IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
R. SCOTT GARDNER,	)	**Supreme Court #SC97207**
	)	
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 January 17, 2018 in Jefferson City, Missouri. It was a one Count Information. **App. 5-11.**[1]

One witness testified for the Informant. Respondent testified at the hearing. In addition, one witness testified for Respondent by submission of a deposition. **App. 56 (Tr. 2-4).**

The Disciplinary Hearing Panel recommended an indefinite suspension with no leave to apply for reinstatement for six months. **App. 344-359.** Informant accepted the recommendation. **App. 360.** The Respondent rejected the recommendation. **App. 361.** Pursuant to Rule 5.19, this 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 January 17, 2018. 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 has a previous disciplinary history. He has one prior admonition in 2011 for violation of Rules 4-1.3 and 4-1.4 of the Rules of Professional Conduct. Respondent failed to reasonably communicate with his client about a settlement offer in an estate case, and failed to act with reasonable diligence in completing the estate. **App. 152-155 (Ex. 12).**

Work History

Respondent was licensed as an attorney in Missouri in September of 1983. His Missouri Bar number is 33504. His main office address is 416 South Ohio Avenue, Sedalia, Missouri 65301. **App. 129 (Ex. 1).**

After licensure in 1983 the Respondent worked for a short time in Kansas City and then returned in May 1984 to practice at the family law firm in Sedalia. Respondent has been at the firm ever since. He has had a significant probate practice since 1988. Currently Respondent is a sole practitioner. **App. 79 (Tr. 95-96).**

Evidence

Informant exhibits 1-9 and 12-15, and Respondent Exhibits A-P, were admitted by agreement of the parties at the beginning of the hearing. Informant Exhibits 16 and 17, and Respondent Exhibit Q, were offered and admitted during testimony. By stipulation of the parties, Informant Exhibit 17 and Respondent Exhibits C and K were admitted under seal.

In 2014 Respondent was appointed as personal representative for the estate of Ethel M. Hall, deceased, Pettis County Case No. 14PT-PR00123. The estate was supervised, not independent. **App. 75-76, 241 (Ex. L) (Tr. 79-81).**

On February 17, 2015 Respondent filed a motion for approval of partial payment of personal representative fees in the amount of $30,070.00. **App. 129 (Ex. 1).** On February 18, 2015, the Respondent submitted an amended motion for approval of partial payment of fees, once again requesting a partial fee payment of $30,070.00. **App. 130-132 (Ex. 2).**

On that same date of February 18, 2015 the Probate Court of Pettis County, the Honorable R. Paul Beard, Judge, issued two orders on the two motions, stating:

> a) The Court considers the motion for approval of partial payment of fees. The motion is denied for two reasons. The first is that the motion asks for 5% of total reimbursements which exceeds the amount authorized by § 473.153 RSMo. Secondly, receiving a fee when an estate closes is a powerful incentive to encourage a PR to get the estate closed. Were the Court to authorize early payments of partial fees, this incentive would be lost. This Court desires to keep this incentive in place;
>
> b) The Court considers the amended petition for fees. The personal representative is authorized to pay himself an advance personal representative fee in the amount of $15,000.00. This amount shall be deducted from the final calculation of fees due him at the close of the estate.

App. 61, 146-147 (Ex. 7) (Tr. 21-24).

Respondent paid himself the $15,000.00 fee as ordered by the court in February 2015. **App. 384 (Ex. C).**

On or about June 25, 2015 Respondent wrote a check to himself from the Ethel M. Hall Estate account in the amount of $15,466.04, and deposited the money into his law firm account. **App. 150-151 (Ex. 9).** Respondent did not seek permission from the court for payment of additional compensation as personal representative. Neither the final settlement nor a motion to approve final settlement had been filed. **App. 61-62, 137-148 (Ex. 7) (Tr. 24-26).**

Respondent testified the reason he wrote the check to himself on June 25, 2015, was to avoid additional income taxes to the estate. **App. 81 (Tr. 103).** At that time he did not know the amount the estate would save. **App. 91 (Tr. 143).** His accountant, James Bales, later stated in a letter that the total amount saved by Respondent paying himself at that time was a federal tax liability of $1,054.00 and a Missouri tax liability of $338.00. **App. 178 (Ex. A).** Accountant Bales' letter stated the tax benefit was because payments were made prior to the close of the first fiscal year of the estate. However, the estate income tax return (Form 1041) shows the tax year ended May 31, 2015. **App. 381 (Ex. 17).**

Respondent testified he believed he had the authority to pay himself a personal representative fee without court order. However, he also testified it was firm practice to file an application and obtain a court order before paying himself fees. **App. 80 (Tr. 99-100).**

Respondent, between June 25, 2015 and September 1, 2015, never communicated to Judge Paul Beard that he paid himself $15,466.04, nor did he seek court approval of the payment. Judge Beard was out of his office on June 25, 2015, but available for

communication. He had returned to his office in the Pettis County Courthouse by June 29, 2015, and was in his office or in the courtroom on almost every business day thereafter in July and August. Respondent did not communicate with Judge Beard about this estate during that time despite Respondent's office being across the street from the courthouse. **App. 72 (Tr. 65-66).** Respondent testified he was busy with a trial and preparing findings thereafter. **App. 82 (Tr. 105-106).**

On September 1, 2015 Respondent filed a petition for approval of final settlement and order of distribution, accompanied by waivers of any objection from each of the estate beneficiaries. **App 133, 192-203 (Ex. 3) (Ex. D).** On September 3, 2015 Respondent filed his final settlement for the estate. The final settlement did not list the June 2015 payment of $15,466.04 to Respondent. Bank records submitted with the settlement did show the payment. **App. 383-387 (Ex. C).**

Respondent testified that he "just screwed up" by not including the June 25, 2015 check in the final settlement, claiming he previously had prepared a draft in June 2015 and omitted updating it to include the June 25, 2015 payment to himself. **App. 89, 97-98 (Tr. 133, 167-169).** Respondent further testified that he expected Judge Beard or his clerk would see the check when conducting an audit of the settlement. **App. 84 (Tr. 116).**

Judge Beard and his clerk, in reviewing the bank records, discovered the $15,466.04 payment Respondent had written to himself on June 25, 2015, and not reported in the settlement. **App. 62 (Tr. 25-26).** Upon discovery of the payment, Judge Beard on September 10, 2015, issued the following order:

> The Court reviews the settlement and bank records and discovers that the personal representative paid himself $15,446.04 on June 25, 2015, without court permission as an early advance toward his personal representative fees. The personal representative is ordered to appear and show cause on September 15, 2015, at 3:00 p.m. why he should not be held in contempt of this court and removed as personal representative.

App. 144 (Ex. 7).

On September 11, 2015, Respondent submitted a motion for approval of payment of fees and expenses, requesting approval of personal representative fees in the amount of $32,604.87, and noting the $15,000.00 paid in February 2015 as per court order. Respondent did not list the June payment of $15,466.04 in the motion, **App. 134 (Ex. 4)**, even though he knew Judge Beard was then aware of the payment. **App. 84 (Tr. 116).**

After the issuance of Judge Beard's September 10 order, Respondent came to Judge Beard's office. After that meeting, Judge Beard thought that Respondent had apologized and had asked for permission to file a petition for fees. At that point Judge Beard thought it no longer necessary to have a formal court hearing for contempt on September 15. **App. 63 (Tr. 29-30).**

Judge Beard on September 14, 2015 issued an order of contempt finding the Respondent as personal representative had taken money from the estate and deposited it in his personal account without court order, and in direct contradiction to the Court's order of February 18, 2015. By the order of September 14, 2015, the Respondent's fee for services as personal representative was reduced by $2,138.83. **App. 63, 135 (Ex. 5) (Tr. 31-32).**

On October 28, 2015, Judge Beard set aside his contempt order of September 14, 2015. **App. 63-64 (Tr. 32-33).** Instead he ordered the Respondent to restore cash in the amount of $15,466.04 to the estate and also appear before the Court to address the issue of whether Respondent should be removed as personal representative. **App. 64, 136 (Ex. 6) (Tr. 33-34).**

Litigation ensued thereafter between Respondent and Judge Beard, all as set forth more fully in the docket sheet for the Ethel Hall Estate. **App. 137-148 (Ex. 7).** Attorney Wendy Wooldridge was appointed as successor personal representative on March 21, 2017. **App. 149 (Ex. 8).** Respondent reimbursed the estate $15,466.04 in April 2017. **App. 86 (Tr. 121).**

The Ethel Hall Estate remains open. Respondent and Wendy Wooldridge, the successor personal representative, in January 2018 entered into a stipulation for the payment of personal representative fees for the estate, with Ms. Wooldridge to receive $2,500.00 and Respondent to receive $15,104.87. **App. 204-206 (Ex. E).** Judge Beard approved the stipulated payment of personal representative fees on January 8, 2018. **App. 240 (Ex. J).** Although not classified as a sanction, Judge Beard thought the reduction in fees for Respondent, and the payment to Ms. Wooldridge, was a fair resolution of the personal representative fee issue. **App. 69-70 (Tr. 54-57).** The reduction of $2,500.00 in what would otherwise have been Respondent's personal representative fee was slightly more than the now moot reduction of $2,138.83 which Judge Beard had ordered in September 2015. **App. 64 (Tr. 35-36).**

Respondent had appeared before Judge Beard many times in probate court. **App. 60 (Tr. 18-19).** Respondent knew Judge Beard could be rigid in his expectations. **App. 90 (Tr. 137).**

Respondent presented attorney Kenton Askren as a witness via deposition. **App. 220-239 (Ex. I).** Mr. Askren served as Associate Circuit (and Probate) Judge in Cooper County from 1975 to 2006. **App. 221 (Ex. I, p. 6).**

Both Mr. Askren and Respondent testified that Respondent could lawfully pay himself a personal representative fee without court order because a personal representative fee is a claim under RSMo. § 473.433. **App. 82-83, 87, 227, 235 (Tr. 108-109, 126) (Ex. I, p. 29, 61).** Mr. Askren's opinion was qualified "It's always my caveat, a personal representative does at their own peril." **App. 227 (Ex. I, p. 29).**

Respondent submitted four affidavits attesting to Respondent's good character. **App. 242-301 (Ex. M, N, O and P).** In addition, Judge Beard testified that he believed Respondent to be a good man who worked to make a difference in his community. **App. 79 (Tr. 93).**

DHP Analysis

The Disciplinary Hearing Panel drew several conclusions based on the Facts as submitted, on the applicable statutes, and the credibility of witness' analysis of those facts and statutes. The Panel found:

a) RSMo. § 473.153.6 required Respondent to make an application for, and to receive approval of, a partial representative fee before payment could be made. **App. 156-158 (Ex. 13).** To the extent that Respondent claims he did not need to file a motion and receive advance approval, **App. 80 (Tr. 99)**, Respondent is wrong under Missouri law. Respondent implicitly acknowledged the need to file a motion and receive approval because he stated it was firm practice to do so and something the firm had always done. **App. 80 (Tr. 99-100) (Panel Finding – App. 346).**

b) RSMo. § 473.153.6 sets out the specific procedure a personal representative is to follow when obtaining a fee. A fee is allowable only upon final settlement, or partial compensation upon application therefore. **App. 156-158 (Ex. 13).** Respondent did not follow the proper statutory procedure. Compounding the violation of the statute, he then failed to properly disclose the premature payment to himself in his final settlement filed with the Court. **App. 383-387 (Ex. C).** He only filed a proper application for approval of personal representative fees when confronted by the Court. **App. 134 (Ex. 4) (Panel Finding – App. 352).**

c) Respondent said he withdrew $15,466.04 on June 25, 2015 to save the estate taxes. But Respondent did not know how much tax would be saved, and his accountant's letter showed the showed the savings insignificant. The Respondent's testimony, and the letter from accountant Bales, are inconclusive on the reason for payment and do not justify Respondent's payment to himself on June 25, 2015 without Court approval. **(Panel Finding – App. 347).**

d) Respondent's excuses for not contacting Judge Beard between June 25, 2015 and September 1, 2015 are given no weight. **(Panel Finding – App. 347).**

e) Both Respondent and Mr. Askren are incorrect in saying Respondent could pay himself a personal representative fee without court order in a supervised estate. The personal representative fee is governed by RSMo. § 453.153.6 and the procedures therein. Ex. 13. The panel specifically finds that Judge Beard is correct on this point. **App. 62, 64-66 (Tr. 27-28, 36-37, 40-41) (Panel Finding – App. 350).**

f) Respondent's personal representative fee is not a claim against the estate. Taking the fee without complying with RSMo. 473.153.6 is not justified to avoid a potential claim against an estate for taxes. Even if arguably a "claim", Respondent did not follow the specific claim provision for claims of personal representatives set out in RSMo. § 473.423 entitled "Claim of Personal Representative". **App. 172 (Ex. 16) (Panel Finding - App. 352).**

g) Even if a personal representative fee would be considered "a claim" in RSMo. Chapter 473 (which it is not), Respondent did not follow the proper procedure for submission of a claim by a personal representative. RSMo. § 473.423 requires the claim to be filed with the court. **App. 65-66, 172 (Ex. 16) (Tr. 38-41) (Panel Finding – App. 350).**

h) Mr. Askren in his testimony also mentioned RSMo. § 473.277, 473.330, 473.335, 473.430, 473.433, and 473.613. Those sections are irrelevant to the issues raised in the Complaint and Respondent's defenses to it. RSMo. §473.153 and §473.423 apply. **(Panel Finding – App. 351).**

i) To the extent the testimony of Judge Beard and Mr. Askren differs, this panel gives substantially greater weight to Judge Beard's. Taken as a whole, Mr. Askren's deposition testimony appeared to be a search for after-the-fact justification of Respondent's conduct. **(Panel Finding – App. 351).**

DHP Decision / Conclusions of Law / Recommended Sanction

The Disciplinary Hearing Panel found that Respondent violated multiple Rules of Professional Conduct:

a) The Respondent violated Rule 4-1.15 by failing to safekeep client property in that he withdrew money for personal representative fees without Court authorization. **App. 351.**

b) Respondent violated Rule 4-3.3 by making a false statement of fact to a tribunal when Respondent submitted a final settlement in September 2015 without disclosing the unauthorized payment of personal representative fees to himself in June 2015. **App. 351.**

c) Respondent violated Rule 4-3.4(c) by taking a personal representative fee without court authorization and in violation of the Court's order of February 18, 2015. **App. 351.**

d) Respondent violated Rule 4-8.4(c) by engaging in deceitful conduct in taking a personal representative fee without court authorization and failing to disclose that payment in the final settlement submitted to the court. **App. 351.**

The Panel recommended that Respondent be suspended indefinitely with no leave to apply for reinstatement for six months. **App. 358.**

POINTS RELIED ON

I.

RESPONDENT IS SUBJECT TO DISCIPLINE BY THE SUPREME COURT BECAUSE HE ENGAGED IN PROFESSIONAL MISCONDUCT BY NOT FOLLOWING APPLICABLE STATUTES IN PAYING HIMSELF A PERSONAL REPRESENTATIVE'S FEE WITHOUT COURT AUTHORIZATION AND FAILING TO DISCLOSE THAT PAYMENT ON THE FINAL SETTLEMENT HE FILED WITH THE PROBATE COURT.

Rule 4-1.15, Rules of Professional Conduct

Rule 4-3.3, Rules of Professional Conduct

Rule 4-3.4(c), Rules of Professional Conduct

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

Missouri Revised Statute RSMo. § 473.153.6

Missouri Revised Statute RSMo. § 473.423

Knight v. Carnahan, 282 S.W.3d 9 (Mo. App. W.D. 2009)

Robinson v. Health Midwest Development Group, 58 S.W.3d 519 (Mo. banc 2001)

POINTS RELIED ON

II.

AN INDEFINITE SUSPENSION WITH LEAVE TO APPLY FOR REINSTATEMENT AFTER SIX MONTHS IS THE APPROPRIATE SANCTION WHEN RESPONDENT VIOLATED SAFEKEEPING PROPERTY RULES, FAILED TO DISCLOSE A PREVIOUSLY PAID PERSONAL REPRESENTATIVE FEE ON THE FINAL SETTLEMENT, AND TOOK A PERSONAL REPRESENTATIVE FEE WITHOUT COURT AUTHORIZATION. THE INDEFINITE SUSPENSION WITH LEAVE TO APPLY FOR REINSTATEMENT AFTER SIX MONTHS IS APPROPRIATE BECAUSE:

A. **THIS COURT HAS RULED THAT FAILURE TO FOLLOW APPLICABLE PROBATE STATUTES BEFORE RECEIVING A PERSONAL REPRESENTATIVE FEE WARRANTS AT LEAST A SUSPENSION; AND**

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

C. **THE CONDUCT INVOLVED, THE PRIOR CASE LAW, AND AGGRAVATING AND MITIGATING CIRCUMSTANCES, SUGGEST A MINIMUM ACTUAL SUSPENSION OF AN**

INDEFINITE SUSPENSION WITH LEAVE TO APPLY FOR REINSTATEMENT AFTER SIX MONTHS IS THE APPROPRIATE SANCTION.

Rule 4-1.15, Rules of Professional Conduct

Rule 4-3.3, Rules of Professional Conduct

Rule 4-3.4(c), Rules of Professional Conduct

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

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

In re Charron, 918 S.W.2d 257 (Mo. banc 1996)

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

ARGUMENT

I.

RESPONDENT IS SUBJECT TO DISCIPLINE BY THE SUPREME COURT BECAUSE HE ENGAGED IN PROFESSIONAL MISCONDUCT BY NOT FOLLOWING APPLICABLE STATUTES IN PAYING HIMSELF A PERSONAL REPRESENTATIVE'S FEE WITHOUT COURT AUTHORIZATION AND FAILING TO DISCLOSE THAT PAYMENT ON THE FINAL SETTLEMENT HE FILED WITH THE PROBATE COURT.

Respondent was appointed personal representative of an estate in 2014. It was a supervised estate, not independent administration, thus requiring Court approval of his acts. Respondent did not have independent counsel, serving as his own attorney.

The minimum fee for a personal representative is set forth via a sliding scale in RSMo. § 473.153.1. Given the general value of the estate, an estimate of the permissible statutory fee would be slightly more than $30,000.

In February of 2015 Respondent submitted a motion for approval of partial payment of personal representative fees in the amount of $30,700. The next day the Respondent submitted an amended motion, based on procedural errors in the first motion. Both requested the same amount of $30,700, essentially asking for full payment of all personal representative fees as though the estate had been completed.

Judge Beard, in ruling on each motion, clearly indicated his position on personal representative fees. He awarded $15,000, about half of what Respondent requested, but

advised Respondent that having a remaining balance of fees was a powerful incentive to close an estate, specifically saying "…receiving a fee when an estate closes is a powerful incentive to encourage a PR to get the estate closed." **App. 146.**

Respondent was clearly on notice as to what the Judge expected. Respondent claimed at the DHP Hearing that he did not have to get the Judge's permission before paying himself a fee, but his position is refuted for two reasons.

The first reason is Respondent's own acts. He acknowledged in his testimony that he always filed a motion with the Court to receive fees. Why would he continue to do that in almost thirty years of practice if he did not truly believe that it was required?

The second reason is the wording of the applicable probate statute. RSMo. § 453.153.6 states:

> Compensation properly allowable hereunder may be allowed to personal representatives or attorneys upon final settlement, or partial compensation upon application therefore, at any time or times during administration. If the Court finds that a personal representative has failed to discharge his duties as such in any respect it may deny him any compensation whatsoever or may reduce the compensation which would otherwise be allowed. If the Court finds that any attorney's services or actions in connection therewith are wrong, improper or injurious to the estate, no attorney fees whatever shall be allowed.

The statute clearly requires all partial compensation to a personal representative must be by application to the Court, and the final level of compensation is to be determined only when the final settlement is filed. Respondent appropriately requested a partial fee payment in February 2015. He did not appropriately request the second fee.

Respondent instead took a fee of $15,466.04 on June 25, 2015. It either was a partial fee (without filing a motion with the Court) or a final fee taken over two months prior to the filing of the final settlement on September 3, 2015. To compound the problem, Respondent did not list the $15, 466.04 payment of June 25, 2015 on his final settlement.

Respondent's activities violated several of the Rules of Professional Conduct, as set forth below:

Rule 4-1.15 requires a lawyer to hold the property of clients or third parties separate from that of the lawyer, distribute the property in a timely fashion when appropriate, and safekeep the property at all times. Respondent failed to do so in this case. He transferred a portion of the client estate's property to himself in June of 2015 without court order or authorization to do so. This was contrary to Judge Beard's February 18, 2015 order limiting the fee to $15,000 until completion of the estate. The property, i.e. the personal representative fees, by statute was not to be transferred until filing the final settlement. The transfer violated the safekeeping property Rule 4-1.15.

Respondent also violated Rule 4-3.3, which states a lawyer shall not knowingly make a false statement of fact or law to a tribunal. Not only did Respondent fail to seek the Court's permission before paying himself on June 25, 2015, he then failed to disclose the payment on the final settlement. This omission in the final settlement is a violation of Rule 4-3.3.

Respondent attempted to justify his action. He said the failure was an oversight, a mistake because he had prepared most of the final settlement back in June of 2015. But he

had ample opportunity to correct any error from June 25 onward. He testified that he tried to contact Judge Beard on or about June 25 while the Judge was out-of-town. However, he did nothing in July or August of 2015 to explain to Judge Beard his taking of the fee. Respondent said he was too busy even though his office was across the street from the courthouse. Then he did not list the payment in final settlement.

The Disciplinary Hearing Panel did not find that Respondent's rationale convincing, nor should the Court. The DHP had the opportunity to hear Respondent testify and observe his credibility. It found his reasoning for the June 25, 2015 fee payment not justified, his excuses for not contacting Judge Beard to be given no weight, and his explanation unsatisfactory for omission of the payment from the final settlement.

Respondent also violated Rule 4-3.4(c), which states a lawyer shall not knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists.

In this case Respondent clearly knew Judge Beard's position on the award of the final settlement fee. There is no other logical position that can be taken after Judge Beard's two orders of February 18, 2015. Judge Beard clearly intended the incentive for closing the estate would be the payment of the remainder of the personal representative fee.

Respondent ignored these orders and also clearly ignored RSMo. § 473.153.6, by taking a fee without court order over two months prior to the filing of the final settlement. Respondent cannot say he was disobeying an obligation because of an open refusal that no obligation existed, because he did not file an application with the Court and he omitted the

fee payment from the final settlement. His actions speak louder than words. As the Disciplinary Hearing Panel noted, his actions and the deposition testimony of his witness, Kenton Askren, appear to be a search for an after-the-fact justification of his conduct.

Finally, Respondent violated Rule 4-8.4(c), which states that it is lawyer misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Respondent appears to contend that his act was only an accident and, in any event, the omission would have been found by Judge Beard and/or his clerk while auditing the final settlement. The possibility that something may be found does not justify a failure to disclose when that disclosure is required. It also does not justify taking a fee over two months prior to the final settlement and not advising the Court of that payment had been made. Respondent's taking of the fee on June 25 without court authorization, his failure to communicate to communicate with Judge Beard thereafter, and then his failure to include the check on the final settlement show a pattern of misrepresentation. This is a violation of Rule 4-8.4(c).

As Informant understands Respondent's testimony, and the testimony of former Judge Kenton Askren, Respondent offered three defenses for his activities:

(1) No Court authorization was needed; (2) he had a good motivation to pay himself on June 25, 2015 – to preserve and protect the estate assets from taxation; and (3) he returned the property to the estate. Each defense will be addressed in turn.

As previously discussed, RSMo. § 473.153.6 is very specific on the procedure for personal representative fees. Respondent did not follow that procedure.

Respondent and Mr. Askren attempted to justify the payment, saying the personal representative fee was a claim against the estate, which Respondent could pay without court order. However, once again there is a specific statute on this matter. RSMo. § 473.423 governs claims by personal representatives against estates. That statute states:

> A personal representative may establish a claim against the estate by proceeding against his co-representative in the manner prescribed for other persons; but if there is no co-representative, he shall file his claim and other papers, and, unless the persons whose interests would be adversely affected thereto consent thereto in writing, the court shall appoint some suitable person as administrator ad litem to appear and to manage the defense. The fee allowed to the administrator ad litem shall be charged against the claimant as costs unless the claim arose prior to decedent's death or, that by advancing funds on behalf of the estate, the estate was benefited thereby, in which event the fee allowed the administrator ad litem shall be charged as costs against the estate and paid as an expense of administration.

This statute requires a claim be made to the court and an administrator ad litem be appointed. Even if this statute were applicable (which Informant contends it is not because personal representative fees are not claims), Respondent did not follow the required procedure.

Respondent, and Mr. Askren, in their testimony cite numerous other statutes to claim Respondent did not need a court order for fees. The problem is these statutory references do not follow a basic principle of statutory construction – the doctrine of *lex specialis derogat legi generali* – "if two laws govern the same factual situation, a law governing a specific subject matter overrides a law governing general matters." See *Knight*

v. Carnahan, 282 S.W. 3d 9, 20-21 (Mo. App., W.D. 2009); *Robinson v. Health Midwest Development Group*, 58 S.W. 3d 519, 522 (Mo Banc 2001). Here there are specific laws regarding the compensation of a personal representative (RSMo. § 473.153) and handling of claims of a personal representative (RSMo. § 473.423). The language in those statutes govern over any general statutes. Respondent did not follow the proper procedures.

The second defense appears to be Respondent had good motivation in making the June 25, 2015 payment to avoid tax consequences. But Respondent did not know at the time of the $15,466.04 payment to himself how much, if any, tax liability there would be. His accountant said the amount saved by Respondent paying himself a fee was a federal tax liability exposure of $1,054 and a Missouri tax liability exposure of $338, neither of which is a significant sum in a seven figure probate estate. And that still does not explain Respondent's failure to communicate with Judge Beard after the payment, nor does it explain Respondent's failure to disclose the payment on the final settlement.

The third defense appears to be repayment. Respondent did return the $15,466.04 payment to the estate. Judge Beard initially ordered the money returned in his order of October 28, 2015. The money was not returned to the estate until April 2017. Instead Respondent first entered into extensive litigation, as shown by the docket sheet, **App. 137-148 (Ex. 7).**

Regardless of any reason for the delay, the return of the money does not explain or justify the central focus of this case – that Respondent took a personal representative fee without court authorization and failed to disclose it in the final settlement.

Respondent's acts violated Rules 4-1.15, 4-3.3, 4-3.4(c), and 4-8.4(c) of the Rules of Professional Conduct.

II.

AN INDEFINITE SUSPENSION WITH LEAVE TO APPLY FOR REINSTATEMENT AFTER SIX MONTHS IS THE APPROPRIATE SANCTION WHEN RESPONDENT VIOLATED SAFEKEEPING PROPERTY RULES, FAILED TO DISCLOSE A PREVIOUSLY PAID PERSONAL REPRESENTATIVE FEE ON THE FINAL SETTLEMENT, AND TOOK A PERSONAL REPRESENTATIVE FEE WITHOUT COURT AUTHORIZATION. THE INDEFINITE SUSPENSION WITH LEAVE TO APPLY FOR REINSTATEMENT AFTER SIX MONTHS IS APPROPRIATE BECAUSE:

A. **THIS COURT HAS RULED THAT FAILURE TO FOLLOW APPLICABLE PROBATE STATUTES BEFORE RECEIVING A PERSONAL REPRESENTATIVE FEE WARRANTS AT LEAST A SUSPENSION; AND**

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

C. **THE CONDUCT INVOLVED, THE PRIOR CASE LAW, AND AGGRAVATING AND MITIGATING CIRCUMSTANCES,**

SUGGEST A MINIMUM ACTUAL SUSPENSION OF AN INDEFINITE SUSPENSION WITH LEAVE TO APPLY FOR REINSTATEMENT AFTER SIX MONTHS IS THE APPROPRIATE SANCTION.

Respondent has violated multiple rules of professional conduct. He has violated his duty to the profession, to the Court, and to his client, by taking a personal representative fee without court authorization. He failed to safekeep property (Rule 4-1.15), submitted false and/or incomplete information in a final settlement (Rule 4-3.3), disobeyed an obligation under the rules of a tribunal by taking a personal representative fee prior to final settlement when the court in February 2015 had stated only a partial award would be made at that time to have an incentive for the remainder of the fee to be awarded at final settlement (Rule 4-3.4(c)), and engaged in conduct involving deceit in not disclosing the June payment to himself in the final settlement (Rule 4-8.4(c)). Respondent's conduct warrants an actual suspension, an indefinite suspension with leave to apply for reinstatement after six months.

This Court takes seriously inappropriate acts in handling an estate. In the case of *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994), the Court found Respondent to have violated Rule 4-1.15 by directing expenditures from an estate account before having sought permission from the Court. Griffey was disbarred. However, there were multiple charges in that case and Respondent Griffey actually stole money, factors not present in this case.

A closer case on the facts is *In re Charron*, 918 S.W.2d 257 (Mo. banc 1996). In *Charron* the Respondent failed to file an annual settlement before paying himself both fees as personal representative and money owed to him by the decedent. The *Charron* Respondent failed to follow applicable probate procedures, just as in the present case. In *Charron*, as Judge Limbaugh noted in his opinion, the Respondent truly was owed the money, both in personal representative fees and pursuant to the decedent's promissory note. Charron received a one year suspension.

In the current case there is a smaller amount of money involved than in *Charron*, but Respondent still took his fee before the final settlement. He could not have known what that fee truly would be until the time of the final settlement, even if entitled to it. Also this is not a case of first impression on improper management of a probate estate. *Griffey* and *Charron* already stand as precedent.

Case law suggests a suspension is warranted. Because the amount of money is much less than *Charron*, and because of Respondent's reputation in the community, the shortest applicable actual suspension the Court will consider is appropriate. Hence an indefinite suspension with leave to apply after six months is a base sanction recommendation.

Besides case law, in making discipline and sanction analysis the Supreme Court often looks to the ABA Standards for Imposing Lawyer Sanctions, (1991 ed.) for guidance. Each of the four rule violations in this case has a different ABA Standard:

4-1.15: Standard 4.1

4-3.3: Standard 6.1

4-3.4: Standard 6.2

4-8.4(c): Standard 5.1.

Sanction Standard 4.1 for violation of Rule 4-1.15 is entitled "failure to preserve the client's property."

> ABA Standard 4.12 states: 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.
>
> ABA Standard 4.13 states: Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

The applicable Standard in this instance is 4.12 on suspension. Respondent knew what he was doing in writing the check on June 25, 2015. That was estate money until the Court ordered otherwise. Respondent had an opportunity to advise the Court from June 25 until September 1, 2015, when, why, and how much he had paid himself. He failed to do so. Then in September, Respondent submitted a final settlement without disclosing the payment on that settlement.

Sanction Standard 6.1 for violation of Rule 4-3.3 is entitled "False Statements, Fraud and Misrepresentation."

> ABA Standard 6.12 states: Suspension is generally appropriate when a lawyer knows that false statements or documents are

> being submitted to the Court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceedings, or causes an adverse or potentially adverse effect on the legal proceeding.
>
> ABA Standard 6.13 states: Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Once again, suspension is the appropriate standard. Respondent knew about the June 25 payment when submitting his final settlement to the Court in September. He took no remedial action until being confronted by Judge Beard. His acts reflected adversely on the proceeding and appropriate probate procedure. Judge Beard thought Respondent's acts sufficient that they be reported to the OCDC. Knowing conduct warrants a suspension.

The Sanction Standard for violation of Rule 4-3.4 is ABA Standard 6.2 entitled "Abuse of the Legal Process."

> ABA Standard 6.22 states: Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or other

party, or causes interference or potential interference with the legal proceeding.

ABA Standard 6.23 states: Reprimand is generally appropriate when a lawyer negligently fails to comply with the court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with the legal proceeding.

Respondent knew in February 2015 that Judge Beard had no intention of awarding the final personal representative fee payment until the final settlement was filed and the estate ready to close. There can be no other reading from Judge Beard's two orders on February 18. Nonetheless, Respondent paid himself on June 25 and did not disclose that payment on his final settlement, resulting in a meeting with the judge in which Respondent acknowledged he had made the payment. This is not negligent, it is knowing, and under the ABA Standards a suspension is warranted.

Sanction Standard 5.1 for violation of Rule 4-8.4(c) [for duties owed to the profession] is entitled "Failure to Maintain Personal Integrity."

ABA Standard 5.12 states: Suspension is generally appropriate when a lawyer knowing engages in criminal conduct that does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

> ABA Standard 5.13 states: Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit or misrepresentation and that adversely reflects on a lawyer's fitness to practice law.

Under this Standard reprimand might be the appropriate sanction. Respondent did not engage in criminal conduct, nor did that conduct seriously adversely reflect on his fitness to practice. Nonetheless, it is hard to say that Respondent did not knowingly engage in deceitful conduct when he failed to disclose his June 25 payment on the final settlement filed in September of 2015. Were this to be the only rule violation, a base sanction of reprimand might be appropriate. However, it is not the only rule violation.

The ABA base standard, when looking at all the rule violations, suggests suspension as appropriate. Once the base sanction has been established, in this case suspension, it is appropriate to consider both mitigating and aggravating factors. Mitigating and aggravating factors are set forth in the ABA Sanction Standards 9.22 (aggravation) and 9.32 (mitigation). After reviewing those factors, there is no reason to change the base sanction of suspension. Aggravating factors present in this case include a prior disciplinary history, a selfish motive in paying himself a personal representative fee before the estate was ready to be closed and not disclosing that payment to the court upon final settlement, the refusal to acknowledge wrongful conduct by insisting that what he did was and is not wrong, and Respondent's substantial experience in the practice of law since being licensed in 1983.

Mitigating factors in this case are a cooperative attitude towards the proceedings (Respondent met with the OCDC and provided his complete file upon request), character or reputation from lawyers and judges in his circuit, including Judge Beard, and the imposition of other penalties or sanctions. The "imposition of other penalties or sanctions" in this case would be that Respondent did not receive $2,500.00 in fees that the size of the estate would otherwise indicate would be his. Instead that money by stipulation went to the successor personal representative.

The mitigating factors do not warrant the change in the base discipline, particularly considering the aggravating factors that offset them.

Probation is not appropriate in this case. Comparable case law resulted in an actual suspension. Respondent has not acknowledged the wrongfulness of his acts. The directives of a judge were ignored. A payment to Respondent was not disclosed in filing the final settlement. There was harm to the integrity of the probate process. Probation is not justified when these factors are considered.

Missouri case law suggests that Respondent be suspended. The ABA Standards also suggest that Respondent be suspended.

CONCLUSION

Respondent engaged in professional misconduct involving failure to safekeep property, failure to disclose a payment to himself in a final settlement, and failure to seek court approval before paying himself a personal representative fee in an estate. This conduct violated multiple Rules of Professional Conduct. After consideration of

case law, the ABA Standards, and the applicable aggravating and mitigating factors, an appropriate sanction is an indefinite suspension with leave to apply for reinstatement after six months.

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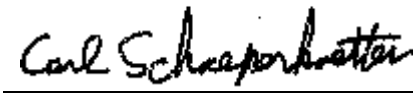
Chief Disciplinary Counsel

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2018, a true and correct copy of the Informant's foregoing Brief was served on **Counsel for Respondent** via the Missouri Supreme Court electronic filing system pursuant to Rule 103.08:

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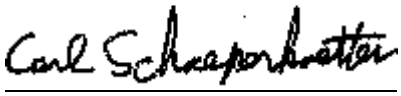
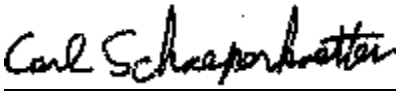


Carl Schaeperkoetter

CERTIFICATION OF COMPLIANCE: 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. Brief served upon Respondent's Counsel by email pursuant to Rule 103.08;
3. Complies with the limitations contained in Rule 84.06(b);
4. Contains 7,196 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



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