IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
RICHARD L. WINKIE,	)	**Supreme Court #SC97313**
	)	
Respondent.	)	

INFORMANT'S BRIEF

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ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

STATEMENT OF JURISDICTION

Jurisdiction over lawyer 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

Background

Respondent, Richard L. Winkie ("Respondent"), born November 21, 1971, was licensed to practice law in Missouri on April 18, 2007. **App. 36**. The address Respondent designated in his most recent registration with The Missouri Bar is 101 E. Sheridan St., PO Box 502, Macon, MO 63552. **App. 37**. Respondent's license to practice law is currently in good standing. **App. 37**.

Conduct Underlying the Information

Brandon and Jamie Huskey and Matt and Melissa Cross-Count I of the Information

Brandon and Jamie Huskey and Matt and Melissa Cross ("the Huskeys and Crosses") endeavored to sell a piece of jointly-owned land. **App. 37**. The Huskeys planned to use their proceeds from the sale of the land to fix several of their farm tractors and equipment so that Mrs. Huskey could expand her produce business and increase their net income. **App. 71 (Tr. 18).** In or around January, 2015, the Huskeys and Crosses hired Respondent to assist them in processing and closing the sale of the property. **App. 37**. On March 5, 2015, sales proceeds in the amount of $14,406.75 were distributed to Respondent. **App. 37**. On March 9, 2015, Respondent deposited the $14,406.75 into his client trust account. **App. 37-38.**.

Amongst other client distributions, the following transactions took place soon after the Huskeys' and Crosses' money had been deposited:

a. On March 11, 2015, Respondent made a withdrawal of $5,666.00;

b. On March 16, 2015, Respondent transferred $1,650.00 to his operating account;

c. On March 23, 2015, Respondent transferred $500.00 to his operating account;

d. On March 25, 2015, Respondent transferred $500.00 to his operating account;

e. On March 31, 2015, Respondent transferred $500.00 to his operating account;

f. On April 13, 2015, Respondent made a cash withdrawal of $7,191.00;

g. On April 15, 2015, Respondent transferred $1,000.00 to his operating account;

h. On April 15, 2015, Respondent made a cash withdrawal of $5,000.00;

i. On April 29, 2015, Respondent transferred $1,500.00 to his operating account;

j. On May 5, 2015, Respondent transferred $1,500.00 to his operating account;

k. On May 14, 2015, Respondent transferred $1,500.00 to his operating account;

l. On May 20, 2015, Respondent transferred $700.00 to his operating account;

m. On May 26, 2015, Respondent transferred $1,400.00 to his operating account;

n. On June 4, 2015, Respondent transferred $2,000.00 to his operating account;

o. On June 9, 2015, Respondent transferred $300.00 to his operating account;

p. On June 26, 2015, Respondent transferred $500.00 to his operating account;

q. On June 29, 2015, Respondent transferred $500.00 to his operating account; and

r. On July 2, 2015, Respondent transferred $500.00 to his operating account.

App 38-40. By July 15, 2015, the balance in Respondent's trust account was $12.23, such that all of the money belonging to the Huskeys and Crosses had been depleted. **App. 40**.

From March, 2015 to July, 2015, Respondent's operating account was repeatedly overdrawn, indicating that all money transferred from Respondent's trust account to his operating account was no longer being held in the operating account. **App. 40; App. 127-149; App 150-213.** Withdrawals from Respondent's operating account included payments to Walmart, the IRS, credit card companies, payroll checks, restaurants and supermarkets. **App. 150-213**.

Upon issuance of the proceeds check to Respondent, the Huskeys and Crosses had contacted Respondent and asked for the distribution of their money, but Respondent told them that their money had been held up by the title company. **App. 40; App. 114-118.** On April 15, 2015, Respondent traveled to China with approximately $10,000-$15,000 in cash. **App 96 (Tr. 120)**. Two days prior to leaving for China, Respondent withdrew $12,191 from his trust account, depleting a substantial portion of the Huskeys' and Crosses' sales proceeds. **App. 97 (Tr. 122)**. Respondent knew a large portion of the money did not belong to him when he took it from the trust account. **App. 97 (Tr. 123)**.

In June, 2015, the Huskeys and Crosses sent Respondent an e-mail requesting distribution of their funds. **App. 114-118; App. 113.** On June 18, 2015, Respondent wrote back and stated that he had a leg injury and was swamped and that he would "work to get you guys in over the coming weeks to close things out." **App. 113.** The same month, Respondent made an authorized distribution of money to a third party, such that the money due and owing to the Huskeys and Crosses was then $9,617.15. **App. 41.** Between June, 2015 and October, 2015, the Huskeys and Crosses repeatedly attempted to contact Respondent, but received no response. **App. 114-118; App. 69 (Tr. 13); App. 70 (Tr.**

14). On October 9, 2015, the Huskeys and Crosses spoke with Respondent, who apologized and said that he would have their money in the mail that week. **App. 114-118; App. 70 (Tr. 14).** Respondent failed to send the Huskeys and Crosses their money in October, 2015. **App. 42.** In November, 2015, Respondent told the Huskeys and Crosses that he would get them their money, but failed to do so. **App. 42.** The Huskeys and Crosses set a meeting with Respondent for December 2, 2015, at 4:00 pm. **App. 42.** On the day of the meeting, at 2:00 pm, Respondent messaged the Huskeys and Crosses and said that he re-injured his knee and could not attend the meeting. **App. 42.** Between March and December, 2015, Respondent intentionally withheld the true status of their money from the Huskeys and Crosses because Respondent was hoping to obtain money that he could use to cover the depletion. **App. 97 (Tr. 123-124).**

On December 11, 2015, the Huskeys and Crosses appeared at Respondent's office and waited 2.5 hours to meet with Respondent. **App. 70 (Tr. 16).** At the December 11, 2015 meeting, Respondent informed the Huskeys that he did not have the entirety of their money, but paid each couple $1,500.00, leaving $6,617.15 due and owing. **App. 43.** On December 18, 2015, the Huskeys and Crosses again met with Respondent and demanded the return of all of their money. **App. 43.** Respondent informed the Huskeys and Crosses that he did not have the money, but that he would talk to a relative or try to get a loan. **App. 43.** For the next five months, the Huskeys and Crosses repeatedly attempted to contact Respondent, with no response. **App. 43; App. 71 (Tr. 19).**

On July 8, 2016, the Huskeys and Crosses filed a complaint with the Office of Chief Disciplinary Counsel ("OCDC"). **App. 43-44.** In his August 18, 2016 response to the

OCDC, Respondent acknowledged that the money was owed to the Huskeys and Crosses and stated that he would "engage in written communication with the Huskeys and Crosses in the coming weeks to rectify the situation..[.]" **App. 44.** Respondent failed to engage in written communication with the Huskeys and Crosses and did not return their money. **App. 44.** In September, 2016, the Huskeys and Crosses initiated proceedings with The Missouri Bar's Fee Dispute Resolution Committee in an attempt to recover their money. **App. 44; App 71 (Tr. 21).** Both parties agreed to binding arbitration, and in December, 2016, Respondent remitted the full amount owed to the Huskeys and Crosses. **App 71 (Tr. 21).** Respondent admits that this was not a fee dispute and that the Huskeys and Crosses were fully entitled to all of the money. **App 98 (Tr. 126).**

Randy Otto-Count II of the Information

Complainant, Randy Otto ("Mr. Otto") was in the process of building a cabin on his property when the builder abandoned the project, resulting in $30,000 of damage. **App. 73 (Tr. 29)**. In or around February, 2012, Mr. Otto hired Respondent to institute a breach of contract action. **App. 46.** Mr. Otto paid Respondent a total of $770.00. **App. 46.** On April 3, 2012, Respondent filed the petition in the breach of contract action. **App. 46.** On May 29, 2013, after the opposing parties' failure to appear, Mr. Otto received a default judgment in the amount of $23,850.00 with 9% interest to begin retroactive accrual. **App. 46.** Mr. Otto had a loan on the property and planned to use the judgment towards the repayment of the loan. **App. 76 (Tr. 38)**.

On June 26, 2014, Respondent successfully executed a 180-day wage garnishment against the contractor to collect Mr. Otto's judgment. **App. 47.** Respondent and Mr. Otto

agreed that Respondent would receive the garnishment checks and deposit the checks into Mr. Otto's bank account. **App. 47.** Mr. Otto specifically opened a local account to make it easier for Respondent to deposit the checks. **App. 74 (Tr. 32-33).** The bank was less than one mile from Respondent's law office. **App. 47.** As a result of the garnishment, on July 31, 2014, the Macon County Clerk issued a check for $213.19 payable to Respondent. **App. 47.** On August 6, 2014, Respondent deposited $213.19 belonging to Mr. Otto into Respondent's trust account. **App. 47.** Respondent failed to promptly distribute this money to Mr. Otto. **App. 47.** On September 4, 2014, Respondent's trust account balance fell to $160.83, which was below the $213.19 sum that was to be held in trust for Mr. Otto. **App. 47.** From September 25, 2014 to February 9, 2015, the following similar transactions occurred:

Check issued by Macon County Clerk	**Check deposited in Respondent's trust account**	**Money distributed to Otto**	**Total to be held in trust for Otto**	**Deficiencies in trust account**
8/29/14-$90.10	9/25/14-$90.10	$0.00	$303.29	N/A
9/30/14-$206.81	10/9/14-$206.81	$0.00	$510.10	Balance fell to $488.14 on 10/23/14; and $449.84 on 10/30/14

10/21/14- $90.90	10/31/14- $90.90	$0.00	$601.00	Balance fell to $444.86 on 11/3/14; and $311.64 on 11/4/14
10/31/14- $212.32	11/5/14- $212.32	$0.00	$813.32	N/A
		11/20/14- $300 deposit to Otto	$513.32	Balance fell to $440.28 on 11/24/14; and $415.61 on 12/2/14
11/17/14- $189.52	12/4/14- $189.52	$0.00	$702.84	Balance fell to $406.55 on 12/30/14; Balance fell below on 5 more dates between 12/30/14 and 1/8/15, reaching $189.01 on 1/7/15
		1/30/15- $300.00 check to Otto	$402.84	N/A

12/5/14- $86.50 12/17/14- $82.83 12/31/14- $94.57	2/2/15- $263.90	$0.00	$666.74	N/A
1/30/15- $96.60	2/9/15- $96.60	$0.00	$763.34	N/A

App. 127-149. After receiving checks from the County Clerk's office, Respondent failed to promptly deposit them into his trust account, at one point holding checks for two months. **App. 49.** During this time period, Mr. Otto repeatedly telephoned Respondent to inquire about his money, but Respondent failed to return the majority of Mr. Otto's telephone calls. **App. 49.** After depositing checks into his trust account, Respondent failed to promptly distribute them to Mr. Otto, at one point holding checks for three months. **App. 49.**

On February 17, 2015, Respondent applied for and was issued another 180-day garnishment, which expired on August 31, 2015. **App. 49.** From March 2, 2015 to January 29, 2016, the following transactions occurred:

Check issued by Macon County Clerk	**Check deposited in Respondent's trust account**	**Money distributed to Otto**	**Total to be held in trust for Otto**	**Deficiencies in trust account**
2/11/15- $97.63	3/2/15- $97.63	$0.00	$860.97	N/A
2/26/15- $95.84	3/9/15- $95.84	$0.00	$956.81	N/A
3/20/15- $109.82	3/30/15- $109.82	$0.00	$1066.63	N/A
4/6/15- $110.03	4/13/15- $110.03	$0.00	$1176.66	N/A
		5/22/15- $800	$376.66	N/A
4/17/15- $110.46 4/24/15- $109.41 5/11/15- $112.99	5/27/15- $380.13	$0.00	$756.79	Balance fell to $703.80 on 6/10/15; Balance fell below on 4 more dates between 6/10/15 and 7/16/15, reaching $12.23 on 7/16/15

7/8/15- $114.92	7/28/15- $114.92	$0.00	$871.71	Balance fell to $515.11 on 8/10/15; Balance fell below on 6 more dates between 8/3/15 and 8/25/15, reaching a -$37.89 on 8/19/15 (overdraft)
7/14/15- $113.91	8/31/15- $113.91	$0.00	$985.62	Balance fell to $562.61 on 9/2/15; Balance fell below on 16 more dates between 8/31/15 and 1/12/16, reaching $182.89 on 1/6/16
11/13/15- $110.03 11/30/15- $200.43 12/22/15- $85.95 12/31/15- $85.95	1/14/16- 482.36	$0.00	$1467.98	Balance fell to $263.26 on 1/15/16; Balance fell below on 4 more dates between 1/15/16 and 1/26/16

1/25/16- $57.77	1/29/16- $57.77	$0.00	$1525.75	Balance fell to $1206.22 on 2/4/16; Balance continued to fall with a -$1.56 on 3/2/16 and -$8.98 on 5/27/16; Balance remained below total to be held until 7/15/16

App. 127-149. After receiving checks from the County Clerk's office, Respondent failed to promptly deposit them into his trust account, at one point holding checks for two months. **App. 51.** During this time period, Mr. Otto repeatedly telephoned Respondent to inquire about his money, but Respondent failed to return the majority of Mr. Otto's telephone calls. **App. 52 (Tr. 35-36).** After depositing checks into his trust account, Respondent failed to promptly distribute them to Mr. Otto, at one point holding checks for over nine months. **App. 52.**

Following the expiration of the February, 2015 garnishment, Respondent failed to apply for a new garnishment, resulting in Mr. Otto's inability to collect his judgment for over eight months. **App. 52.** Having not received checks for several months, Mr. Otto contacted the court and received an accounting of the checks issued to Respondent. **App. 119-121; App. 75 (Tr. 34-35).** Mr. Otto then learned that Respondent had collected over $1,000 that had not yet been distributed to Mr. Otto. **App. 119-121; App. 75 (Tr. 34-35).**

Mr. Otto was forced to take out a personal loan to make payments on the property loan, as no checks were forthcoming. **App. 76 (Tr. 39).** At a cost of $300.00-$400.00, Mr. Otto hired a new attorney to help him refile the garnishment and manage collection of his judgment. **App. 52; App. 76 (Tr. 41).**

On June 20, 2016, Mr. Otto filed a complaint with the Office of Chief Disciplinary Counsel. **App. 52.** At the time of Mr. Otto's complaint, Respondent had not distributed over $1,000.00 owed to Mr. Otto. **App. 52.** Mr. Otto repeatedly attempted to telephone Respondent to obtain the remainder of his money, but Respondent did not return Mr. Otto's telephone calls. **App. 53; App. 76 (Tr. 39-40).** In his August, 2016 response to the Office of Chief Disciplinary Counsel, Respondent acknowledged that Mr. Otto was due a refund, but did not promptly refund Mr. Otto's money. **App. 53.** In January, 2017, Mr. Otto instituted a small claims case against Respondent to collect the remainder of his money. **App. 122-124**. On the day of the hearing, Respondent offered to pay Mr. Otto $500, immediately, and $800 at a later date to settle the matter. **App. 77 (Tr. 42-43).** Upon payment of the $800, Mr. Otto considered the matter settled. **App 79 (Tr. 50)**.

Trust Account Violations-Count III of the Information

Following the complaints of the Huskeys, Crosses and Mr. Otto, Office of Chief Disciplinary Counsel investigative examiner, Kelly Dillon, conducted an audit of Respondent's trust and operating accounts. **App. 55.** Respondent appeared at the Office of Chief Disciplinary Counsel offices on March 10, 2017, and gave a sworn statement, in which he was asked about the financial transactions in his accounts. **App. 55.** The audit

of Respondent's trust account, as well as the sworn statement of Respondent, revealed the following:

a. Respondent's trust account records were insufficient to allow identification of multiple deposited items into Respondent's trust accounts; **App. 55.**

b. Respondent made numerous cash withdrawals; **App. 56.**

c. Respondent's trust account records were insufficient to allow identification of the matters relating to the cash withdrawals; **App. 56.**

d. Respondent repeatedly paid employee, Kristy Lea, from his client trust account; **App 56.**

e. On May 27, 2015, Respondent deposited $2,000.00 in personal funds from his wife, Annika Robb Winkie, into his client trust account; **App. 56.**

f. From September 3, 2015 to January 19, 2016, Respondent wrote over $2,400.00 in checks to his wife, Annika Robb Winkie, from his client trust account; **App. 56.**

g. Respondent repeatedly wrote checks to WalMart and Sam's Club, for personal items, from his client trust account; **App. 56-57; App. 127-149.**

h. Respondent paid for office expenses, such as postage and phones, from his client trust account; **App. 57.**

i. Respondent repeatedly wrote checks to his children's daycare provider from his client trust account; **App. 57; App. 127-149.**

j. Respondent made his mortgage payment to US Bank from his client trust account; **App. 57.**

k. Respondent deposited personal rent payments from his tenant into his client trust account; **App. 57.**

l. Respondent was not regularly reconciling his trust account; **App. 57-58.** and

m. Respondent repeatedly overdrafted his client trust account. **App. 127-149.**

The audit of Respondent's operating account, as well as the sworn statement of Respondent, revealed the following:

a. On September 8, 2016, LaDonna Furhop signed a fee agreement with Respondent. On the same day, Respondent deposited $1,500.00 in unearned fees for LaDonna Furhop into his operating account. By October 6, 2016, Respondent's operating account was overdrawn by $-47.91. Pursuant to Respondent's invoices, as of July, 2017, Respondent should have been holding at least $1,000.00 in unearned fees for LaDonna Furhop. During the time that LaDonna Furhop's money was held in Respondent's operating account, Respondent also held personal funds in the account; **App. 58.**

b. On September 9, 2016, Respondent deposited $1,000.00 in unearned fees for client, Dawn Kribbs, in his operating account. By October 6, 2016, Respondent's operating account was overdrawn by $-47.91. Pursuant to Respondent's invoices, as of July, 2017, Respondent should have been holding at least $900.00 in unearned fees for Dawn Kribbs. During the time that Dawn Kribbs' money was held in Respondent's operating account, Respondent also held personal funds in the account; **App. 59.**

c. On November 2, 2016, Respondent's operating account was overdrawn by $-360.60. On November 3, 2016, Respondent deposited $1,000.00 in unearned fees for Bill May into Respondent's operating account. $360.60 of Bill May's money was used to fund the overdraft; $72.00 of Bill May's money went to overdraft fees; and Respondent wrote a check for $500.00 to his wife, Annika Winkie, resulting in a balance of $67.40 remaining from the $1,000.00 of Bill May's funds. During the time that Bill May's money was held in Respondent's operating account, Respondent also held personal funds in the account; **App. 59-60.** and

d. On January 30, 2017, Respondent's operating account was overdrawn by $-811.76. On January 31, 2016, Respondent deposited $1,000.00 in unearned fees for Ellen Gehringer's son into Respondent's operating account. $811.76 of Ellen Gehringer's money was used to fund the overdraft, leaving $188.24 of Ellen Gehringer's $1,000.00 in funds. During the time that Ellen Gehringer's money was held in Respondent's operating account, Respondent also held personal funds in the account. **App. 60.**

Respondent was aware that his trust account records were insufficient and testified, "…my trust account records are a disgrace. I don't know the first thing about how to do any of that." **App. 105 (Tr. 157)**. Between 2010-2011, the Office of Chief Disciplinary Counsel recommended that Respondent attend a trust accounting seminar. Respondent declined to attend the trust accounting seminar. **App. 109 (Tr. 173); App. 110 (Tr. 174).**

Disciplinary Proceeding

An Information was filed with the Advisory Committee on September 29, 2017, setting forth Informant's belief that probable cause existed to establish that Respondent violated multiple Rules of Professional Conduct. **App. 4-21.**. Respondent filed his Answer to the Information on November 13, 2017, and at the same time requested appointment of counsel. **App. 22-26; App. 27-29.** A hearing panel was appointed, thereafter. **App. 30-34.** On December 14, 2017, Respondent's request for appointment of counsel was granted, and Robert Russell was appointed to represent Respondent. **App. 35.** On January 16, 2018, counsel for Respondent filed Respondent's First Amended Answer To Information. **App. 36-65.**

The disciplinary hearing took place on February 26, 2018. **App. 66-112**. By order of the Presiding Officer of the Disciplinary Hearing Panel, both Informant and counsel for Respondent submitted Proposed Findings of Fact, Conclusions of Law and Recommendations for Sanction. **App. 66-112.** On May 18, 2018, the Disciplinary Hearing Panel issued its Decision. **App. 214-239**. The Disciplinary Hearing Panel found Respondent guilty of 16 separate conduct violations, including knowing misappropriation, and recommended that Respondent be disbarred. **App. 214-239**. On May 30, 2018, Informant filed its written acceptance of the Disciplinary Hearing Panel's Decision. **App. 240.** On June 20, 2018, Respondent filed his rejection of the Disciplinary Hearing Panel's Decision, which brings the matter before this Court. **App. 241.**

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT KNOWINGLY MISAPPROPRIATED THE PROCEEDS FROM THE HUSKEYS' AND CROSSES' SALE OF LAND IN VIOLATION OF RULES 4-1.15(a), 4-1.15(d) and 4-8.4(c) IN THAT RESPONDENT DEPOSITED MONEY BELONGING TO THE HUSKEYS AND CROSSES IN HIS CLIENT TRUST ACCOUNT AND USED THE ENTIRETY OF THE PROCEEDS FOR PERSONAL EXPENDITURES.

In re Schaeffer, 824 S.W.2d 1, 5 (Mo. banc 1992)

In re Farris, 472 S.W.3d 549, 560 (Mo. banc 2015)

In re Ehler, 319 S.W.3d 442, 450 (Mo. banc 2010)

In re Kohlmeyer, 327 S.W.2d 249, 252 (Mo. banc 1959)

Rule 4-1.15

Rule 4-1.15(a)

Rule 4-1.15(d)

Rule 4-8.4(c)

ABA/BNA Lawyers Manual on Professional Conduct

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO APPROPRIATELY HANDLE THE PROCEEDS OF RANDY OTTO'S JUDGMENT IN VIOLATION OF RULES 4-1.15(a) AND 4-1.15(d) IN THAT RESPONDENT COLLECTED THE PROCEEDS OF RANDY OTTO'S GARNISHMENT CHECKS AND HELD THEM FOR MONTHS WITHOUT DEPOSITING THEM INTO A CLIENT TRUST ACCOUNT, ALLOWED HIS CLIENT TRUST ACCOUNT BALANCE TO FALL BELOW THE AMOUNT THAT WAS TO BE HELD FOR RANDY OTTO AND FAILED TO PROMPTLY DELIVER TO RANDY OTTO THE PROCEEDS OF HIS GARNISHMENT CHECKS.

In the Matter of St. Onge, 958 A.2d 143, 144 (R.I. 2008)

In re Schaeffer, 824 S.W.2d 1, 5 (Mo. banc 1992)

In re Farris, 472 S.W.3d 549, 566 (Mo. banc 2015)

In re Buder, 217 S.W.2d 563, 570 (Mo. banc 1949)

Rule 4-1.15

Rule 4-1.15(a)

Rule 4-1.15(d)

POINTS RELIED ON

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO APPROPRIATELY MANAGE HIS CLIENTS' FUNDS AND CLIENT TRUST ACCOUNT IN VIOLATION OF RULES 4-1.15(a), 4-1.15(c) AND 4-1.15(f) IN THAT RESPONDENT COMMINGLED PERSONAL FUNDS AND CLIENT FUNDS IN HIS CLIENT TRUST ACCOUNT, COMMINGLED PERSONAL FUNDS AND CLIENT FUNDS IN HIS OPERATING ACCOUNT, FAILED TO PROMPTLY DEPOSIT CLIENT MONEY INTO A CLIENT TRUST ACCOUNT, OVERDRAFTED HIS OPERATING ACCOUNT WITH CLIENT FUNDS PRESENT AND FAILED TO KEEP COMPLETE RECORDS PERTAINING TO HIS CLIENT TRUST ACCOUNT.

In re Schaeffer, 824 S.W.2d 1, 5 (Mo. banc 1992)

In re Farris, 472 S.W.3d 549, 561 (Mo. banc 2015)

In re Ehler, 319 S.W.3d 442, 450 (Mo. banc 2010)

Rule 4-1.15(a)

Rule 4-1.15(c)

Rule 4-1.15(d)

Rule 4-1.15(f)

POINTS RELIED ON

IV.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO ADEQUATELY COMMUNICATE WITH HIS CLIENTS IN VIOLATION OF RULE 4-1.4(a) IN THAT RESPONDENT REPEATEDLY FAILED TO RETURN THE TELEPHONE CALLS OF THE HUSKEYS, THE CROSSES AND RANDY OTTO OR TO INFORM HIS CLIENTS OF THE TRUE STATUS OF THEIR LEGAL MATTERS.

In re Ehler, 319 S.W.3d 442, 449 (Mo. banc 2010).

In re McMillin, 521 S.W.3d 604, 608 (Mo. banc 2017)

Rule 4-1.4(a)

Rule 4-1.4(a)(1)

ABA/BNA Lawyers Manual on Professional Conduct

POINTS RELIED ON

V.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO DILIGENTY REPRESENT RANDY OTTO IN VIOLATION OF RULE 4-1.3 IN THAT RESPONDENT ALLOWED RANDY OTTO'S GARNISHMENT TO LAPSE SUCH THAT HE COULD NOT COLLECT HIS JUDGMENT.

In re Ehler, 319 S.W.3d 442, 449 (Mo. banc 2010)

Rule 4-1.3

ABA/BNA Lawyers Manual on Professional Conduct

POINTS RELIED ON

VI.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE RESPONDENT:

a. KNOWINGLY CONVERTED THE CLIENT MONEY OF THE HUSKEYS, CROSSES AND OTTO, CAUSING DAMAGE TO HIS CLIENTS;

b. KNOWINGLY DECEIVED THE HUSKEYS AND CROSSES WITH THE INTENT TO BENEFIT RESPONDENT, CAUSING DAMAGE TO THE HUSKEYS AND CROSSES; AND

c. KNOWINGLY DEALT IMPROPERLY WITH HIS CLIENT TRUST ACCOUNT CAUSING INJURY AND POTENTIAL INJURY TO NUMEROUS CLIENTS.

In re Farris, 472 S.W.3d 549, 562 (Mo. banc 2015)

In re Mentrup, 665 S.W.2d 324 (Mo. banc 1984)

In re Carey, 89 S.W.3d 477, 483 (Mo. banc 2002)

In re Belz, 258 S.W.3d 38, 43 (Mo. banc 2008)

Rule 4-8.4(c)

ABA Standards for Imposing Lawyer Sanctions (1991)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT KNOWINGLY MISAPPROPRIATED THE PROCEEDS FROM THE HUSKEYS' AND CROSSES' SALE OF LAND IN VIOLATION OF RULES 4-1.15(a), 4-1.15(d) AND 4-8.4(c) IN THAT RESPONDENT DEPOSITED MONEY BELONGING TO THE HUSKEYS AND CROSSES IN HIS CLIENT TRUST ACCOUNT AND PURPOSELY USED THE ENTIRETY OF THE PROCEEDS FOR PERSONAL EXPENDITURES.

A disciplinary hearing panel's recommendation is advisory in nature. *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). In a disciplinary matter such as this, the Missouri Supreme Court conducts a *de novo* review of the evidence and reaches its own conclusions of law. *Id*. Discipline will not be imposed unless professional misconduct is proven by a preponderance of the evidence. *Id*. Where misconduct is proven by a preponderance of the evidence, violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004).

Missouri Supreme Court Rule 4-1.15(a) provides that a lawyer in possession of client funds shall hold those funds in a client trust account, separate from the lawyer's own property. Rule 4-1.15(d) further provides that upon receiving client funds, a lawyer shall promptly deliver to the client any funds that the client is entitled to receive. Implicit in

Rule 4-1.15 is an obligation by the lawyer to refrain from using client funds for his own purpose. ABA/BNA Lawyers Manual on Professional Conduct, *Lawyer Client Relationship* § 45:501 (2005). When an attorney does deposit client funds into an account used by the attorney for his own purpose, and particularly when the account balance is reduced to an amount less than the amount of the funds being held for the client, it is characteristic of misappropriation. *In re Schaeffer*, 824 S.W.2d 1, 5 (Mo. banc 1992).

The facts in this matter are undisputed by Respondent, and Respondent has conceded virtually each allegation of Rule violation as charged in the Information. Respondent deposited a $14,406.75 check belonging to the Huskeys and Crosses into his client trust account on March 9, 2015. Respondent did not promptly remit the money to the Huskeys and Crosses. Instead, in a series of large withdrawals and transfers, Respondent removed all of the Huskey and Cross money from his client trust account. To the extent that Respondent withdrew the Huskeys' and Crosses' funds in cash, the money was spent on personal expenditures, like a trip to China, and not for the benefit of the Huskeys and Crosses. To the extent that Respondent transferred the money to his operating account, the money was spent on personal purchases from retail, grocery and other establishments. Where an attorney repeatedly transfers funds from a trust account to his operating account and those funds are used for personal expenditures, this Court has held that the attorney has misappropriated client funds. See *In re Farris*, 472 S.W.3d 549, 560 (Mo. banc 2015). Further, because Respondent's operating account was repeatedly overdrawn during the time period in question, it can be concluded that all of the Huskey

and Cross money that may have resided in Respondent's operating account was depleted by Respondent.

Respondent testified during the disciplinary hearing that when withdrawing the funds from his trust account, he knew a large portion of the money was client money that he was not entitled to take. This Court has recognized that the failure of an attorney to remit client money, such as settlement proceeds, is totally incompatible with Missouri ethical standards. *In re Houtchens*, 555 S.W.2d 24, 26 (Mo. banc 1977). This Court has further recognized that the conversion of client funds necessarily involves an act of deceit and misrepresentation. *In re Ehler*, 319 S.W.3d 442, 450 (Mo. banc 2010). As such, Respondent's conversion of the funds belonging to the Huskeys and Crosses was in direct contravention of Rule 4-8.4(c), which provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Compounding the conversion of the Huskey and Cross money was Respondent's deliberate attempts to mislead the Huskeys and Crosses. The Huskeys and Crosses began asking for their distribution check in March, 2015, but Respondent told them that the money had been held up by the title company. Respondent continued to mislead his clients by telling them that he would have the money in the mail, shortly, but never followed through with his representations, going so far as to schedule and then cancel multiple meetings. Respondent did not inform the Huskeys and Crosses that he had spent their money for another nine months. "[A]s members of a self-regulating profession, we must be ever mindful that, at minimum, the public should be able to rely upon 'an attorney's honesty and devotion to his clients' interests.'" *In re Haggerty*, 661 S.W.2d 8, 10 (Mo.

banc 1983). In the present action, Respondent engaged in intentional dishonesty towards his clients.

Though Respondent ultimately returned the entirety of the money to the Huskeys and Crosses, it took almost two years and required the Huskeys and Crosses to institute a Fee Dispute Resolution Complaint. Respondent's payment of restitution in no way obviates the multiple violations of Rule on the part of Respondent. This Court has previously stated:

> [R]estitution does not deprive the public of its right to be protected against an unsafe member of a privileged class. Nor does it deprive the courts of their right to have attorney officers who are conscious of their high duty to the public, to the courts and to their profession[.] A restitution does not automatically make one fit, who has already proven himself unfit.

In re Kohlmeyer, 327 S.W.2d 249, 252 (Mo. banc 1959) (citing *In re Conner*, 207 S.W.2d 492 (Mo. banc 1948)). In the present case, Respondent's actions were intentional. Respondent knew that he was not entitled to spend the Huskeys' and Crosses' money and he did it, nonetheless. Respondent's attempts to mislead the Huskeys and Crosses regarding the status of their money constituted additional violations of the Rules of Professional Conduct. As such, Respondent's license to practice law should be disciplined.

ARGUMENT

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO APPROPRIATELY HANDLE THE PROCEEDS OF RANDY OTTO'S JUDGMENT IN VIOLATION OF RULES 4-1.15(a) AND 4-1.15(d) IN THAT RESPONDENT COLLECTED THE PROCEEDS OF RANDY OTTO'S GARNISHMENT CHECKS AND HELD THEM FOR MONTHS WITHOUT DEPOSITING THEM INTO A CLIENT TRUST ACCOUNT, ALLOWED HIS CLIENT TRUST ACCOUNT BALANCE TO FALL BELOW THE AMOUNT THAT WAS TO BE HELD FOR RANDY OTTO AND FAILED TO PROMPTLY DELIVER TO RANDY OTTO THE PROCEEDS OF HIS GARNISHMENT CHECKS.

The mandates of Rule 1.15 are strict and failure to abide by their terms is cause for discipline. *In the Matter of St. Onge*, 958 A.2d 143, 144 (R.I. 2008). As discussed above, Missouri Supreme Court Rule 4-1.15(d) requires a lawyer, who receives client funds, to promptly deliver to the client any funds that the client is entitled to receive. When an attorney must hold client funds, Rule 4-1.15(a) requires the attorney to hold the funds in a client trust account.

In the present action, Respondent and Randy Otto agreed that the garnishment checks received from Mr. Otto's judgment would be delivered to Respondent and deposited

into a bank account belonging to Mr. Otto. Mr. Otto opened a bank account less than a mile from Respondent's office to make the process more convenient. Nevertheless, having received garnishment checks from the circuit court for a period of 15 months, Respondent repeatedly failed to deposit the checks into Mr. Otto's account. In some instances, Respondent held the checks for months at a time, depositing them into no account. In other instances, Respondent deposited the checks into his own trust account, but failed to make a disbursement to Mr. Otto. On January 30, 2015, Respondent held over $13,000 in his trust account. $702.84 of the money in trust belonged to Randy Otto. On January 30, 2015, Respondent made a disbursement to Mr. Otto, but instead of depositing the entirety of the $702.84 owed to Mr. Otto, Respondent deposited only $300.00. Such action by Respondent indicates that Respondent's handling of Mr. Otto's money was knowing and intentional. A lawyer, as a fiduciary, must avoid any variance from an established course of action when handling client money. *In re Buder*, 217 S.W.2d 563, 570 (Mo. banc 1949). In failing to promptly deposit Mr. Otto's funds in trust and failing to promptly distribute those funds to Mr. Otto, Respondent violated the Rules of Professional Conduct.

In addition to Respondent's failure to properly hold and distribute Mr. Otto's money, Missouri law establishes that an attorney's failure to preserve the client's funds undiminished in an escrow account constitutes a serious violation of the disciplinary rules. *In re Schaeffer*, 824 S.W.2d 1, 5 (Mo. banc 1992). Bank records establish that over the course of the 15 months during which Respondent was to be holding money for Mr. Otto, the balance for Respondent's account fell below what was to be held in trust for Mr. Otto on at least 50 different dates. In January, 2016, Respondent should have held $1525.75 in

trust for Mr. Otto, but on March 2, 2016, Respondent's account was overdrawn, indicating that all of Mr. Otto's money had been misappropriated. Respondent has admitted the same. "When a lawyer misappropriates property belonging to a client or a third party, that lawyer breaches one of the fundamental duties of this profession. Doing so not only injures the property owner, but also the Bar as a whole. *In re Farris*, 472 S.W.3d 549, 566 (Mo. banc 2015). Because Respondent's gross mishandling of Mr. Otto's funds resulted in violation of Missouri Supreme Court Rules 4-1.15(a) and 4-1.15(d), Respondent's license to practice law should be disciplined.

ARGUMENT

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO APPROPRIATELY MANAGE HIS CLIENTS' FUNDS AND CLIENT TRUST ACCOUNT IN VIOLATION OF RULES 4-1.15(a), 4-1.15(c) AND 4-1.15(f) IN THAT RESPONDENT COMMINGLED PERSONAL FUNDS AND CLIENT FUNDS IN HIS CLIENT TRUST ACCOUNT, COMMINGLED PERSONAL FUNDS AND CLIENT FUNDS IN HIS OPERATING ACCOUNT, FAILED TO PROMPTLY DEPOSIT CLIENT MONEY INTO A CLIENT TRUST ACCOUNT, OVERDRAFTED HIS OPERATING ACCOUNT WITH CLIENT FUNDS PRESENT AND FAILED TO KEEP COMPLETE RECORDS PERTAINING TO HIS CLIENT TRUST ACCOUNT.

Missouri Supreme Court Rule 4-1.15(c) provides that a lawyer shall withdraw fees only as they are earned. In the present action, Respondent repeatedly deposited client money into his operating account on the day that it was received, having taken no action on the client matter. In the cases of LaDonna Furhop, Dawn Kribbs, Ellen Gehringer and Bill May, Respondent deposited thousands of dollars into his operating account. According to Respondent's own records very little, if any, of the money had been earned at the time of deposit. Because Respondent's operating account was so regularly

overdrawn, the money in these client matters was immediately diminished and ultimately, misappropriated.

Respondent has articulated that he was ignorant of the trust accounting requirements. At hearing, Respondent testified, "…my trust account records are a disgrace. I don't know the first thing about how to do any of that." The evidence, however, establishes that Respondent routinely deposited client money into his operating account whenever the operating account was overdrawn, indicating that Respondent's conduct was intentional and not borne of carelessness. Further, this defense to misappropriating client funds has previously been rejected by this Court. Where a lawyer asserts that he exercised poor office practices, it does not mitigate a charge of misappropriation when it is clear that the lawyer directed the client's money to be deposited into the operating account and is later withdrawn by the lawyer. *In re Schaeffer*, 824 S.W.2d 1, 5 (Mo. banc 1992).

Missouri Supreme Court Rule 4-1.15(f) provides that complete records of client trust accounts shall be maintained by a lawyer. According to the Rule, complete records are to include receipt and disbursement journals, ledgers for all client trust accounts, fee agreements, accountings to clients of disbursements, bills for legal fees, bank statements and records, identifying information pertaining to all electronic transfers, reconciliations and records of credit card transactions. In the present action, Respondent's trust account records were so lacking that it was impossible to list each violation of Rule with specificity. The records of Respondent's trust account were insufficient to allow identification of multiple deposited items. Respondent made numerous cash withdrawals from the trust account, but with no record to indicate if they were related to a client matter or a withdrawal

of fees. Again, to the extent Respondent has asserted that his conduct was unintentional and a result of his ignorance regarding the trust accounting Rules, Respondent's argument has previously been rejected by this Court:

> [O]ne of the twin purposes of Rule 4-1.15(d) is to ensure that an attorney always knows what money is being moved into or out of the trust account and why. The other purpose of Rule 4-1.15(d) is to ensure that, if a problem arises with an attorney's trust account, the OCDC and this Court are not forced to depend on the attorney's self-serving memory and claims that he 'did not know.'
>
> The Court abandons the purpose of Rule 4-1.15(d) if it allows a lawyer's failure to maintain the required records to work to that attorney's benefit. To avoid this result, the failure to comply with Rule 4-1.15(d) must give rise to an inference of knowledge, particularly when the attorney tries to defend a charge of misappropriating trust funds on grounds that the required documents plainly would support or refute had the attorney kept them.

In re Farris, 472 S.W.3d 549, 561 (Mo. banc 2015).

Finally, Respondent's misuse of his trust account resulted in an untold number of instances of commingling and misappropriation. Where a Missouri attorney paid her personal utility bills out of her client trust account, resulting in a misappropriation of client funds, this Court determined that the attorney failed to hold client property "with the care required of a professional fiduciary." See *In re Ehler*, 319 S.W.3d 442, 450 (Mo. banc 2010). In the present action, Respondent repeatedly paid his assistant from his client trust

account. If Respondent's assistant was paid from Respondent's earned fees, then the presence of the fees in the trust account with client funds resulted in a commingling of the funds. If Respondent's assistant was paid from client money, the payment to Respondent's assistant resulted in a misappropriation of client money. On May 27, 2015, Respondent deposited $2,000 in personal funds from his wife, Annika Robb Winkie, into his client trust account, resulting in a commingling of funds. From September 3, 2015 to January 19, 2016, Respondent wrote over $2,400 in checks to his wife from his client trust account. Records were insufficient to determine if the extra $400 to Respondent's wife was generated from earned fees or from a misappropriation of client money. Respondent also wrote checks to WalMart, his mortgage company, his children's daycare and other personal items, from his trust account. Respondent deposited personal rent payments from his tenant into his trust account, resulting in intentional commingling. Respondent's complete lack of regard for the prescribed use of his trust account violated multiple Rules of Professional Conduct and justifies the discipline of Respondent's license.

ARGUMENT

IV.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO ADEQUATELY COMMUNICATE WITH HIS CLIENTS IN VIOLATION OF RULE 4-1.4(a) IN THAT RESPONDENT REPEATEDLY FAILED TO RETURN THE TELEPHONE CALLS OF THE HUSKEYS, THE CROSSES AND RANDY OTTO OR TO INFORM HIS CLIENTS OF THE TRUE STATUS OF THEIR LEGAL MATTERS.

Missouri Supreme Court Rule 4-1.4(a)(1) states that a lawyer shall keep the client reasonably informed about the status of the matter. Keeping a client informed entails responding to client telephone calls and letters. ABA/BNA Lawyers Manual on Professional Conduct, *Lawyer Client Relationship* § 31:501 (2005). "Communication with a client is essential to maintain a productive attorney-client relationship." *In re Ehler*, 319 S.W.3d 442, 449 (Mo. banc 2010).

In the present case, Respondent was presumably less concerned with maintaining a productive attorney-client relationship and more concerned with avoiding the consequences of his misappropriation. However, Respondent's failure to respond to his clients repeated telephone calls caused considerable grief for the Huskeys, Crosses and Mr. Otto. Upon issuance of the Huskeys' and Crosses' proceeds from the sale of their property in March, 2015, the clients began contacting Respondent. On June 18, 2015, Respondent

acknowledged in an email that he needed to remit the funds. However, between June, 2015 to October, 2015, Respondent failed to return the many telephone calls from the Huskeys and Crosses. Respondent would set meetings with the Huskeys and Crosses, but then cancel them with little notice. By December, 2015, the Huskeys and Crosses were so frustrated that they waited 2.5 hours in Respondent's office for a scheduled meeting. It was only at this time, nine months after the land had been sold, that Respondent informed the clients that Respondent had misappropriated their money.

Randy Otto began noticing that his garnishment checks were not being deposited in his account. Mr. Otto repeatedly telephoned Respondent, but Respondent failed to return the majority of Mr. Otto's calls. Mr. Otto was forced to contact the county clerk to learn the status of his garnishment action. Upon receiving a printout of checks that had been issued to Respondent, Mr. Otto became aware that over the course of 15 months, Respondent had collected over $1,000 that had not been distributed to Mr. Otto.

In the *McMillin* matter, this Court found that an attorney who repeatedly avoided phone calls and canceled scheduled meetings, leaving his client unable to consistently communicate with the attorney, was in violation of Rule 4-1.4(a). *In re McMillin*, 521 S.W.3d 604, 608 (Mo. banc 2017). In the present action, Respondent not only avoided telephone calls and meetings, but actively misled his clients by telling them that payment would be forthcoming. As such, Respondent's license should be disciplined.

ARGUMENT

V.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO DILIGENTY REPRESENT RANDY OTTO IN VIOLATION OF RULE 4-1.3 IN THAT RESPONDENT ALLOWED RANDY OTTO'S GARNISHMENT TO LAPSE SUCH THAT HE COULD NOT COLLECT HIS JUDGMENT.

Missouri Supreme Court Rule 4-1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." At the core of the duty of diligence is a lawyer's obligation to perform in a timely manner the work for which he or she was hired. ABA/BNA Lawyers Manual on Professional Conduct, *Lawyer-Client Relationship* § 31:403 (2005). "The diligent representation of a client is particularly important because 'a client's interests can be adversely affected by the passage of time or the change of conditions[.]'" *In re Ehler*, 319 S.W.3d 442, 449 (Mo. banc 2010).

In the present matter, Randy Otto had an existing loan on a property that had been abandoned by the contractor. Mr. Otto sought and obtained a judgment against the contractor to allow Mr. Otto to repay the loan. In order to collect the judgment from the contractor, Mr. Otto put a garnishment order in place against the contractor's wages. When the garnishment order was set to expire, Respondent agreed to file a new garnishment order. However, Respondent failed to file the order, leaving Randy Otto unable to collect on his judgment for a period of eight months.

"Perhaps no professional shortcoming is more widely resented than procrastination." Rule 4-1.3, Comment [3]. Mr. Otto was ultimately required to seek a personal loan to repay the property loan when Respondent allowed the garnishment to lapse. Respondent's lack of diligence caused Mr. Otto monetary damage and, as such, should result in discipline of Respondent's license.

ARGUMENT

VI.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE RESPONDENT:

a. KNOWINGLY CONVERTED THE CLIENT MONEY OF THE HUSKEYS, CROSSES AND OTTO, CAUSING DAMAGE TO HIS CLIENTS;

b. KNOWINGLY DECEIVED THE HUSKEYS AND CROSSES WITH THE INTENT TO BENEFIT RESPONDENT, CAUSING DAMAGE TO THE HUSKEYS AND CROSSES; AND

c. KNOWINGLY DEALT IMPROPERLY WITH HIS CLIENT TRUST ACCOUNT CAUSING INJURY AND POTENTIAL INJURY TO NUMEROUS CLIENTS.

When considering the level of discipline to impose for violation of the Rules of Professional Conduct, this Court relies on the American Bar Association model rules for attorney discipline ("ABA Standards"). *In re Coleman*, 295 S.W.3d 857, 869 (Mo. banc 2009). Under Section II, The Theoretical Framework, the Standards state that each court imposing sanctions must consider the ethical duty and to whom it is owed, the attorney's mental state, the amount of injury caused by the attorney's misconduct and any aggravating or mitigating factors. Standards for Imposing Lawyer Sanctions, American Bar Association, 1991, pg. 5. The Theoretical Framework of the ABA Standards also provides that when an attorney violates multiple Rules of Professional Responsibility, as is charged

in the case of Respondent, the ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct and often should be greater than the sanctions for the most serious misconduct. *Id*.

ABA Standards Applied

a. Knowingly converted client money

The ABA Standards assume that "the most important ethical duties are those obligations which a lawyer owes to clients." Standards for Imposing Lawyer Sanctions, American Bar Association, 1991, pg. 5. When a lawyer knowingly converts client property and causes injury or potential injury to a client, ABA Standard 4.1 provides that disbarment is generally appropriate.

Knowledge is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." *Id*. at 17. In the case of the Huskeys and Crosses, Respondent's conduct was "knowing" in that Respondent testified at hearing that he was aware that the money belonged to his clients and that he was not entitled to spend the funds. In the case of Mr. Otto, Respondent deposited Mr. Otto's funds in his trust account, but did not distribute the full amount owed to Mr. Otto, even when the money was available. Over the course of the time that Respondent held Mr. Otto's money, Respondent's trust account repeatedly fell below the amount that was to be held in trust for Mr. Otto, due to numerous cash withdrawals and transfers to Respondent's operating account. The awareness by Respondent that he was intentionally holding Mr. Otto's money during times that his trust

account was overdrawn constitutes knowledge on the part of Respondent that Mr. Otto's money was misappropriated.

Though Respondent advocated that there was no actual harm to any client, this is simply not the case. The Crosses and Huskeys were unable to use their proceeds to fund their farming operation and had to expend time and money filing complaints with the Office of Chief Disciplinary Counsel and with the Fee Dispute Resolution Committee, attempting to collect the money that rightfully belonged to them. Mr. Otto was forced to hire and pay another attorney to reinstate his garnishment and had to file a civil action against Respondent to obtain the $1,000 still owed to Mr. Otto. Both Mr. Otto and Brandon Huskey testified at hearing as to the aggravation they experienced attempting to contact Respondent to obtain the status of their money, only to be ignored. All of this constitutes harm to the client.

The Missouri Supreme Court recognizes that disbarment is the baseline sanction for misappropriation. *In re Farris*, 472 S.W.3d 549, 562 (Mo. banc 2015) (citing *In re Belz*, 258 S.W.3d 38, 42 (Mo. banc 2008). Though it is reserved only for cases of severe misconduct where it is clear the attorney is not fit to continue in this profession, *In re Shunk*, 847 S.W.2d 789, 792 (Mo. banc 1993) Respondent's knowing conversion of client funds makes disbarment the appropriate sanction.

b. Knowingly deceived the Huskeys and Crosses with the intent to benefit Respondent

The Disciplinary Hearing Panel in this case found Respondent guilty of conduct towards a client involving dishonesty, fraud, misrepresentation or deceit, in violation of

Rule 4-8.4(c). ABA Standard 4.6 provides that in cases where an attorney engages in deceit toward a client, "[d]isbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client."

In the present action, Respondent deposited the Huskeys' and Crosses' sales proceeds in March, 2015, and by July, 2015, all of their money had been depleted by Respondent. Yet, on October 9, 2015, Respondent stated that he would put the money in the mail the same week. Respondent testified at hearing that he knew he did not have sufficient funds to reimburse the Huskeys and Crosses. Again, in November, 2015, Respondent told the Huskeys and the Crosses that he would provide them their money, but failed to do so. Having set a meeting with his clients on December 2, 2015, Respondent messaged them two hours before the meeting, stating that he had re-injured his knee and could not attend the meeting. Respondent's conduct constituted an actual and knowing attempt to mislead the Huskeys and Crosses and conceal from them the misappropriation that had already taken place.

Where the standards for imposing disbarment as a sanction for dishonest conduct towards a client have been met, Missouri case law further establishes that disbarment is the appropriate sanction. See *In re Mentrup*, 665 S.W.2d 324 (Mo. banc 1984); *In re Storment*, 873 S.W.2d 227 (Mo. banc 1997); and *In re Murphy*, 732 S.W.2d 895 (Mo. banc 1987). Respondent has demonstrated that without the ability to behave honestly towards his clients, Respondent is unfit to continue practicing law.

c. Knowingly mishandled trust account

Rule 4.12 of the ABA Standards states that 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. In light, however, of the ABA's position that the ultimate sanction should be at least consistent with the disbarment, as established above, the mishandling of Respondent's trust account only bolsters a finding of disbarment as the appropriate, ultimate sanction.

Respondent's mishandling of his client trust account resulted in multiple instances of commingling and misappropriation. In the cases of Bill May, LaDonna Furhop and others, their money was misappropriated almost immediately upon deposit, due to the overdrawn status of Respondent's operating account. As to the remainder of Respondent's clients, Respondent's failure to keep appropriate trust account records hindered the ability to ascertain the identity of each of the clients affected, as well as the extent of the harm.

That Respondent's conduct was "knowing" is evidenced by the fact that he would generally transfer money from his trust account to his operating account whenever the operating account would be overdrawn. Respondent did this with no real knowledge of who's money was being transferred to the operating account. Though Respondent has articulated that he was ignorant of the trust accounting mandates in Missouri, it is simply not believable that Respondent did not know that he was prohibited from writing checks to his wife or daycare provider out of his trust account. Further, as an attorney licensed in Missouri, ignorance of the Rules of Professional Conduct is not an appropriate defense to

their violation. As such, Respondent's gross mishandling of his trust account, in addition to Respondent's other violations of Rule, warrant's Respondent's disbarment.

Aggravating and Mitigating Circumstances

The ABA Standards provide that once misconduct is established, it is appropriate to evaluate the aggravating and mitigating circumstances in considering what sanction to impose. Standards for Imposing Lawyer Sanctions, American Bar Association, 1991, pg. 49. The Missouri Supreme Court has also established that while disbarment is the baseline sanction for cases of misappropriation, the Court will consider the presence of aggravating and mitigating factors in each case. *In re Belz*, 258 S.W.3d 38, 43 (Mo. banc 2008).

In the case at bar, Respondent's use of client money for personal expenditures does evidence a selfish motive. There is a pattern of misconduct, multiple offenses and, at least with respect to the Crosses and Huskeys, vulnerability of the victims, in that they were young couples with little to no experience handling legal matters. Respondent has been practicing for more than 10 years and most certainly knew that his conduct was prohibited by the Rules, as evidenced by his statement at the Office of Chief Disciplinary Counsel, where Respondent stated that he "got his hand caught in the cookie jar." Respondent was forthright and honest in his admissions before the disciplinary hearing panel, admitting to virtually all of the violations charged in the Information. However, his honesty before the panel is tempered somewhat by the dishonesty that he displayed towards his clients. No other mitigating factors are applicable.

It is well established that the purpose of attorney discipline is not to punish the attorney, but to "protect the public and maintain the integrity of the legal profession." *In*

re Carey, 89 S.W.3d 477, 483 (Mo. banc 2002). At hearing, Respondent advocated for the imposition of a suspension with probation and a mentor. The Office of Chief Disciplinary Counsel has previously articulated, before this Court, that the problem with probation and mentoring in a case of knowing misappropriation is that it is impossible to teach someone to be honest. While a mentor may be able to help Respondent establish a billing system or set up alarms for court, a mentor cannot be Respondent's full-time moral compass. In the face of all of the evidence in this case, the public and the integrity of the profession is best protected by Respondent's disbarment.

CONCLUSION

For the reasons set forth above, the Chief Disciplinary Counsel respectfully requests this Court:

(a) find that Respondent violated Rules 4-1.3, 4-1.15(a), (c), (d) and (f) and 4-8.4(c);

(b) disbar Respondent; and

(c) tax all costs in this matter to Respondent, including the $2,000.00 fee for disbarment, pursuant to Rule 5.19(h).

Respectfully submitted,

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ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2018, a true and correct copy of the foregoing was served on Respondent via the Missouri Supreme Court efiling system:

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Macon, MO 63552

Respondent

Shannon L. Briesacher

CERTIFICATE 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. Was served on Respondent via the Missouri electronic filing system pursuant to Rule 103:08;

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

4. Contains 9,635 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Shannon L. Briesacher