

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:)
)
RICHARD L. WINKIE,) **Supreme Court # SC97313**
)
Bar No. 59455)
)
Respondent.)

RESPONDENT'S BRIEF

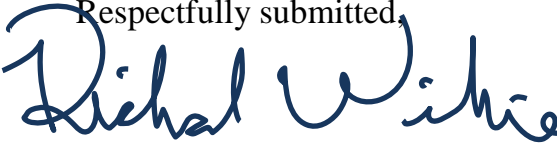
Respectfully submitted,

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SUPPLEMENTAL STATEMENT OF FACTS

Testimony and Evidence

Respondent has had a solo law practice since 2009. (Record Vol. 1, page 13 (Tr. 5, 1.12 - 1. 21)). Respondent worked for a personal injury attorney during and after graduating from law school in 2006 and then worked for another attorney in the Kansas City metropolitan area. (Record Vol. 1, pages 13 and 14 (Tr. 5, 1.25 – 6, 1. 7)). In Respondent's initial legal career, he did not have any prior on-hand experience with managing client trust accounts. (Record Vol. 1, page 328 (Tr. 143, 1. 10 – 15, 144, 1. 1-3, 145, 1. 2-13)). Respondent opened a trust account in or about 2009 but was not fully aware of all the nuances of maintaining such, including requirements related to individual client ledgers. (App. 331-332) (DH Tr. 146, 1. 11 – 147, 1. 1).

Respondent's understanding of trust account requirements was weak prior to discussions and guidance offered by legal counsel during the Disciplinary Hearing process. (App. 336) (DH Tr. 151, 1. 18 – 152, 1. 15). Respondent was recommended (by legal counsel) to take a webinar on trust accounting rules and did prior to the Disciplinary Hearing. (App. 336) (DH Tr. 151, 1. 16 –21).

Respondent was asked by Matt and Melissa Cross and Brandon and Jamie Huskey to assist with a real estate transaction in early 2015. (App. 192) (DH Tr. 7, 1. 18 –8, 1. 1). Respondent received proceeds from the real estate sale involving the Crosses and Huskeys in March, 2015. (App. 306) (DH Tr. 121, 1. 6 –9). Respondent disbursed funds from the proceeds of the real estate transaction to another family member of the Crosses and Huskeys in late May, 2015. (App. 308) (DH Tr. 123, 1. 5 –13). Respondent made a

partial disbursement of funds to the Huskeys and the Crosses on December 11, 2015. (App. 201-201) (DH Tr. 16, l. 21 – 17, l. 3). Respondent fully paid the Huskeys and Crosses, plus waived all legal fees and added additional interest with payments made in December, 2016. (App. 209-210) (DH Tr. 24, l. 18 – 25, l. 2). Brandon Huskey, testifying on behalf of the Crosses and Huskeys, stated that he had not been financially damaged as result of the delay in receiving payment. (App. 210) (DH Tr. 25, l. 3 –8).

Respondent represented Randy Otto with regard to a breach of contract matter and obtained Judgment on behalf of Randy Otto. (App. 214-215) (DH Tr. 29, l. 24 – 30, l. 7). Respondent assisted Randy Otto to collect on the judgment by filing wage garnishment forms. (App. 215-216) (DH Tr. 30, l. 20 – 31, l. 10). Respondent was eventually asked by Randy Otto to deposit wage garnishment checks directly into an account of Randy Otto at a bank in Macon. (App. 217-218) (DH Tr. 32, l. 19 – 33, l. 2). The wage garnishment for Randy Otto expired at some point as Respondent did not get it refilled. (App. 223) (DH Tr. 38, l. 3 – 11). Randy Otto later learned that Respondent had not deposited into his bank account in Macon the full sum of money collected from the garnishment checks. (App. 222) (DH Tr. 37, l. 18 – 25). Respondent repaid Randy Otto amounts claimed by him, and waived further legal fees, such that Randy Otto stated he felt Respondent owed him no more money and understood that Respondent was not seeking further payment from him. (App. 234-235) (DH Tr. 49, l. 23 – 50, l. 15).

Respondent adopted two children from China in 2015. (App. 304) (DH Tr. 119, l. 22 –24). Respondent injured his leg while in China and had surgery in May, 2015, which

impacted work operations in the summer of 2015. (App. 62-63) (SS Tr. 61, l. 21 – 62, l. 1).

Character and Reputation Evidence

Attorney Jill Whitehead Creed submitted a letter advising that in her experiences with Respondent, she has noted him to exhibit the highest degree of professionalism, honesty and integrity. (App. 706).

Trinette Peukert, City Clerk for Bevier, Missouri, submitted a letter advising she knows Respondent to be dependable, responsible, honest and courteous. (App. 707). She additionally states that Respondent is well liked and respected by residents of the community and the local area. Id.

Grant Gall submitted a letter on behalf of Respondent as a former client, stating Respondent was a capable, well-meaning individual capable of being contacted at any hour. (App. 708). Grant Gall additionally stated Respondent showed a desire to provide legal services to the underrepresented, working with him financially and viewed Respondent to be a valuable asset to the community. Id.

Attorney Gillis Leonard submitted a letter on behalf of Respondent, stating that in his experience, Respondent has conducted himself with dignity, honesty, integrity, and humility. (App. 709).

Attorney Cody Wells submitted a letter on behalf of Respondent, stating that his word has been good and his work timely. (App. 710).

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, (hereinafter "OCDC"), by and through staff counsel, Shannon Briesacher, and submits his Proposed Findings of Facts, Conclusions of Law and Recommendation for Discipline as follows:” (App. 723).

POINTS RELIED ON

I.

**THE SUPREME COURT SHOULD DISCIPLINE
RESPONDENT’S LICENSE BECAUSE A MISAPPROPRIATION
OF THE PROCEEDS FROM THE SALE OF REAL ESTATE
INVOLVING THE HUSKEYS AND CROSSES OCCURRED.**

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

ABA Standards for Imposing Lawyer Sanctions (1991)

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT NEGLIGENTLY MADE USE OF CLIENT MONEY BELONGING TO OTTO BUT LATER MITIGATED SUCH USE BY REPAYING RANDY OTTO AND WAIVING FEES.

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

ABA Standards for Imposing Lawyer Sanctions (1991)

POINTS RELIED ON

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO MANAGE HIS CLIENT TRUST ACCOUNT AS PER RULES 4-1.15(a), (c) AND (f).

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

Rule 4-1.15(a)

Rule 4-1.15(c)

Rule 4-1.15(d)

Rule 4-1.15(f)

ABA Standards for Imposing Lawyer Sanctions (1991)

POINTS RELIED ON

IV.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO ADEQUATELY COMMUNICATE WITH THE CROSS AND HUSKEY FAMILIES AND RANDY OTTO RELATED TO STATUS OF THEIR LEGAL MATTERS.

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

ABA Standards for Imposing Lawyer Sanctions (1991)

POINTS RELIED ON

V.

**THE SUPREME COURT SHOULD DISCIPLINE LICENSE BECAUSE
RESPONDENT FAILED TO DILIGENTLY REPRESENT RANDY OTTO BY
ALLOWING A GARNISHMENT TO LAPSE.**

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

Rule 4-1.13

ABA/BNA Lawyer's Manual on Professional Conduct

POINTS RELIED ON

VI.

THE SUPREME COURT SHOULD NOT DISBAR RESPONDENT BECAUSE RESPONDENT:

- a. **TEMPORARILY USED CLIENT MONEY OF THE HUSKEYS AND CROSSES AND OTTO, WHICH WAS RECTIFIED AND CAUSED THEM NO LASTING DAMAGE;**
- b. **DID NOT KNOWINGLY DECEIVE THE HUSKEYS AND CROSSES FOR HIS OWN BENEFIT IN SUCH A WAY AS TO CAUSE DAMAGE TO THE HUSKEYS AND CROSSES;**
- c. **CAUSED NO INJURY TO CLIENTS DUE TO IMPROPER TRUST ACCOUNT MANAGEMENT.**

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

In re Coleman, 295 S.W.3d 857, 869 (Mo. banc 2009)

In re Forge, 747 S.W.2d 141, 145 (Mo. banc 1988)

In re Shunk, 847 S.W.2d 789, 791 (Mo. banc 1993)

In re Littleton, 719 S.W.2d 772, 777-8 (Mo. banc 1986).

Rule 4-8.4(c)

ABA Standards for Imposing Lawyer Sanctions (1991)

ARGUMENT

I.

**THE SUPREME COURT SHOULD DISCIPLINE
RESPONDENT’S LICENSE BECAUSE A MISAPPROPRIATION
OF THE PROCEEDS FROM THE SALE OF REAL ESTATE
INVOLVING THE HUSKEYS AND CROSSES OCCURRED.**

The facts in this matter are largely undisputed by Respondent, and it is admitted by Respondent that misappropriation of client funds occurred. Respondent disagrees with some of the timelines suggested within Informant’s Brief as to Point I, disputes he told the Crosses and Huskeys their funds were held up by the title company, and disputes he used the “entirety” of the proceeds for personal expenditures. However, Respondent accepts a defense of those minor points is unlikely to impact the Court’s ultimate decision to impose some degree of discipline.

ARGUMENT

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT NEGLIGENTLY MADE USE OF CLIENT MONEY BELONGING TO OTTO BUT LATER MITIGATED SUCH USE BY REPAYING RANDY OTTO AND WAIVING FEES.

The facts in this matter are largely undisputed by Respondent, and it is admitted by Respondent that misappropriation of client funds occurred. Respondent disputes characterization that the entirety of funds held on behalf of Otto were client funds as opposed to earned fees (in part), however, Respondent accepts a defense as to characterization of part of the funds is unlikely to impact the Court's ultimate decision to impose some degree of discipline.

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO MANAGE HIS CLIENT TRUST ACCOUNT AS PER RULES 4-1.15(a), (c) AND (f).

The facts in this matter are largely undisputed by Respondent, and it is admitted by Respondent that he failed to appropriately manage his client trust account in violation of Rules 4-1.15(a), (c) and (f). Respondent disputes characterization of some fees as client funds versus earned fees, but, Respondent accepts a defense as to characterization of some transactions (without being able to defend characterization as to all transactions) is unlikely to impact the Court's ultimate decision to impose some degree of discipline.

IV.

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S
LICENSE BECAUSE RESPONDENT FAILED TO ADEQUATELY
COMMUNICATE WITH THE CROSS AND HUSKEY FAMILIES
AND RANDY OTTO RELATED TO STATUS OF THEIR LEGAL
MATTERS.**

The facts in this matter are largely undisputed by Respondent, and it is admitted by Respondent that he failed to appropriately maintain communication with the Crosses, Huskeys and Otto. Respondent disputes some of the claims related to communications, but accepts that he is unable to suggest constant communication was being maintained, such that any such defense is unlikely to impact the Court's ultimate decision to impose some degree of discipline.

V.

**THE SUPREME COURT SHOULD DISCIPLINE LICENSE
BECAUSE RESPONDENT FAILED TO DILIGENTLY REPRESENT
RANDY OTTO BY ALLOWING A GARNISHMENT TO LAPSE.**

The facts in this matter are largely undisputed by Respondent, and it is admitted by Respondent that he failed to note a garnishment had lapsed in the Otto matter such that several months went by when money was not being collected on Otto's behalf. Respondent disputes the suggestion that Otto obtained a personal loan to repay the property loan solely because of Respondent's actions but accepts that such defense is unlikely to impact the Court's ultimate decision to impose some degree of discipline.

VI.

THE SUPREME COURT SHOULD NOT DISBAR RESPONDENT BECAUSE RESPONDENT:

- a. **TEMPORARILY USED CLIENT MONEY OF THE HUSKEYS AND CROSSES AND OTTO, WHICH WAS RECTIFIED AND CAUSED THEM NO LASTING DAMAGE;**
- b. **DID NOT KNOWINGLY DECEIVE THE HUSKEYS AND CROSSES FOR HIS OWN BENEFIT IN SUCH A WAY AS TO CAUSE DAMAGE TO THE HUSKEYS AND CROSSES;**
- c. **CAUSED NO INJURY TO CLIENTS DUE TO IMPROPER TRUST ACCOUNT MANAGEMENT.**

The ABA Standard for Imposing Lawyer Sanctions set out the factors to be considered in imposing sanctions. *In re Coleman*, 295 S.W.3d 857, 869 (Mo. banc 2009). Standard 3.0 states “in imposing a sanction after a finding of lawyer misconduct, Court should consider the following factors:

- a) The duty violated;
- b) The lawyer’s mental state;
- c) The potential or actual injury caused by the lawyer’s misconduct; and
- d) The existence of aggravating or mitigating factors.

In the present case, the ethical duty is a duty Respondent had to his clients, the Crosses, the Huskeys and Mr. Otto. Once that is determined, then the question is what was the lawyer’s mental state. Did he act intentionally, knowingly or negligently. Respondent does not fit easily into any of those three categories. His mental state was one of ignorance. On Page 29 of the ABA Standards, in discussing the appropriateness of a reprimand for negligent dealing with client property, the commentary states

“suspension or disbarment as applicable under Standards 4.11 and 4.12 in the commentary thereto is appropriate for lawyers who are grossly negligent. For example, lawyers who are grossly negligent in failing to establish proper accounting procedures should be suspended; reprimand is appropriate for lawyers who simply fail to follow their established procedures.”

Respondent’s ignorance in regard to the trust accounting procedures, the records required to be kept and the rules regarding what goes into the trust account and what goes to the operating account show an almost complete ignorance of trust account requirements and would constitute gross negligence.

The ABA Standards provide for matters of aggravation and mitigation. Factors which may be considered in aggravation include:

- a) Prior disciplinary offenses;
- b) Dishonest or selfish motive;
- c) Pattern of misconducts;
- d) Multiple offenses;
- e) Bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with Rules or Orders of the Disciplinary Agency;
- f) Submission of false evidence, false statements or other deceptive practices during the disciplinary process;
- g) Refusal to acknowledge wrongful nature of conduct;
- h) Vulnerability of victim;
- i) Substantial experience in the practice of law;

j) Indifference to making restitution;

k) Illegal conduct including that involving the use of controlled substances.

In looking at the aggravating factors which are present in this case they would involve b) a dishonest or selfish motive; c) a pattern of misconducts; d) multiple offenses and h) vulnerability of victim.

In regard to mitigating factors, Standard 9.32 provides for mitigating factors which includes:

- a) Absence of a prior disciplinary record;
- b) Absence of a dishonest or selfish motive;
- c) Personal or emotional problems;
- d) Timely good-faith effort to make restitution or to rectify consequences of misconduct;
- e) Full and free disclosure to disciplinary board of cooperative attitude toward proceedings;
- f) Inexperience in the practice of law;
- g) Character or reputation;
- h) Physical disability;
- i) Mental disability or chemical dependence including alcoholism or drug abuse when:
 - 1. There is medical evidence that the respondent is affected by a chemical dependency or mental disability;

2. The chemical dependency or mental disability caused the misconduct;
 3. The respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
 4. The recovery arrested the misconduct and recurrence of that misconduct is unlikely.
- j) Delay in disciplinary proceedings;
 - k) Imposition of other penalties or sanctions;
 - l) Remorse;
 - m) Remoteness of prior offenses.

Respondent has no prior disciplinary record; he has made a good faith effort to make restitution to his clients and they admit that they have received their money and that he has paid it with interests and that he has not charged them all or the full measure of potential legal fees; he has been full and free in his disclosures during the disciplinary process and has been cooperative toward the proceedings and has testified and admitted to misconduct. With regard to his experience in the practice of law, he may have experience in the practice of law but he has no experience in the handling of trust accounts in the practice. He has presented evidence of his good character and reputation and has shown his remorse by his testimony that he knows that he needs to be "fixed" and that he has learned through this proceeding about the trust account rules and that he wishes to abide by the rules if shown how to accomplish the same.

Under ABA Standard 4.1, dealing with failure to preserve the client's property, Standard 4.11 states "disbarment is generally appropriate when a lawyer knowingly converts property and causes injury or potential injury to a client." Standard 4.12 provides "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." Standard 4.12 provides "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." Because of Respondent's lack of actual knowledge about handling his trust account with regard to client monies he did not have actual knowledge of his violations, but it is clear that he should have known that he was dealing improperly with client property. However, he did not cause injury to the clients as they all agreed they received back the money they should have had, plus additional monies and that some or all legal fees were waived by Respondent.

The definition section of the ABA Standard discusses potential injury as being harm to the client, the public, the legal system, or the profession, with said harm being reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

In the case of *In re Belz*, 258 S.W.3d 38 (Mo banc 2008), Belz had been a successful attorney in the St. Louis area with approximately 32 years of practice experience at the time the Court decided his case. Belz made use of Client monies with an intent to repay the funds. The OCDC and Belz agreed that the taking of those funds was a misappropriation of client funds that violated Rules 4-8.4c and 4-8.4d and Rule 4-

1.15(a). Like Belz, Respondent agrees that the use of client monies amounts to a misappropriation and is therefore misconduct subjecting him to discipline.

Unlike Respondent, Belz presented evidence that he suffered from a bipolar disorder and he produced testimony that his misconduct was a result of his bipolar disorder. Belz asked the Court to stay the suspension and place him on probation.

Belz was found to have had no prior discipline, he exhibited remorse and voluntarily made restitution, he was not found to have a dishonest or selfish motive, there were multiple offenses, Belz had substantial experience in the practice of law and the potential for vulnerability of the victims. The Court suspended Belz's license indefinitely, with a right to reapply after three years.

Similarly, Respondent has no prior discipline, has remorse and voluntarily restored money to clients, waiving legal fees and paying additional interest. He did not have a dishonest or selfish motive in taking the funds to China to ensure the adoption process went through as it was expected that all such funds would be repaid upon return. Like Belz, there are multiple offenses and there is a potential for vulnerability of the victim. While Respondent chronologically has extensive experience in the practice of law, little of that experience involving learning about trust accounts before he was forced to begin operating as a solo practitioner.

Respondent has produced evidence of his good reputation, has readily admitted his violations and lack of knowledge, and has gotten his clients paid, with them agreeing that they have not suffered any actual harm.

The OCDC seeks disbarment. Disbarment is reserved only for clear cases of severe misconduct. *In re Forge*, 747 S.W.2d 141, 145 (Mo. banc 1988). Disbarment 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, 791 (Mo. banc 1993). Suspension, is an appropriate intermediate sanction where reprimand is insufficient to protect the public and maintain the integrity of the profession, and where this Court does not believe that the acts of a respondent are such that he should not be at Bar. *In re Littleton*, 719 S.W.2d 772, 777-8 (Mo. banc 1986).

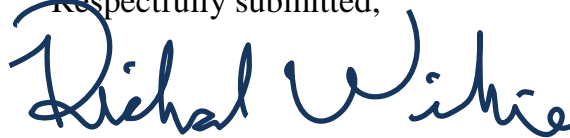
Respondent has requested either probation or stayed suspension with mentoring to enable him to continue to serve the populations he serves but also to receive guidance he has not had the previous benefit of receiving.

CONCLUSION

While Respondent did commit acts that arise to the level of professional misconduct, mitigating factors such as the injury sustained while in China on the adoption trip, efforts to repay the complaining parties, the waiving of fees, payment of interest for amounts misappropriated and efforts to become compliant with trust accounting rules since this complaint was filed all serve as mitigating factors for the acts as alleged. Further, Respondent has presented evidence from fellow attorneys and clients who speak to his integrity and work ethic.

Respondent concedes that this Court will determine he should be disciplined and that disbarment is the normal discipline imposed in this matter. However, Respondent is not someone unfit to continue in the profession and, in light of the mitigating factors, can be corrected and the safety of the public ensured by probation or a stayed suspension involving probation terms and requirements for enlisting the aid of a mentor.

Respectfully submitted,



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RESPONDENT

CERTIFICATE OF SERVICE

I certify I signed the “original” in accordance with Rule 103.04 and that this 1st day of October, 2018, I have served a true and accurate copy of the foregoing via efile to:
Attorneys for Informant.



Richard Winkie

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 3569 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.



Richard Winkie