this Court should be guided by its actions in past disciplinary cases." *In re Eisenstein*, 485 S.W.3d 759, 765 (Mo. banc 2016) (Fischer, J., dissenting).

Fifth, Respondent relies on purported mitigating factors that are not supported by the factual record. As addressed above, Respondent's claim of good faith, negligence and ignorance should be rejected. Respondent's professional misconduct at issue in this Court is intentional and deliberate and fraught with fraud, deceit and dishonesty. In some respects, the misconduct is deliberately retaliatory and vindictive. Respondent claims his efforts to make restitution were timely and in good faith. They were not. The panel considered the payments made by Respondent, but declined to give Respondent mitigating credit for making payments, without interest, three and four years after they should have been paid. **App. 656.**

Sixth, Respondent's argument suggests that it would be appropriate for this Court to protect his family and to elevate the priority of Respondent's interest in maintaining future household earnings for his family over the interests of the public or profession at

large. Respondent claims that he and his family will suffer irreparable financial harm if he is disbarred. However, the purpose of this proceeding is to protect the public and the integrity of the profession. It is not a mitigating factor that Respondent is the primary breadwinner for his family. Respondent is free to earn a living for his family in any respect that does not involve the practice of law.

There are two head-scratching conundrums in this case. On the one hand, the hearing panel found multiple instances of dishonesty and instances where Respondent placed his financial interests above others (particularly those of his client's health care providers). On the other hand, the panel found no clear evidence of dishonest or selfish motive. Misappropriation is the quintessential example of dishonest and selfish motives. *See In re Belz*, 258 S.W.3d (Mo. banc 2008). Respondent received personal benefits—over \$16,000—from this misconduct. Lies and deceit and an attempt to conceal and hide the misappropriation are also clear examples of dishonest and selfish motives. *Annotated Standards for Imposing Lawyer Sanctions* at p. 424 (ABA 2015). Improper billing and fee-related practices often include dishonest and selfish motives. *Id.* at 425. Retaliatory misconduct is also viewed as an example of a selfish motive. *Id.* at 426.

Similarly, on the one hand, Respondent's claim of cooperation in the investigation is belied by the evidence and the express findings of the hearing panel, which found a violation of Rule 4-8.1(c) and dishonesty towards the disciplinary investigators. Respondent withheld documentary evidence (such as a trial transcript and evidence of the actual disposition of the settlement proceeds) from Informant until the eleventh hour, prejudicing the taking of his deposition and the presentation of evidence at the hearing.

On the other hand, the panel found that Respondent “substantially cooperated with disciplinary authorities.” With all due respect to the panel, Informant takes exception with the panel’s identification of mitigating factors. Informant hopes that this Court is not similarly led astray.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the above and foregoing was filed electronically on this 7th day of May, 2018 under Missouri Supreme Court Rule 103 and that the undersigned signed the original and the original will be maintained in accordance with Rule 55.03.

Kevin J. Odrowski

Kevin J. Odrowski

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 1933 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Kevin J. Odrowski