

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

NANCY J. FISHER,
1658 East Saint Louis
Springfield, MO 65802

Missouri Bar No. 62474

Respondent.

)
)
) **Supreme Court No. SC97694**
)
)
)
)
)

INFORMANT'S BRIEF

Respectfully submitted,

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel

Kevin J. Rapp #57974
Special Representative, Division XV
Office of Chief Disciplinary Counsel
2847 S. Ingram Mill Road, A102
Springfield, MO 65804
Telephone: 785-554-1030
Kjrapp.ocdc@lawyer.com

ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

COVER PAGE 1

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

STATEMENT OF JURISDICTION 4

CASE SUMMARY 5

STATEMENT OF FACTS 6

POINTS RELIED ON

 I. 14

 II. 15

ARGUMENT

 I. 16

 II. 21

CONCLUSION 27

CERTIFICATE OF SERVICE 28

CERTIFICATION OF COMPLIANCE: RULE 84.06(C) 28

TABLE OF AUTHORITIES

CASES

In re Belz, 258 S.W.3d 38 (Mo. banc 2008) 23

In re Farris, 472 S.W.3d 549 (Mo. banc 2015)..... 15, 16, 19, 21, 22, 26

In re Mentrup, 665 S.W.2d 324 (Mo. banc 1984) 16, 22

OTHER AUTHORITIES

ABA Standard 4.1 24

ABA Standard 4.12 23

ABA Standard 4.4 25

ABA Standard 4.42 25

ABA Standard 9.32 26

ABA Standard 9.4 26

ABA Standards for Imposing Lawyer Sanctions (1991 ed.) 16, 23

RULES

SUPREME COURT RULE 4-1.3 14, 16, 17, 18, 21, 24, 27

SUPREME COURT RULE 4-1.4 14, 16, 18, 21, 24, 27

SUPREME COURT RULE 4-8.4 14, 16, 17, 20, 21, 24, 27

SUPREME COURT RULE 4-1.15 14, 16, 18, 19, 20, 21, 24, 27

SUPREME COURT RULE 5.225 21, 22, 26

STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo. 2000.

CASE SUMMARY

This case involves Respondent Nancy Fisher's alleged violation of the rules of professional conduct regarding honesty, communication, diligence, and trust account management. In December 2017, Informant filed a two count Information charging Respondent with said violations. Respondent filed an Answer and this matter proceeded to a Disciplinary Hearing Panel ("DHP") hearing on June 21, 2018. On December 14, 2018, the DHP entered a decision that Respondent committed multiple rule violations as alleged in Counts I and II of the Information. The Panel recommended that Respondent be suspended from the practice of law with no leave to apply for readmission for six months. Informant accepted the DHP's decision. Respondent rejected the decision.

STATEMENT OF FACTS

I. Respondent's Background

Nancy Fisher (“Respondent”) was licensed to practice in Missouri in June 2010 and holds a Missouri license (bar number) of 62474. **App. 118-130.** Respondent maintains a solo practice in Springfield, Greene County, Missouri. *Id.* Respondent has no previous discipline. *Id.*

II. Respondent's Representation of Katrina Putfark and Settlement

In January 2014, Katrina Putfark (“Putfark”) hired Respondent to represent her for personal injuries sustained in a motor vehicle accident. *Id.* Putfark signed a 33 and 1/3 percent contingency fee contract. *Id.* In December 2014, Respondent settled Putfark’s case for \$725,000.00. *Id. at 119.* At that time, Putfark and Respondent agreed that all acquired medical bills would be paid from settlement funds. *Id.*

On December 5, 2014, Respondent wrote to Putfark and provided a “Settlement Memorandum” confirming settlement in the amount of \$725,000.00 and breaking down the fees and expenses—including outstanding medical bills—to be paid from the settlement proceeds. *Id.; App. 143.* From the settlement amount, Respondent charged a reduced 15 percent contingent fee and expenses totaling \$109,112.54. **App. 143.** Respondent also listed the amounts due and owing to various medical providers totaling \$102,817.09 as follows:

Ozark Anesthesia Associates	\$3,442.50
University Physicians	\$9,830.00
Mercy EMS	\$2,741.00

Litton & Giddings Radiological	\$2,419.00
Springfield Neurological & Spine Institute	\$ 779.07
Cox Health Springfield (SNSI)	\$ 369.00
Ferrell-Duncan/Bone & Joint	\$4,425.00
Cox Health Home Support	\$ 450.08
Cox Health – Cox South Medical Center	\$71,557.38*
Physical Therapy Specialists	\$6,804.06

At the DHP hearing, Informant provided evidence that established Respondent made payments to each of these medical providers from settlement funds in March and April 2015, with the exception of the \$4,425.00 owed to Ferrell-Duncan/Bone & Joint (“Ferrell-Duncan”). **App. 15-16; 135-138.** Respondent testified that she wrote a check and/or attempted to make a payment to Ferrell-Duncan from the settlement proceeds. **App. 63-65.** However, Respondent was unable to provide any evidence that Ferrell-Duncan ever received payment. *Id.*

With respect to the \$71,557.38 owed to Cox Health Systems (“Cox”) and marked with an asterisk (*) on the “Settlement Memorandum,” Respondent testified that the asterisk represented the reduced amount that Cox agreed to accept as full settlement of amount it was owed. **App. 60-61.** Prior to this alleged reduction, Respondent testified that the amount due and owing to Cox was \$155,873.24. **App. 3-4.** Respondent testified as to various discussions she had with Cox employees wherein she states Cox agreed to reduce its claim to \$71,557.38; however, Respondent was unable to produce any written

agreement or documentation establishing that Cox agreed to accept a reduction. **App 60-61.**

On December 23, 2014, Respondent wrote Putfark a check in the amount of \$513,070.37 representing the amount of the proceeds of the settlement minus Respondent's fees and expenses and the amounts due to the aforementioned medical providers. **App. 139-142.**

III. Post Settlement Developments

Putfark testified that in Fall 2015 she began receiving collection calls and letters from Cox alleging that she still owed at least \$84,000.00 for medical treatment related to her auto accident. **App. 157; 158; 162-164; 186; 187; 188.** This amount represents roughly the difference between the total billed (\$155,873.74) by Cox and paid by Respondent (\$71,557.38). Putfark requested documentation from Cox showing that it had agreed to a reduction in the amounts it was owed. Cox advised her that it had no such documentation. **App. 156.**

After Putfark started receiving collection letters from Cox, she contacted Respondent and spoke with Respondent on the phone in October 2015. Putfark testified that Respondent told her that "there must be a mistake and that she [Respondent] would take care of it . . ." **App. 159-160.** Respondent admits the phone conversation with Putfark, but denies that she told Putfark that she would take care of it. **App. 70-71.**

Putfark testified that this phone call was the last conversation she had with Respondent and that Respondent stopped answering her calls. Putfark stated that she then involved her father and an attorney, Derik Scott, to contact Respondent and request

information and that Respondent also failed to respond to their requests for information. **App. 160-161.** Respondent denies this. **App. 70-72.** Putfark further testified that she advised the Cox collectors that she was represented by Respondent and to contact Respondent. **App. 169.** However, Putfark stated that the calls later resumed because Respondent would not return the collection calls. **App. 169.**

Putfark also testified that in April 2018, she attempted to obtain a home loan but could not because of the unpaid Cox bills showing up on her credit report. **App. 164-165.**

IV. OCDC Investigation

On October 11, 2016, Putfark filed a complaint against Respondent with the Office of Chief Disciplinary Counsel. **App. 177-185.** As part of its investigation, OCDC Investigator, Kelly Dillon, subpoenaed Respondent's operating (Account No. XXXXXX3345) and trust (Account No. XXXXXX6647) accounting records from Academy Bank. **App. 24.** OCDC also requested that Respondent produce full trust and operating account records to include bank statements and records of deposited items and disbursements as required by Missouri Rule of Professional Conduct 4-1.15. **App. 24-25.** Respondent did not produce all of these records as required by the Rule. **App. 25.** Later, Respondent admitted in her Answer to the Information that she did not maintain all the trust account records required by Rule 4-1.15. **App. 125; 134.**

OCDC's investigation and audit of Respondent's trust account (No. XXXXXX6647) revealed the following:

- a. The trust account was opened at roughly the same time that Respondent received the Putfark settlement funds in December 2014. **App. 135-138; 38.** Prior to this date, Respondent admitted practicing law without a trust account. **App. 76.**
- b. The deposit of \$750,000.00 was the only deposit in Respondent's trust account during the audited period of December 9, 2014 to April 28, 2017. **App. 135-138.**
- c. Following settlement in December 2014, Respondent allowed earned fees to remain in trust even after all the medical providers (with the exception of Ferrell-Duncan) were paid in March and April of 2015. From April 2015 to October 2016, Respondent made over 30 withdrawals or transfers of earned fees from her trust account. ***Id.***
- d. On October 13, 2015, Respondent made a cash withdrawal of \$1,000.00 from her trust account. **App. 135-138.**
- e. By September 11, 2017, only \$823.35 remained in Respondent's trust account, which is less than the amount due and owing to Ferrell-Duncan. **App. 135-138; 36.**

V. The DHP Hearing

On December 22, 2017, Informant filed a two count Information charging Respondent with multiple violations of the Missouri Rules of Professional Conduct ("Rules.") **App. 118-130.** In Count I, Informant alleged that Respondent violated the following rules regarding her representation of Putfark:

- Rule 4-1.3 (Diligence) by failing to fully settle all outstanding medical bills from settlement funds as agreed to by attorney and client;
- Rule 4-1.4 (Communication) by failing to respond to Putfark, her father, or her attorney's requests for information about unpaid medical bills;
- Rule 4-1.5 (Fees) by representing Putfark in a contingent fee case without a signed contract or fee agreement. This charge was based on the fact that despite multiple requests, Respondent did not produce a signed contract to the OCDC during the investigation stage;
- Rule 4-7.3 (Solicitation) by directly approaching and soliciting Putfark for legal representation. This charge was based on Putfark's representations in her initial OCDC complaint that Respondent solicited her in this manner;
- Rule 4-8.4(c) (Misconduct) by falsely stating to Putfark that she would "take care" of all unpaid medical bills; and
- Rule 4-8.4(d) (Misconduct) by engaging in conduct prejudicial to the administration of justice.

In Count II, Respondent was charged with violating the Rules regarding safekeeping and management of client property (namely client funds) in her trust account as follows:

- Rule 4-1.15(a) by commingling client and personal funds in her trust account;

- Rule 4-1.15(a)(5) by making a cash withdrawal from her trust account;
- Rule 4-1.15(a)(7) by failing to reconcile her trust account;
- Rule 4-1.15(f) by failing to maintain appropriate trust account records;
- Rule 4-1.15(g) by practicing law without a trust account;
- Rule 4-8.4(c) (Misconduct) by misappropriating client funds belonging to Putfark; and
- Rule 4-8.4(d)(Misconduct) by engaging in conduct prejudicial to the administration of justice.

On March 29, 2018, Respondent filed her Answer. **App. 131-134.** The matter then proceeded to a DHP hearing on June 21, 2018. At the outset of the hearing, Informant dismissed the Rule 4-7.3 charge set forth in Count I of the Information. **App. 190-202.** Respondent also testified at the hearing that she was prepared to tender a check to Putfark for the full amount owed to Ferrell-Duncan. **App. 83.** On cross-examination, Respondent agreed to provide proof of any payment to Putfark to both Informant and the DHP. **App. 98.** Based on information and belief, those funds have yet to be paid¹.

Following the hearing, the record was left open by agreement of the parties to take Putfark's deposition by phone as she now resides in Colorado. **App. 190-202.** On July 6, 2018, Putfark's deposition was taken. **Id.** For the first time, Putfark produced a copy

¹ It is Informant's understanding from discussions with Respondent's counsel that Respondent has now set aside funds to pay Putfark. However, this occurred after the DHP entered its decision and was not part of the record below.

of a written fee agreement with Respondent. **App. 189.** Thereafter, Putfark's deposition was provided to the DHP for consideration and the record was closed.

On December 12, 2018, the DHP entered its decision. Specifically, the DHP found that Respondent committed the following Rule violations as charged in Count I:

- Rule 4-1.3 (Diligence) by failing to memorialize in writing any agreement with Cox hospital to reduce its billed medical charges; and
- Rule 4-1.4 (Communication) by failing to respond to Putfark's requests for information regarding unpaid medical bills; and
- Rule 4-8.4(d) (Misconduct) by engaging in conduct prejudicial to the administration of justice during her representation of Putfark.

***Id.* at 198-199.**

The Panel found that Respondent did not violate Rule 4-1.5 or Rule 4-8.4(c) as charged in Count I. ***Id.***

With respect to Count II, the Panel further found that Respondent violated Rules 4-1.15 and 4-8.(c) and (d) as charged by the OCDC and set forth above. ***Id.* at 200-202.** The Panel recommended that Respondent be suspended from the practice of law with no leave to apply for reinstatement for six months. ***Id.* at 202.** On January 11, 2019, Informant accepted the DHP's decision. **App. 203.** That same day, Respondent rejected the DHP's decision. **App. 204.**

POINTS RELIED ON

I.

RESPONDENT VIOLATED RULE 4-8.4(c) BY MISAPPROPRIATING CLIENT FUNDS; VIOLATED RULE 4-1.3 BY FAILING TO ACT WITH REASONABLE DILIGENCE IN REPRESENTING A CLIENT; VIOLATED RULE 4-1.4 BY FAILING TO RESPOND TO CLIENT REQUESTS FOR INFORMATION; VIOLATED MULTIPLE PROVISIONS OF RULE 4-1.15 BY IMPROPERLY USING AND MANAGING HER TRUST ACCOUNT; AND VIOLATED RULE 4-8.4(d) BY ENGAGING IN CONDUCT THAT IS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

Missouri Supreme Court Rule 4-1.3

Missouri Supreme Court Rule 4-1.4

Missouri Supreme Court Rule 4-1.15

Missouri Supreme Court Rule 4-8.4

POINTS RELIED ON

II.

UPON APPLICATION OF THE ABA SANCTION STANDARDS, INCLUDING AGGRAVATING AND MITIGATING FACTORS, AND PRIOR DECISIONS OF THIS COURT, THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE FOR A PERIOD OF NOT LESS THAN SIX MONTHS.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

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

ARGUMENT

I.

RESPONDENT VIOLATED RULE 4-8.4(c) BY MISAPPROPRIATING CLIENT FUNDS; VIOLATED RULE 4-1.3 BY FAILING TO ACT WITH REASONABLE DILIGENCE IN REPRESENTING A CLIENT; VIOLATED RULE 4-1.4 BY FAILING TO RESPOND TO CLIENT REQUESTS FOR INFORMATION; VIOLATED MULTIPLE PROVISIONS OF RULE 4-1.15 BY IMPROPERLY USING AND MANAGING HER TRUST ACCOUNT; AND VIOLATED RULE 4-8.4(d) BY ENGAGING IN CONDUCT THAT IS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

A. Respondent’s Misappropriation of Client Funds and Dishonest Conduct in Violation of Rule 4-8.4(c)

Rule 4-8.4(c) provides that “[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” This Court has found that misappropriation occurs when an attorney fails to pay over money collected by her for her client or by appropriating to her own use funds entrusted to her care. *In re Farris*, 472 S.W.3d 549, 562 (Mo. banc 2015) (quoting *In re Mentrup*, 665 S.W.2d 324, 325 (Mo. banc 1984)). As such conduct necessarily involves deceit and misrepresentation, it falls under the purview of Rule 4-8.4(c). *Farris*, 472 S.W.3d at 558 (discussing cases).

Here, the most serious of Respondent's violations is her misappropriation of client funds. As correctly found by the DHP, the evidence establishes that Respondent violated Rule 4-8.4(c) by failing to pay Ferrell-Duncan the \$4,425.00 it was owed out of Putfark's settlement proceeds, despite representing to Putfark in the Settlement Memo that she would do so, and then spending those funds. **App. 27-28; 135-138.** Respondent initially allowed these funds to remain in her trust account but then made withdrawals, ultimately depleting the trust account balance to \$823.37, well below the amount needed to pay Ferrell-Duncan. **App. 135-138.** In so doing, she appropriated client settlement funds entrusted to her care for her own use. This is the very definition of misappropriation.

Accordingly, this Court should find that Respondent violated Rule 4-8.4(c) and committed misconduct by misappropriating client funds and otherwise engaging in dishonest conduct as prohibited by Rule 4-8.4(c).

B. Respondent's Lack of Diligence in Violation of Rule 4-1.3

Rule 4-1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." In this matter, the evidence establishes that Respondent failed to document or memorialize in writing an alleged agreement with Cox Hospital to reduce the amount of medical bills allegedly owed to Cox from \$155,873.24 to \$71,557.38. *Id.* Cox had advised Putfark that it had no such record of any agreement and has since attempted to collect the approximately \$84,000 or more it is still owed from Putfark. **App. 186; 187; 188.** Said deficiencies have also appeared on Putfark's credit report, rendering her unable to purchase a home. **App. 188.** As found by the DHP, had Respondent been more diligent in obtaining such an agreement in writing, this issue

could have been addressed and mitigated prejudice to Putfark. Thus, this Court should hold that Respondent violated Rule 4-1.3.

C. Respondent's Lack of Communication in Violation of Rule 4-1.4

Rule 4-1.4 provides that “[a] lawyer shall keep the client reasonably informed about the status of the matter [and] promptly comply with reasonable requests for information.”

Here, the evidence establishes that after Cox Hospital initiated collection attempts against Putfark, she reached out to Respondent for assistance. They had one phone call to discuss the matter. **App. 159-160.** Thereafter, the evidence shows that Respondent failed to respond to additional inquiries from Putfark, her father, or her attorney to address the issue of unpaid medical bills and collection attempts. **App. 160-161.** For these reasons, this Court should find that Respondent failed to keep Putfark reasonably informed and failed to promptly comply with reasonable requests for information, and thereby violated Rule 4-1.4.

D. Respondent's Multiple Misuse and Mismanagement of her Trust Account in Violation of Rule 4-1.15(a), (f) and (g)

Rule 4-1.15(a) provides that “[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.” Respondent admits that she maintained personal funds (namely, earned fees from the Putfark Settlement) in her trust account for nearly two years after the settlement was finalized. **App. 135-138.** These funds were commingled with the \$4,425.00 that should have been paid to Ferrell-Duncan or returned to Putfark.

Id. The evidence further establishes that Respondent paid personal expenses from her trust account, to include payment of personal expenses by using funds belonging to Putfark *Id.*

Rule 4-1.15(a)(5) provides that “withdrawals shall be made only by check payable to a named payee, and not to cash, or by authorized electronic transfer. . . .” Respondent admitted that she made a cash withdrawal of \$1,000 from her trust account in violation of this Rule on October 13, 2015. *Id.* at 136.

Rule 4-1.15(a)(7) requires a lawyer to perform a reconciliation of a trust account each time the lawyer receives a bank statement. Here, the evidence shows that Respondent failed to reconcile her accounts. As noted by the DHP, had she done so, the reconciliation would have shown that the payment she claimed she made to Ferrell-Duncan in the amount of \$4,425.00 had not cleared. **App. 190-202.**

Rule 4-1.15(f) provides in relevant part that a lawyer shall maintain complete records of client trust accounts, including, but not limited to checkbooks, cancelled checks, check stubs, vouchers, ledgers, closing statements, and other similar records reflecting the date, amount, source, and explanation for transactions of the account for a period of at least five years. *See also Farris*, 472 S.W.3d at 560-61 (discussing the record keeping requirements of Rule 4-1.15(f)). In this case, Respondent admitted this violation in her answer. **App. 118-130; 131-134.** Further, the evidence adduced at the hearing showed that Respondent failed to keep or produce a vast majority of required Rule 4-1.15 records.

Finally, Rule 4-1.15(g) requires Missouri lawyers to maintain one or more trust accounts. Here, Respondent admitted that she practiced law without a trust account prior to December 2014, when she opened a trust account only after receiving the Putfark settlement funds. **App. 76.** She makes no claim that the nature of her practice exempted her from maintaining a trust account under Rule 4-1.145(a)(6). Of course, no exemption would be applicable because she was holding Putfark’s funds.

Accordingly, this Court should hold that Respondent violated subparts (a), (f) and (g) of Rule 4-1.15.

E. Respondent Engaged in Conduct Detrimental to the Administration of Justice in Violation of Rule 4-8.4(d)

Rule 4-8.4(d) provides that a lawyer shall not “engage in conduct that is prejudicial to the administration of justice.” Respondent’s conduct, as set forth above, was prejudicial to the administration of justice.

ARGUMENT

II.

UPON APPLICATION OF THE ABA SANCTION STANDARDS, INCLUDING AGGRAVATING AND MITIGATING FACTORS, AND PRIOR DECISIONS OF THIS COURT, THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE FOR A PERIOD OF NOT LESS THAN SIX MONTHS.

Respondent's misappropriation of client funds is a serious offense. This Court has held that disbarment constitutes the baseline sanction for misappropriation. *In re Farris*, 472 S.W.3d at 562. In addition to misappropriation, Respondent also committed additional violations of Rules 4-1.3, 4-1.4, 4-1.15 and 4-8.4. Accordingly, the imposition of serious discipline is warranted. Informant respectfully submits that after considering the facts of the underlying case and all aggravating and mitigating circumstances, that Respondent should receive an indefinite suspension from the practice of law, with no leave to apply for reinstatement for at least six months, as found by the DHP. Informant has accepted the DHP's decision and while it will not be seeking a higher sanction from this Court, Informant leaves it to the Court's discretion as to the imposition of a longer period of suspension should the Court find it warranted. Informant opposes any lesser sanction, including a stayed suspension with probation. Under Rule 5.225, probation is not appropriate where disbarment is warranted.

Standard

Sanction analysis commonly derives from several sources: parties' recommendations or stipulations; hearing panel recommendations; applicable rules, e.g. Rule 5.225 (the probation rule); application of the ABA Standards for Imposing Lawyer Sanctions (1991 ed.); consideration of previous Missouri Supreme Court decisions for consistency; and other jurisdictions' decisions. In deciding what sanctions to recommend, the OCDC routinely considers all of these sources, whether they are reaching a stipulation or whether in more adversarial settings. As importantly, the OCDC attempts to consider the Court's many unreported decisions made in stipulated and contested cases. Using all sources, the analysis is then applied to each new case, and considered along with any aggravating or mitigating factors. It is the goal of the OCDC to recommend sanctions in accord with those apparent standards and to justify or explain any deviations from the standards.

Analysis

The most serious violation in this case is the misappropriation of client funds. Disbarment constitutes the baseline sanction for misappropriation. *In re Farris*, 472 S.W.3d at 562. It is always a ground for the disbarment of an attorney that he has misappropriated the funds of his client, either by failing to pay over money collected by him for his client or by appropriating to his own use funds entrusted to his care." *Id.* (citing *In re Mentrup*, 665 S.W.2d 324, 325 (Mo. banc 1984)). "Though disbarment is the presumptive discipline, the Court must consider mitigating and aggravating

circumstances before determining whether to depart from this discipline in a particular case.” *Id.* at 563 (citing *In re Belz*, 258 S.W.3d 38, 42 (Mo. banc 2008)).

ABA Standard 4.1 deals with misappropriation of client funds. It provides that “Absent aggravating or mitigating circumstances. . . suspension is generally appropriate when a lawyer knows or should know that [she] is dealing improperly with client property and causes injury or potential injury to a client. ABA Standards 4.1 and 4.12.

As set forth above, the evidence in this case shows that Respondent misappropriated client funds belonging to Katrina Putfark. Instead of paying Ferrell-Duncan the \$4,425.00 it was owed or returning this money to Ms. Putfark, Respondent misappropriated and spent it, leaving an insufficient balance (\$823.35) to cover the amount owed.

Thankfully, Respondent’s misappropriation appears to have been limited to the single incident regarding her representation of Ms. Putfark. Informant’s investigation uncovered no other evidence of misappropriation of client funds by Respondent. Respondent testified that she believed the amount had been paid to Ferrell-Duncan. However, if Respondent had even basic trust account record keeping or accounting practices in place, it is likely that this non-payment could have been discovered and addressed early on. This did not occur, leading to the misappropriation of client funds – intentional or not. Such facts, along with consideration of the aggravating and mitigating factors set forth below, make the imposition of suspension appropriate in this case.

ABA Standard 4.4 provides the appropriate sanctions for a lawyer’s lack of diligence. Specifically, Standard 4.42 provides that suspension is generally appropriate

when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client.

Here, Respondent also evidenced a lack of diligence regarding the resolution of the medical bills owed to Cox. Respondent testified that she believed that she negotiated a reduction in the amount of medical bills owed to Cox hospital from approximately \$155,000 to \$71,000. However, to the extent that such reduction attempts were in fact attempted, they were not memorialized, resulting in subsequent collection attempts by Cox and damage to Ms. Putfark's credit score that left her unable to purchase a house.

Lastly, Respondent's violations of Rule 4-1.4 (Communication), and Rule 4-1.15 (Trust Account Management) as set forth above, while serious, are probably at the level of a reprimand or admonition as the evidence shows that said violations likely occurred due to Respondent's negligence or sloppiness as opposed to intentional, knowing conduct. This would be especially true had they occurred without the accompanying diligence and misappropriation violations. However, they did not, and thus these violations must be considered alongside those more serious charges and further warrant a period of actual suspension at the minimum.

Aggravating Circumstances

ABA Standard 9.22 sets forth factors which may be considered aggravating circumstances.

(d) Multiple Offenses.

Respondent committed multiple offenses in violation of the Rules of Professional conduct, including Rules 4-1.3, 4-1.4, 4-1.15 and 4-8.4.

Mitigating Circumstances

ABA Standard 9.32 sets forth factors which may be considered mitigating circumstances. Respondent's Mitigating factors include:

(a) Lack of Prior Discipline.

Respondent has no previous discipline.

(e) Full and Free Disclosure to Disciplinary Board and Cooperative Attitude Toward Proceedings.

Respondent retained counsel to represent her in this matter. Both Respondent and her attorney were cooperative at all times with the disciplinary investigation and at the hearing. Respondent's counsel remained in close contact with Informant's counsel and repeatedly made overtures to mitigate Respondent's actions or damages to Putfark.

Factors Which are Neither Aggravating Nor Mitigating

ABA Standard 9.4 lists a number of factors which are neither aggravating nor mitigating. Included among these factors is "forced or compelled" restitution. In this case, Respondent testified at the disciplinary hearing on June 21, 2018, that she was prepared to pay restitution of the misappropriated funds to her client Katrina Putfark. By the time the DHP handed down its decision on December 10, 2018, she had not done so. Based on information and belief, including discussions with Respondent's counsel, it appears that Respondent has now set aside funds to pay restitution to Putfark. Informant writes only to state its position that at this late point in the proceedings, such restitution, if in fact voluntarily paid or ordered to be paid by the Court, should not be treated as either an aggravating or mitigating factor.

Probation Is Not Appropriate In This Case

Missouri Supreme Court Rule 5.225 sets the minimum standards for the use of probation in Missouri discipline cases. A lawyer is eligible for probation if (a) the lawyer is unlikely to harm the public and can be supervised; (b) continued practice by the lawyer would not harm the profession's reputation; and (c) the misconduct does not warrant disbarment. Rule 5.225.

Informant does not believe that probation is appropriate in this case. Respondent misappropriated client funds to her own use, a serious offense for which the baseline sanction is disbarment. *In re Farris*, 472 S.W.3d at 562. Respondent's lack of diligence further left her client exposed to approximately \$84,000.00 in unpaid medical bills and damaged her client's credit score.

However, if the Court elects to impose stayed suspension with probation, Informant would welcome the opportunity to recommend probation terms and conditions.

CONCLUSION

As the evidence makes clear, Respondent has committed multiple violations of the Rules of Professional Conduct and is subject to discipline. Respondent did not diligently ensure that Putfark's medical bills would be paid out of settlement funds or memorialize an agreement with Cox Hospital to reduce its bill in violation of Rule 4-1.3. Respondent did not respond to Putfark's and others' requests for information regarding outstanding medical bills in violation of Rule 4-1.4. Respondent did not properly use, maintain, document or reconcile her trust account in violation of multiple provisions of Rule 4-1.15. Most notably, Respondent misappropriated client funds in violation of Rule 4-8.4(c). All of this conduct was further prejudicial to the administration of justice in violation of Rule 4-8.4(d). For all these reasons, Informant respectfully suggests that Respondent's license be suspended. Said suspension should be indefinite, with no leave to for reinstatement for at least six months.

Respectfully submitted,

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel



Kevin J. Rapp #57974
Special Representative, Division XV
Office of Chief Disciplinary Counsel
2847 S. Ingram Mill Road, A102
Springfield, MO 65804
Telephone: 785-554-1030
Kjrapp.ocdc@lawyer.com

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2019, a true and correct copy of the Informant’s foregoing Brief was served on Respondent’s counsel via the Missouri Supreme Court electronic filing system pursuant to Rule 103.08:

William J. Fleischaker
418 S. Wall Street
P.O. Box 996
Joplin, MO 64802-0996

Counsel for Respondent



Kevin J. Rapp

CERTIFICATION OF COMPLIANCE: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Brief served upon Respondent’s counsel by the Supreme Court e-filing system pursuant to Rule 103.08;
3. Complies with the limitations contained in Rule 84.06(b);
4. Contains 4,993 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Kevin J. Rapp