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IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
R. SCOTT GARDNER,	)	**Supreme Court # SC97207**
	)	
Bar No. 33504	)	
	)	
Respondent.	)	

RESPONDENT'S BRIEF

Respectfully submitted,

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SUPPLEMENTAL STATEMENT OF FACTS

Testimony and Evidence

Respondent has had a significant probate practice since 1988. (App. 79-80) (Tr. 95, l. 23 - 97, l. 7). However, Respondent has only been a personal representative several times. (App. 90) (Tr. 139). Respondent did not believe it was necessary to file a motion for authority to pay himself the personal representative fee that had been earned, but it had been the practice in his firm to do so. (App. 80) (Tr. 99, l. 188 - 100, l. 8). Because of this practice, on February 17, 2015, Respondent filed a motion for approval of partial payment of personal representative fees in the amount of $30,070. (App. 129) (Exhibit 1).

Judge Beard's first docket entry on February 18, 2015, was titled "Motion Denied" and denied the motion, giving reasons. (App. 146) (Exhibit 7, pg. 10). Judge Beard said in his explanation that he did not want to allow Respondent to take substantial fees early, but the only thing actually wrong with the first motion was that it was calculated incorrectly. (App. 61) (Tr. 21, l. 14-24). The only portion of that docket entry that could constitute a directive is "The motion is denied for two reasons." (App. 67) (Tr. 46-47, l. 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. (App. 130) (Exhibit 2). Judge Beard's second docket entry on February 18, 2015, (App. 146-147) (Exhibit 7, pgs. 10-11) was labelled **"Ord Allowing Fees – Pers Rep."** and stated:

> 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. This amount shall be deducted from the final calculation of fees due him at the close of the estate.

Based on Judge Beard's testimony and the language of Judge Beard's second docket entry, the second docket entry on February 18, 2015, reversed the first docket entry that Judge Beard made on February 18, 2015. (App. 67) (Tr. 47, l. 22-25).

On June 25, 2015, Respondent wrote a check (App. 150) (Ex. 9) 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. 46) (Admitted in Answer) Respondent paid himself the personal representative fee, at that time, based on his understanding of the advice of decedent's tax advisor. He understood that, unless all expenses and fees of the estate were paid by the end of the estate's fiscal year, the estate would either have to pay federal and state income tax or the estate's distributees would receive a portion of their final distribution as taxable income. (App. 81). (Tr. 102, l. 21 – 103, l. 13). Respondent thought that the end of the estate's fiscal year was June 29, 2015. (App. 81). (Tr. 104). Respondent did not know the amount the estate would save, at that time (App. 91) (Tr. 143, l. 12 – 144, l. 5). Respondent had a fiduciary duty to minimize the expenses of the estate. (App. 83) (Tr. 109, l. 17 - 110, l. 1).

Respondent believed he had authority to pay himself the personal representative fee on June 25, 2015, without prior court authority, for three reasons:

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a. Respondent believed that it was not legally necessary to obtain prior court approval for the personal representative to pay himself the personal representative fee, although it had historically been his practice to do so because it was the firm's practice when he joined it. (App. 80) (Tr. 99, l. 22 - 100, l. 8).

b. Respondent believed that he had authority to pay himself this fee based on the language of the Will. (App. 82-83) (Tr. 108, l. 24 – 109 l. 16).

c. Respondent believed that, under his authority as personal representative to pay claims, he could pay himself this fee because it served to avoid a tax claim. (App. 81; 86-87; 96) (Tr. 102, l. 24 – 103, l. 7; 124, l. 12 – 125, l. 11; 126, l. 18 – 127, l. 9; 128, l. 2-16; 164, l. 15-22).

Respondent's understanding of his authority to pay himself the personal representative fee without prior court approval was supported by the testimony of Judge Kenton Askren. Judge Askren, who had been a probate judge for 32 years, testified:

> Q. I guess what we can agree, it's your opinion that that is a -- would be appropriate for the personal representative to pay himself or herself before --
>
> A. It is my opinion that you do not have to ask for approval to make that payment under your powers as a personal representative, not only here but in some of the other sections that we talked about. But you do it at your own peril because you may not have sufficient funds when you get down to final settlement time and, therefore, you're going to have to give it back.

(App. 237) (Exhibit I, pg. 69, l. 9-20).

The amount of the partial personal representative fee Respondent took on June 25, 2015, was ultimately approved as part of the total appropriate fee, although the distribution changed in light of the fees paid to the successor personal representative. (App. 204) (Exhibit E).

Judge Beard's testimony confirmed that the personal representative has authority to pay claims without prior approval from the court. (App. 64) (Tr. 36).

Respondent attempted to contact Judge Beard several times by going to his office between June 25, 2015, and July 4, 2015, to advise him of the payment but found that Judge Beard was not available in person or for communication. (App. 85-86; 89) (Tr. 120, l. 20 – 121, l. 12; 133, l. 7-24.). According to his own testimony, Judge Beard was unavailable on Thursday, June 25, 2015, and through Saturday, June 27, 2015. (App. 68). (Tr. 50). Judges in that circuit rarely step in and handle each other's matters when a judge is unavailable. (App. 68) (Tr. 50).

When Respondent made the payment to himself on June 25, 2015, he believed he would be closing the estate within the next month. (App. 82) (Tr. 105, l. 6-16). The personal representative fee could not have gone down from the amount that Respondent calculated on that June 25, 2015. (App. 90) (Tr. 138). Respondent did not get the estate closed as he anticipated because Respondent had another matter that went to trial on July 9 -10, 2015. That matter, with post-trial briefing, took most of Respondent's time until mid to late August. (App. 82) (Tr. 105, l. 17 – 106, l. 19.).

Respondent should have listed the June 25, 2015, check on page 3 of the Final Settlement (App. 383) (Exhibit C) with the other June 25, 2015, disbursements from the

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estate checking account. (App. 62) (Tr. 26). Respondent submitted bank records as exhibits to the Final Settlement that did show the payment. (App. 62; 85; 150). (Tr. 26, l. 3-11; 117, l. 21-25; Ex. 9). Respondent acknowledged in his testimony that he should have listed that check (App. 150) (Exhibit 9) on page 3 of the Final Settlement (App. 383) (Exhibit C), but he "screwed up." He had presented a draft of the Final Settlement to the accountant when he learned of the concern about paying expenses and fees before the end of the estate's fiscal year. After Respondent presented the draft of the Final Settlement to the accountant, Respondent made the June 25, 2015, payment to himself pursuant to the accountant's advice. Respondent failed to update the Final Settlement form to include that payment when he finalized the form and filed it with the court on September 3, 2015. (App. 83-84; 97) (Tr. 112, l. 7 – 113, l. 22; 167, l. 13 – 168, l. 15).

Although Respondent has acknowledged that he made a mistake by not specifically listing the payment on the Final Settlement form, Respondent anticipated that the clerk would see the check (App. 150) (Exhibit 9) when they performed their detailed audit of the Final Settlement and supporting documents. He was not trying to hide it. (App. 84-85) (Tr. 116 – 117, l. 14). It is standard practice for the clerk and/or judge to audit the final settlement by comparing it to the actual final settlement with the supporting documents. (App. 68; 76). (Tr. 51, l 23 – 52, l. 3; 82, l. 4 – 83, l. 4).

The amount of the personal representative fee, including the June 25, 2015, payment was listed in the far right column on the final settlement, which is the column indicating items that have been paid and are, therefore, a credit for the estate. (App. 84; 229) (Tr. 114, l. 17 – 115, l. 14; Ex. I, pg. 37, l 7-23).

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There was no issue with the amount of the partial personal representative fee Respondent took. Judge Beard's only issue with the payment was that he believed that the statute required Respondent to get permission from the court before he made the partial payment to himself. Judge Beard felt that Respondent's failure to get prior permission was unethical. (App. 73) (Tr. 71, l. 16-25).

If Respondent had been able to close the estate soon after he made the June 25, 2015, payment to himself, as he anticipated, Judge Beard would have seen no problem with his action:

> The way it works is, when the attorney files the final settlement, usually, that subsection right there describes the fees they're proposing, and so I authorize it, but I never actually look and see whether the proposed check to themselves is actually -- was cashed the day before or the week before. When it's right around the final settlement, I just assume that's the reasonable protocol. It was only because this was several months earlier that caused me concern.

(App. 73) (Tr. 72, ll-17).

Character and Reputation Evidence

Judge Beard testified that Respondent is a good man who works really hard to make a difference in the community. (App. 79) (Tr. 93, l. 2-6).

Judge Robert L. Koffman testified by affidavit. He has known Respondent since 1984. He said that Respondent is "a man of high moral character and integrity." He further described Respondent as "honest, trustworthy, fair and ethical." (App. 242) (Exhibit M).

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Judge Jeff Mittelhauser testified by affidavit. He has known Respondent since high school and they have both practiced law in Pettis County for over thirty years. Respondent has a reputation for being "honest and above-board." Respondent "will not seize an unfair advantage or engage in sharp dealing. He is always prepared, professional and friendly." Judge Mittelhauser's confidence in Respondent's personal and professional ethics has led him to refer probate and real estate clients, including Judge Mittelhauser's own parents, to Respondent, (App. 294) (Exhibit N).

Judge Kenton Askren testified by deposition. He has known Respondent since Respondent began practicing law in Sedalia. (App. 221). (Exhibit I, pg. 8). He finds Respondent to be of high integrity and is unaware of anyone who has ever expressed concern about Respondent not being honest. Respondent has a professional demeanor. (App. 222-223) (Exhibit I, pg. 11-13).

Attorney Tina Luper testified by affidavit. She has known Respondent for over twenty years. She has found Respondent to be "honest, trustworthy, fair and ethical in the discharge of his duties." (App. 296) (Exhibit O).

Attorney Sean Pilliard testified by affidavit. He has known Respondent since childhood and has been practicing law in Sedalia since 1999. He has always known Respondent to "be of good character and an honest and ethical attorney." (App. 299) (Exhibit P).

DHP Analysis

The hearing panel adopted Informant's proposed findings wholesale, or nearly so. The panel's decision begins: "COMES NOW the Chief Disciplinary Counsel,

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(hereinafter "OCDC"), by and through staff counsel, Carl E. Schaeperkoetter, and submits Proposed Findings of Facts, Conclusions of Law and Recommendation for Discipline as follows:" (App. 344).

The presiding officer objected to Respondent's counsel's questions on several occasions and advised Informant's witness in response to a question by Respondent's counsel on one occasion:

(App. 65) Tr. 37:

> Q.   Okay. I'm going to show you -- I have
> another statute which is 473.360 which has been
> marked as Respondent's Exhibit Q.
> HEARING OFFICER CLAUSEN: We don't need
> another one, do we?
> MS. RITTMAN: You don't have this one yet.
> HEARING OFFICER CLAUSEN: Oh, okay. Okay.
> Thank you.

(App. 65) Tr. 38:

> Q.   So it is a claim of the estate, and you've
> said that claims of the estate can be paid by the
> personal representative without prior approval?
> HEARING OFFICER CLAUSEN: That's not what
> he said.

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(App. 69) Tr. 55:

Q. Okay. I see that it was filed

March 21st of 2017. Okay. So she got approximately

$2,500 for that portion of her representation?

HEARING OFFICER CLAUSEN: Well, it calls

for speculation. He submitted a stipulation to him

and he signed it.

MS. RITTMAN: Well, he approved it.

HEARING OFFICER CLAUSEN: Was there a

hearing on it?

THE WITNESS: No. We had scheduled a

hearing, but they reached an agreement.

(App. 70) Tr. 57:

Q. Okay. But the amount that he paid himself

on June 25th of 2015, once you discovered that

payment in September of 2015, you could have just

used your discretion to approve that payment at that

time; is that correct?

HEARING OFFICER CLAUSEN: Even though it's

not listed in the final settlement?

A. I guess I'm not -- are you suggesting that

I would not have or had not -- and report that to

the ethics committee under the rules?

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Q. (By Ms. Rittman) I'm not suggesting things, I'm asking questions, so ...

(App. 72-73) Tr. 67-69:

Q. I would -- rather than adding to the record, I would just ask you to read lines 13 -- I'm sorry -- actually, if you'd go back up to line 9 where the question is and read the question and answer Lines 9 through --

HEARING OFFICER CLAUSEN: What's the purpose of this, Ms. Rittman?

MS. RITTMAN: Well, a moment ago, when I asked him about people differing in their opinions on the interpretation of the statute, it was pointed out to me that he had not seen exactly what Judge Askren had said in his deposition, so I'm giving him to the opportunity to see exactly what Judge Askren said in his deposition.

HEARING OFFICER CLAUSEN: I don't think this is relevant, so I'm not -- I think you should move on.

MS. RITTMAN: Well, I would like to go ahead and have this –

HEARING OFFICER CLAUSEN: He's not going

to decide this case, okay?

MS. RITTMAN: I understand that, but I would like to go ahead and have his answer be part of the record as an offer of proof.

MR. SCHAEPERKOETTER: For the record, I want to make my own relevance objection, which I was getting ready to do, because they both speak for themselves. The panel can read whatever both of them have said and testified, and I think anything else is irrelevant.

HEARING OFFICER CLAUSEN: All right. So you want to make -- so I sustain that objection. And you want to make an offer of proof, so as part of your offer of proof, you've asked him to read -- what have you asked him to read?

MS. RITTMAN: I've asked him to read lines 9 through 20 of page 69 of Exhibit I.

A. All right. I've read it.

HEARING OFFICER CLAUSEN: Okay. And as part of your offer of proof, what's your question?

Q. (By Ms. Rittman) Based upon that testimony by Judge Askren, do you accept that there can be differing opinions and interpretations of whether the personal representative may pay himself or

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herself the PR fee without prior approval from the

court?

A. Yes. I agree many people can have

different opinion on issues, including this issue.

HEARING OFFICER CLAUSEN: Is that the end

of your offer of proof?

MS. RITTMAN: That is the end of my offer

of proof.

HEARING OFFICER CLAUSEN: Okay. Thank

you.

(App. 78) Tr. 91-93:

THE WITNESS: If there's no opposition, I

would be interested in sharing an opinion about

Mr. Gardner's character from my experience.

HEARING OFFICER CLAUSEN: I have no --

does anybody have an objection?

MR. SCHAEPERKOETTER: I'm not going to

object.

HEARING OFFICER CLAUSEN: Go ahead.

I mean, Judge, I'll tell you, there is --

let's go off the record a second.

(Discussion off the record.)

HEARING OFFICER CLAUSEN: We took a break,

and Ms. Rittman indicates she had an additional question or questions for this witness.

FURTHER CROSS-EXAMINATION

BY MS. RITTMAN:

Q. Judge, I believe that you've already testified about your familiarity with Mr. Gardner, so based upon that, do you have an opinion regarding his character?

MR. SCHAEPERKOETTER: And I will object on the basis. I don't think it's appropriate under the case law for the judge to be giving his opinion in court, and I don't want him to be put in a position where it might be awkward for him to do so.

HEARING OFFICER CLAUSEN: Judge, you've got a right -- you can answer this question or not answer the question. That's your -- that's up to you. I'm not going to -- I'll overrule his objection, but you have to determine whether you want to answer.

THE WITNESS: Thank you.

A. I've worked with Mr. Gardner in morning Rotary Club for several years, and he's served on our school board in our community for many years. I believe he's a good man. He works really hard to

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make a difference in our community.

(App. 82) Tr. 106-107:

Q. So we're talking mid- to late August

before you got that wrapped up?

A. Mid- to late August, because the judge's

final -- the judge's final rewrite that he released

comes out the same night that I saw the judge's

order of September 10.

HEARING OFFICER CLAUSEN: Is there a claim

of alleged diligence in this case?

MR. SCHAEPERKOETTER: No.

MS. RITTMAN: No. I'm just trying to

explain that he thought he was going to be closing

the estate at the time he made the payment as –

HEARING OFFICER CLAUSEN: Got it.

(App. 82) Tr. 107:

Q. (By Ms. Rittman) The -- you've testified

that you don't believe that you need court approval

to pay yourself the personal representative fee.

From what source of authority do you -- or what

source do you think you obtained the authority to

pay the personal representative fee without prior

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court approval?

A. The statute that was quoted by

Judge Askren in his deposition, and, also, if you

look at --

HEARING OFFICER CLAUSEN: Hang on a

second. You didn't have Judge Askren's deposition

when you made this decision, so why don't you answer

her question and not cite to other people --

(App. 85) Tr. 117-118:

Q. Was it -- prior to today, was it your

understanding that the amount that you were awarded

included any kind of a sanction?

A. No. If you'll -- let me -- I -- and I

can --

HEARING OFFICER CLAUSEN: It's been asked

and answered.

Go ahead.

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POINTS RELIED ON

I.

RESPONDENT DID NOT ENGAGE IN PROFESSIONAL MISCONDUCT, AS ALLEGED BY INFORMANT IN THE INFORMATION:

(A) RESPONDENT DID NOT VIOLATE RULE 4-1.15 BY FAILING TO SAFEKEEP CLIENT PROPERTY BECAUSE RULE 4-1.15 APPLIES TO AN ATTORNEY REPRESENTING A CLIENT AND DOES NOT APPLY TO THESE FACTS, IN THAT,

(1) ACTING AS THE *PERSONAL REPRESENTATIVE*, RESPONDENT WITHDREW MONEY FOR PERSONAL REPRESENTATIVE FEES FROM THE ESTATE ACCOUNT WITHOUT PRIOR COURT AUTHORIZATION,

(2) RULE 4-1.15 DOES NOT APPLY TO ESTATE ACCOUNTS, AND

(3) RESPONDENT ACTED IN GOOD FAITH BASED ON HIS INTERPRETATION OF LAW, THE WILL, AND HIS FIDUCIARY DUTY TO REDUCE EXPENSES OF THE ESTATE;

(B) RESPONDENT DID NOT VIOLATE RULE 4-3.3 BECAUSE RESPONDENT DID NOT *KNOWINGLY* MAKING A FALSE STATEMENT OF FACT TO A TRIBUNAL WHEN RESPONDENT SUBMITTED THE FINAL SETTLEMENT IN SEPTEMBER 2015 IN THAT RESPONDENT'S FAILURE TO SPECIFICALLY LIST HIS PAYMENT OF PERSONAL REPRESENTATIVE FEES TO HIMSELF WAS INADVERTENT AND IN THAT THE INADVERTENCE OF THE OMISSION IS

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FURTHER SHOWN BY THE FACT THAT RESPONDENT INCLUDED DOCUMENTATION OF THE PAYMENT WITH THE FINAL SETTLEMENT FORM.

(C) RESPONDENT DID NOT VIOLATE RULE 4-3.4(C) BECAUSE TAKING A PERSONAL REPRESENTATIVE FEE WITHOUT PRIOR COURT AUTHORIZATION WAS NOT CONTRARY TO ANY ACTUAL ORDER OF THE COURT AND, ASSUMING ARGUENDO THAT IT WAS, THAT ORDER HAD BEEN REVERSED THE SAME DAY IT WAS ENTERED.

(D) RESPONDENT DID NOT VIOLATE RULE 4-8.4(C) BECAUSE HIS CONDUCT WAS NOT DECEITFUL, AS ALLEGED BY INFORMANT,

(1) IN THAT TAKING A PERSONAL REPRESENTATIVE FEE WITHOUT PRIOR COURT AUTHORIZATION HAD NOT BEEN PROHIBITED BY COURT ORDER, AND

(2) IN THAT HIS FAILURE TO SPECIFICALLY LIST THAT PAYMENT ON THE FINAL SETTLEMENT FORM WAS AN INADVERTENT OMISSION.

In re Ruffalo, 88 S. Ct. 1222, 1226 (1968)

Duncan v, Mo. Bd. for Architects, Prof. Engineers and Land Surveyors, 744 S.W.2d 524, 539 (Mo. App. ED 1988)

State ex rel. Williams v. Purl, 228 Mo. 1 (1910)

Rule 5.15

Rule 5.11

Rule 4-1.15

Rule 4-3.3

Rule 4-3.4(c)

Rule 74.02

Rule 4-8.4(c)

POINTS RELIED ON

II.

NO DISCIPLINARY ACTION IS APPROPRIATE WHERE RESPONDENT DID NOT ENGAGE IN PROFESSIONAL MISCONDUCT, AS ALLEGED BY INFORMANT IN THE INFORMATION;

ALTERNATIVELY, IF THIS COURT FINDS THAT RESPONDENT ENGAGED IN PROFESSIONAL MISCONDUCT, A REPRIMAND OR ADMONITION IS THE APPROPRIATE SANCTION.

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

ABA Standard 4.14

ABA Standard 6.14

ABA Standard 5.14

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ARGUMENT

I.

RESPONDENT DID NOT ENGAGE IN PROFESSIONAL MISCONDUCT, AS ALLEGED BY INFORMANT IN THE INFORMATION:

(A) RESPONDENT DID NOT VIOLATE RULE 4-1.15 BY FAILING TO SAFEKEEP CLIENT PROPERTY BECAUSE RULE 4-1.15 APPLIES TO AN ATTORNEY REPRESENTING A CLIENT AND DOES NOT APPLY TO THESE FACTS, IN THAT,

(1) ACTING AS THE *PERSONAL REPRESENTATIVE*, RESPONDENT WITHDREW MONEY FOR PERSONAL REPRESENTATIVE FEES FROM THE ESTATE ACCOUNT WITHOUT PRIOR COURT AUTHORIZATION,

(2) RULE 4-1.15 DOES NOT APPLY TO ESTATE ACCOUNTS, AND

(3) RESPONDENT ACTED IN GOOD FAITH BASED ON HIS INTERPRETATION OF LAW, THE WILL, AND HIS FIDUCIARY DUTY TO REDUCE EXPENSES OF THE ESTATE;

(B) RESPONDENT DID NOT VIOLATE RULE 4-3.3 BECAUSE RESPONDENT DID NOT *KNOWINGLY* MAKING A FALSE STATEMENT OF FACT TO A TRIBUNAL WHEN RESPONDENT SUBMITTED THE FINAL SETTLEMENT IN SEPTEMBER 2015 IN THAT RESPONDENT'S FAILURE TO SPECIFICALLY LIST HIS PAYMENT OF PERSONAL REPRESENTATIVE FEES TO HIMSELF WAS INADVERTENT AND IN THAT THE INADVERTENCE OF THE OMISSION IS

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FURTHER SHOWN BY THE FACT THAT RESPONDENT INCLUDED DOCUMENTATION OF THE PAYMENT WITH THE FINAL SETTLEMENT FORM.

(C) RESPONDENT DID NOT VIOLATE RULE 4-3.4(C) BECAUSE TAKING A PERSONAL REPRESENTATIVE FEE WITHOUT PRIOR COURT AUTHORIZATION WAS NOT CONTRARY TO ANY ACTUAL ORDER OF THE COURT AND, ASSUMING ARGUENDO THAT IT WAS, THAT ORDER HAD BEEN REVERSED THE SAME DAY IT WAS ENTERED.

(D) RESPONDENT DID NOT VIOLATE RULE 4-8.4(C) BECAUSE HIS CONDUCT WAS NOT DECEITFUL, AS ALLEGED BY INFORMANT,

(1) IN THAT TAKING A PERSONAL REPRESENTATIVE FEE WITHOUT PRIOR COURT AUTHORIZATION HAD NOT BEEN PROHIBITED BY COURT ORDER, AND

(2) IN THAT HIS FAILURE TO SPECIFICALLY LIST THAT PAYMENT ON THE FINAL SETTLEMENT FORM WAS AN INADVERTENT OMISSION.

No Discipline Based on Facts or Rules Not Alleged in the Information

Respondent's conduct did not violate the Rules of Professional Conduct, based on the facts and rule violations alleged in the Information. Respondent did make mistakes and has acknowledged them. Informant has solely alleged misconduct based on rule violations that require intentional or knowing actions, not mere mistakes.

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In an attorney discipline case, the hearing is conducted on the Information. Rule 5.15(b). "An information … shall set forth in brief form the specific acts of misconduct charged, and shall state briefly the grounds upon which the proceedings are based. Rule 5.11(c). Informant bears the burden of proof to establish the alleged violations of Rule 4 by a preponderance of the evidence. Rule 5.15(d). Informant alleged specific rule violations in the Information. This Court must base its decision solely on whether Informant proved the specific rule violations Informant alleged in the Information. To do otherwise would violate Respondent's due process rights. *See, In re Ruffalo*, 88 S. Ct. 1222, 1226 (1968). *See also, Duncan v, Mo. Bd. for Architects, Prof. Engineers and Land Surveyors*, 744 S.W.2d 524, 539 (Mo. App. ED 1988).

Rule 4-1.15

Informant alleged that Respondent violated "Rule 4-1.15 by failing to safekeep client property in that he withdrew money for personal representative fees without Court authorization."

Rule 4-1.15 does not apply to this situation. Rule 4-1.15(a) (without subdivisions) states:

> A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Client or third party funds shall be kept in a separate account designated as a "Client Trust Account" or words of similar import maintained in the state where the lawyer's office is situated or elsewhere if the client or third person consents.

Respondent was the personal representative of an estate and handled the funds in that capacity. Although he also acted as his own attorney in filing pleadings, his actions

related to paying himself the personal representative fee were taken as the personal representative. Further, Rule 4-1.15 relates to attorney trust accounts, not estate accounts.

Even if Rule 4-1.15 were interpreted as applying to this situation, Respondent's actions were intended to safekeep funds. In these circumstances, Respondent's motivation was to preserve the estate's assets, just as he saved the estate over $30,000 when he deviated from the norm by not hiring an attorney to represent him as personal representative. (App. 75, 78). (Tr. 77, 90). He acted on the basis that paying the personal representative fee before June 29, 2015, would save the estate money. The bank account from which he wrote the June 25, 2015, check was not an interest-bearing account. (App. 88) (Tr. 132, l 6-10). Therefore, the estate lost no funds during the period that Respondent had the funds. Respondent did not pay himself more than the proper amount for the personal representative fee.

Respondent did not believe that court authorization was needed to pay himself the personal representative fee. It had been his practice to take this approach, because his father had done that when Respondent started practicing in his father's firm. Not only did he not believe that he was generally required to obtain court permission to pay himself, he thought that he did not need to do so under these circumstances because he believed that by paying himself the personal representative fee at that specific time, he was fulfilling his fiduciary duty to preserve the assets of the estate. Although he acknowledged at the disciplinary hearing that the statute *may* require prior court

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authority, he did not believe, at the time he made the payment, that he was required to get prior authority.

Informant argues that Respondent's past conduct indicates that he believed he needed prior permission because he had always filed a motion before paying himself fees. Informant queries why Respondent would continue that practice if he did not truly believe it was required. Respondent learned this approach from his father. As this Court is well aware, attorneys are creatures of habit and tradition. It normally takes considerable effort to get attorneys to change their standard practices. Until this case, Respondent did not encounter a reason to change his approach. In this case, he appropriately focused on the interests of the estate and changed his approach to protect the assets of the estate. Further, Respondent has only been a personal representative several times. Respondent has not been in the same position on numerous occasions over thirty years, as Informant implies.

Judge Kenton Askren, a former probate judge for 32 years testified consistently with Respondent's belief. Judge Askren testified that prior authority is not necessary for a personal representative to pay him or herself. Informant notes that Judge Askren said that a personal representative who pays himself without prior authorization does so at his peril. Informant selectively omits the peril that Judge Askren described. The peril was not an ethical violation or sanctions. The peril was simply that the personal representative might have to refund part of the fee. Judge Askren's testimony was: "But you do it at your own peril *because you may not have sufficient funds when you get down to final settlement time and, therefore, you're going to have to give it back*." (Emphasis

added). (App. 237) (Exhibit I, pg. 69, l. 17-20). In fact, Judge Beard himself ultimately testified that his problem with Respondent's conduct wasn't that Respondent paid himself without prior permission and prior to filing the final settlement. His problem was the amount of time that elapsed between the payment and filing the final settlement. (App. 73) (Tr. 72). Instead of the month Respondent anticipated when he made the payment, it turned out to be 2 months and 8 days.

Respondent believed he had authority to pay himself the fee to preserve the assets of the estate, under several different theories. He did not believe the statute required him to obtain prior permission. He believed he had authority under the terms of the Will. He believed he had authority pursuant to the authority of a personal representative to pay claims, because paying himself at that time would avoid a tax claim.

The question before this Court is not whether the statutes allow a personal representative to pay the personal representative fee without prior permission from the court, prior to final settlement of an estate. The question is whether Respondent, in his capacity as personal representative, violated Rule 4-1.15 by failing to safekeep assets of the estate by withdrawing funds from the estate's bank account to pay himself the personal representative fee, without obtaining prior authorization from the court. Respondent took the action that he thought was proper and in the best interest of the estate. Once there was a final order directing him to return the funds to the estate account, he complied right away. The estate was not harmed by the early payment of funds because the estate account was not an interest-bearing account. The estate benefitted from the early payment of funds because it saved at least $613 in tax liability

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and accounting fees. (App. 178). (Exhibit A). Although this was not a lot of money, in relation to the size of the estate, Respondent did not know how much money he would be saving the estate, at the time he made the payment. He only knew that, by taking an action he believed he had the authority to take, he would save the estate money.

When there are differing opinions about the law's requirements among judges and attorneys with significant experience in that area of the law, it is not appropriate to discipline an attorney for acting on his or her opinion. Even if Respondent's legal theories were ultimately incorrect, it would be very dangerous indeed if this Court were to begin to discipline attorneys for good faith mistakes regarding the interpretation and application of statutes. Further, Judge Beard's testimony, and therefore Informant's evidence, did not address two of Respondent's grounds for believing that he had authority to pay himself the personal representative fee, in the specific circumstances of the Hall estate. Respondent should not be disciplined for paying himself the personal representative fee without obtaining prior court authority.

Informant notes that Respondent deposited the funds into his law firm account. Respondent placed the funds in his law firm account because it was necessary to remove the funds from ownership of the estate to accomplish the tax reduction. If he had placed the funds in his trust account, they would have still been property of the estate and the tax issue would have persisted. (App. 91) (Tr. 142, l. 6-19).

Respondent did not believe he needed prior approval, but he realized that making the payment to himself was unusual. Therefore, Respondent attempted to informally tell Judge Beard of the June 25, 2015, payment for a period of time after making the

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payment. Judge Beard's testimony established that he was not available from June 25, 2015, through Saturday June 27, 2015. Although Judge Beard testified that he was available for communication, he was not present to know what his clerk told Respondent. During the period from June 25, 2015 – July 4, 2015, Respondent went to Judge Beard's office on several occasions and was always told that Judge Beard was not available and was not available for communication. After that Respondent became consumed by another matter and did not make further efforts to informally contact Judge Beard about the payment.

Rule 4-3.3

Informant alleges that Respondent violated "Rule 4-3.3 by making a false statement of fact to a tribunal when Respondent submitted the Final Settlement form in September 2015 without disclosing his unauthorized payment of personal representative fees to himself in June 2015." Rule 4-3.3 states, in part:

> (a) A lawyer shall not *knowingly*:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(emphasis added). Paragraph [3] of the Comment states, in part: "There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."

Respondent did not knowingly make a false statement, nor did he knowingly fail to make a disclosure. Respondent did not violate Rule 4-3.3. Respondent has found no

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case in which this Court found a violation of Rule 4-3.3 as a result of a negligent omission.

Respondent made a mistake through inadvertence when he failed to specifically list the June 25, 2015, check on page 3 of the Final Settlement form, under the US Bank Checking Acct heading. (App. 383) (Exhibit C). He provided an explanation for that omission. He had prepared a draft of the Final Settlement form to show to the accountant. He showed the draft to the accountant and that is when Respondent learned that he needed to make the payment to himself. He made the payment that day. He testified that another case had consumed his time between July 4, 2015, and when he filed the Final Settlement. He did include the amount of that check, along with the February 2015 check for partial personal representative fees, for a total amount of $32,604.84, on the Final Settlement in the column that he understood to indicate amounts that had been paid. He also included an image of the check itself, in some form, and bank statements that listed the check.

Respondent made a mistake in failing to specifically list the check. This was one transaction that Respondent omitted from a detailed form. Essentially, Respondent was negligent. A negligent omission does not equate with knowingly making a false statement of fact.

Respondent knew that the judge's clerk, and possibly the judge, would do a detailed comparison of the bank statements and other supporting documents in relation to the final settlement he submitted. Respondent did not omit the check from the form for that reason, but based on his experience with the court, he believed the clerk would see

the check. If Respondent had been trying to hide the payment, he would not have provided a copy of the check in question to the court. If Respondent were engaging in the kind of intentional deceit alleged by Informant, Respondent would have thought nothing of altering the bank records to omit any reference to the check. Nor would he have disclosed the full amount of the personal representative fee in the column he understood to indicate amounts that have been paid.

Respondent complied with his duties under Rule 4-3.3 to take remedial action by filing a petition for fees the next day after Judge Beard alerted him to his omission. (App. 62) (Tr. 28, l. 16 – 31, l. 2).

Throughout this case, the credibility of Respondent's explanations is important. Informant presented no evidence that Respondent is known to be a dishonest or deceitful person. Despite the efforts of the Presiding Officer to dissuade him from doing so, even Judge Beard testified that Respondent is a "good man." Respondent presented testimony from three other current or former judges who attested to their belief in Respondent's honesty. Respondent also presented testimony from two attorneys who practice in the same legal community with Respondent who also attested to their belief in Respondent's honesty. As this Court is well aware, those who provide character and reputation testimony are usually only a sampling of those who would do so.

Informant argues that Respondent's explanation should not be believed and references the decision of the Disciplinary Hearing Panel. This is a case in which this Court should give no consideration to the decision of the Disciplinary Hearing Panel. The Disciplinary Hearing Panel apparently made no independent decision in this case. If

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it had, it surely would not have started its decision with "COMES NOW the Chief Disciplinary Counsel, (hereinafter "OCDC"), by and through staff counsel, Carl E. Schaeperkoetter, and submits Proposed Findings of Facts, Conclusions of Law and Recommendation for Discipline as follows:" As shown in the Supplemental Statement of Facts, the Presiding Officer's intervention in a manner consistent with that of an advocate for Informant began early in Respondent's counsel's cross examination of Informant's witness and continued, from time to time, throughout the hearing. This is a case in which this Court should give no consideration to the decision of the Disciplinary Hearing Panel.

Rule 4-3.4(c)

Informant amended the Information to allege that Respondent violated "Rule 4-3.4(c) by taking a personal representative fee without Court authorization and in direct violation of the Court's order of February 18, 2015."

Rule 4-3.4(c) states:

> A lawyer shall not:
>
> * * * *
>
> (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

Even if an order is considered "an obligation under the rules of the tribunal," Rule 74.02 defines what constitutes an order: "Every *direction of a court* made or entered in writing and not included in a judgment is an order." (Emphasis added). Judge Beard entered two orders on February 18, 2015. In his first order, he denied a specific motion for a partial personal representative fee that did not calculate the partial fee correctly.

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According to Judge Beard, the explanations he gave along with that order were not a direction or directive from the court.

Judge Beard acknowledged in his testimony that the second order he entered that same day reversed the previous order. Judge Beard's second order did not say that Respondent had to wait until the Final Settlement before he could take the remainder of his personal representative fee. The second February 18, 2015 order said:

> 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. This amount shall be deducted from the final calculation of fees due him at the close of the estate.

This was the only order in effect regarding payment of the personal representative fee. Respondent did not violate this order.

In addition to the fact that the second order reversed the first order, the explanations that accompanied the first order do not constitute an order under Rule 74.02. They provided reasoning but do not constitute a directive. Furthermore, the explanations of Judge Beard's reasoning for not allowing a partial personal representative fee did not have continued importance after Judge Beard reversed himself and allowed a partial personal representative fee.

Respondent did not violate a rule of the court related to payment of personal representative fees because there are no Supreme Court or local court rules that address Respondent's conduct. Respondent did not violate Rule 4-3.4(c).

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Rule 4-8.4(c)

Informant alleges that Respondent violated "Rule 4-8.4(c) by engaging in deceitful conduct in taking a personal representative fee without court authorization when knowing that had been prohibited by court order, and then failing to disclose that payment in the final settlement submitted to the Court."

State ex rel. Williams v. Purl, 228 Mo. 1 (1910) discusses deceit:

> The same author defines the word "deceit" in the following language:
>
> "1. An attempt or disposition to deceive or lead into error; any declaration, artifice or practice, which misleads another, or causes him to believe what is false; a contrivance to entrap; deception; a wily device; a trick; fraud.
>
> "2. Law. Any trick, collusion, contrivance, false representation, or underhand practice, used to defraud another. When injury is thereby effected, an action of deceit, as it is called, lies for compensation. See Fraud."

There are three parts to Informant's allegation. First, Respondent did take a personal representative fee without prior court authorization. As addressed above, Respondent did not violate the Rules of Professional Conduct and should not be disciplined for paying himself the personal representative fee without obtaining prior court authority. Respondent had a good faith basis for his legal opinion that he did not need court permission to pay himself the personal representative fee. This is a legal issue on which there are varying opinions among attorneys experienced in probate. No attorney should be disciplined for acting on his good faith opinion when there are varying good faith opinions. Taking disciplinary action under such circumstances would damage

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the legal system by causing attorneys to be fearful to act when clear binding precedent is lacking.

Second, Respondent did not *know* that taking a personal representative fee had been "prohibited by court order." There was no order that said that the personal representative fee could not be taken early. To the contrary, there was an order that permitted an early partial payment several months earlier. The explanations for not allowing the fee to be taken in the first order Judge Beard entered on February 18, 2015, were not orders. Additionally, by the time Respondent took the personal representative fee on June 25, 2015, he thought he would be closing the estate soon. Therefore, as Respondent viewed the estate, at that time, he had no reason to think that the explanations that accompanied the first order on February 18, 2015, applied to the circumstances on June 25, 2015. If unrelated events had not intervened such that Respondent did not get the estate closed within a month, even Judge Beard would not have had a problem with Respondent's conduct.

Informant appears to invite this Court to interpret the relevant probate statutes on this issue. This is not the right proceeding for that type of interpretation. It is also unnecessary. The question is whether Respondent should be disciplined for taking the fee without prior court approval. Respondent acted on his good faith belief on an issue on which experienced attorneys differ, and on which neither side has found determinative caselaw. Under these circumstances, Respondent should not be disciplined for his actions, regardless of how this Court might now interpret the relevant statutes.

Third, Respondent's failure to specifically list the payment on the Final Settlement form resulted not from deceit, but from inadvertence. Respondent did not affirmatively disclose the June 25, 2015, check, other than by including it with the supporting documents with the Final Settlement form and including it in the total amount listed in the far right hand column on page 4 of the Final Settlement. Respondent did not realize his mistake in failing to list the check on page 3 of the Final Settlement until Judge Beard indicated that he had found the discrepancy between the Final Settlement and the supporting documents. Making a disclosure would have been a meaningless act, at that point. Respondent took the appropriate remedial action by filing a petition for fees the next day.

Respondent did not violate Rule 4-8.4(c).

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ARGUMENT

II.

NO DISCIPLINARY ACTION IS APPROPRIATE WHERE RESPONDENT DID NOT ENGAGE IN PROFESSIONAL MISCONDUCT, AS ALLEGED BY INFORMANT IN THE INFORMATION;

ALTERNATIVELY, IF THIS COURT FINDS THAT RESPONDENT ENGAGED IN PROFESSIONAL MISCONDUCT, AN ADMONITION OR REPRIMAND IS THE APPROPRIATE SANCTION.

No Discipline Should Be Imposed

Informant argues that Respondent should be suspended for engaging in professional misconduct. As shown under Point I, Respondent did not engage in professional misconduct, as alleged in the Information. Therefore, this Court should impose no discipline on Respondent.

Alternatively, Admonition or Reprimand Is the Appropriate Discipline

In the event that this Court finds cause for discipline for Respondent's negligent errors, the most appropriate action is to remand to OCDC or the hearing panel with instructions to issue an admonition. There is no rule that prohibits this Court from issuing an admonition or remanding to OCDC or the hearing panel with instructions to issue an admonition. Rule 5.16(a) allows a hearing panel to issue an admonition. The rule provides that, if the discipline is not an admonition, the hearing panel's recommended discipline may be a public reprimand, probation, suspension, or disbarment. Rule 5.16(d). That rule imposes absolutely no limitations on this Court's

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authority to impose any type of available discipline. If admonitions are considered discipline, they should be a disciplinary option available to this Court. It is illogical that this Court would not have the full range of disciplinary options available. This is especially true in light of the fact that OCDC can unilaterally reject an admonition issued by a hearing panel. Rule 5.16(b)(4). OCDC should not be able to unilaterally, permanently remove one of the disciplinary options from the authority of this Court.

ABA Standards

In general, the ABA Standards for Imposing Lawyer Sanctions indicate that an admonition is the appropriate discipline when a lawyer is negligent and causes little or no actual or potential injury. Not only was there no injury to the estate, the estate benefitted by tax savings and accountant fee savings, even though the savings were modest in relation to the size of the estate.

ABA Standard 4.14 states:

> 4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

ABA Standard 6.14 states:

> Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

This standard relates to the determination of whether submitted documents are false. All of the cases Respondent has found regarding this standard relate to negligence

in determining the accuracy of a statement or document that is actually submitted, as opposed to mistakenly omitting information from a form. Respondent has not found a case in which this standard was applied to an inadvertent omission.

ABA Standard 5.14 states:

> Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

An inadvertent omission does not reflect adversely on Respondent's fitness to practice law.

In the absence of admonition as an option, the appropriate discipline is a reprimand.

Informant argues that this Court should suspend Respondent indefinitely. Informant relies on *In re Charron*, 918 S.W.2d 257 (Mo. banc 1996). *Charron* resembles this case only in that Charron was the personal representative of an estate. To the extent that *Charron* is relevant, it shows that Respondent's conduct comes nowhere close to the Charron's conduct, which resulted in a suspension.

Charron was charged with numerous violations of the Rules of Professional Conduct in two matters. The first matter related to his representation of Client A and the second related to his conduct as personal representative and attorney for the personal representative of the estate of Client B and as trustee of a revocable trust established by Client B. After Client A discharged him, Charron only returned Client A's property nineteen months after the original request. Even then, Charron only returned the property after numerous requests and a complaint to OCDC. Charron performed legal services for

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Client B and his business and took a $20,000 promissory note for those services. Client B died. Charron became the personal representative of Client B's estate, never having served as a personal representative before. Charron paid himself the $20,000 owed on the promissory note soon after the estate was opened, without filing a claim against the estate and without following other procedures required when the personal representative is also a creditor. It appears that there was no doubt that these procedures were mandatory. Charron then made payments to himself for legal services to the estate, without prior court approval, and in an amount greater than allowed by statute. He distributed $2,965 worth of furniture without vouchers and his settlement to revocation showed a shortage of $403.55. Charron failed to file the annual settlement, failed to appear several times and failed to provide the required information on others, for a total of at least seventeen dates over fourteen months. Charron was also the trustee of Client B's trust and took excessive attorney fees for services to the trust in light of his failure to effectively manage the trust. *Charron* is so dissimilar to this case that it provides no basis for comparison in terms of the appropriate discipline.

In re Griffey, 873 S.W.2d 600 (Mo. banc 1994) is completely inapposite. As noted in Informant's brief: "there were multiple charges in that case and Respondent Griffey actually stole money, factors not present in this case."

CONCLUSION

Respondent did not engage in professional misconduct, as alleged by Informant in the Information. Therefore, this case should be dismissed.

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If this Court decides that Respondent should be disciplined, the most appropriate discipline in this case would be an admonition. The second most appropriate discipline would be a reprimand. A suspension would be unwarranted and completely excessive.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify I signed the "original" in accordance with Rule 103.04 and that this 13th day of August, 2018, I have served a true an accurate copy of the foregoing via efiling to: Carl Schaeperkoetter, Attorney for Informant.

Sara Rittman

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 8532 words, exclusive of the cover, certificate of service, Rule 84.06 certificate, and signature block, according to Microsoft Word, which is the word processing system used to prepare this brief.

Sara Rittman

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