IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
JOHN DALE WILEY	)	**Supreme Court No. SC97912**
P.O. Box 390	)	
Crane, MO 65633	)	
	)	
Missouri Bar No. 50240	)	
	)	
Respondent.	)	

INFORMANT'S BRIEF

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ATTORNEYS FOR INFORMANT

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STATEMENT OF JURISDICTION

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

STATEMENT OF FACTS

This is an attorney discipline case proceeding under Missouri Supreme Court Rule 5. The case involves a four count Information against John Dale Wiley, Missouri Bar number 50240. Hearings were held in accord with Rules 5.13-5.19 in Springfield, Missouri, on September 17, 2018, and November 13, 2018. The Disciplinary Hearing Panel (DHP) issued its Findings, Conclusions and Recommendation on March 28, 2019. **(App. 901-927).** Informant accepted the Panel's recommendation on April 1, 2019 **(App. 928)**. On April 25, 2019, Respondent rejected the decision by notice to the Panel Chair.

Steven Reed - Count I

Steven Reed retained Respondent for representation in an unlawful detainer action filed against Mr. Reed. For eight years, Mr. Reed rented and occupied a house owned by another person. The house was subject to a Deed of Trust. The mortgage holder foreclosed on the house, resulting in the filing of the unlawful detainer action against Mr. Reed. **(App. 517-518).**

Respondent entered his appearance on behalf of Mr. Reed on January 21, 2015, and filed a Request for a Jury Trial. On January 26, 2015, Respondent did not appear at a scheduled hearing. On April 4, that same year, the Plaintiff in the unlawful detainer action filed a Motion for Summary Judgment. On April 22 the Plaintiff filed a Notice of Hearing on that motion; the hearing was set for May 18, 2015, but later continued to May 20, 2015. **(App. 517-518).**

Respondent did not timely respond to the Motion for Summary Judgment, but on May 11, Respondent filed Defendant's Response to Plaintiff's Motion for Summary Judgment. **(App. 518).**

On May 20, 2015, Respondent did not personally appear at the hearing on the Motion for Summary Judgment, but appeared by another attorney, Chad Courtney. **(App. 518-519)**. At that hearing, Mr. Courtney appeared and acknowledged to the Court that the Motion for Summary Judgment "was ready for decision." He made no argument related to the motion. **(App. 767-779)**. Courtney acted pursuant to Respondent's directions. **(App. 767-779).** Respondent explained to the DHP that his own failure to appear and his consent to a judgment was "the best strategy." **(App. 449).** In his Amended Answer to this disciplinary Information, Respondent answered the charge contained in Paragraph 15 of the Information by saying that that he directed another attorney to appear on his behalf and consent to the judgment. **(App. 518-519)**. Two days before the first hearing in this matter, Respondent again amended his Answer to this Information, this time by interlineation. He continued to admit the allegations in Paragraph 15. But, in the interlineation, he added that neither he nor Mr. Courtney "specifically" consented to the judgment. (**App. 756-758).** That latter explanation is different than his ongoing admission that he "consented to the Court entering judgment against Mr. Reed." (**App. 518-519; 756)**.

In any event, even in his Amended Answer by Interlineation, Respondent continues to argue that allowing the judgment against Mr. Reed was the best strategy for Mr. Reed. (**App. 756).** And, in his clarification **(App. 756-758)**, Respondent acknowledges that he

"consented to the Court entering judgment based on the pleadings, which he anticipated would be against Mr. Reed." **(App. 756-758)**.

In each of his three Answers to paragraph 18 of the Information, Respondent denied an allegation that "Mr. Reed did not give his informed consent for the Court to enter summary judgment." **(App. 516-529; 756-758; 759-760).** He told the hearing Panel that those denials did not imply that he actually did obtain informed consent from Mr. Reed. **(App. 441-443)**. The DHP found that "Respondent's explanations concerning his handling of the Reed matter are not credible." **(App. 903)**.

As to Count I, the Panel concluded that Respondent violated Rules 4-1.1 (competence), 4-1.3 (diligence), and 4-1.4 (communication). **(App. 903).**

Toni Fox – Count II

In September 2015, Toni Fox hired the Respondent to represent her in a collection case filed by Bank of America. Respondent entered his appearance for Ms. Fox on September 15, 2015. On October 8, Plaintiff's attorney submitted Interrogatories and Requests for Production of Documents to Respondent. When Respondent submitted no responses, Plaintiff filed a Motion to Compel Discovery Responses against Ms. Fox on January 16, 2016. **(App. 524; 698-703)**. On February 11, 2016, the Trial Court entered an Order to Compel Discovery Responses against Ms. Fox. Respondent again failed to answer discovery requests and failed to comply with the Court's Order to Compel. **(App. 524; 698-703).**

Based on Respondent's failure to comply with the court order, a judgment was entered against Ms. Fox on March 1, 2016. Notice of the entry of the judgment was sent to Respondent on March 2, 2016. **(App. 520-521).**

Respondent testified that he sent the plaintiff's discovery requests to Ms. Fox, but added that he can't remember when he did so; he acknowledged that he has no records of sending anything to Ms. Fox. **(App. 403)**. Although Respondent told the Panel that he did send the discovery reports to Ms. Fox, he admitted in his Amended Answer that he "failed to send the discovery requests to Ms. Fox to answer." **(App. 521-522)**.

In his Answer to the Information in this discipline case, Respondent explained that he "was litigating in a manner that would allow Ms. Fox the most time to *remain in the house*" (emphasis added). Respondent eventually acknowledged that Ms. Fox's case involved a credit card debt, not a house. **(App. 521-522; 412)**. Respondent's Amended Answer by Interlineation clarified that no house was involved.

Respondent did not respond to Plaintiff's discovery request. When Plaintiff filed a Motion to Compel, Respondent requested ten additional days to respond; he was given twenty days. **(App. 706; 707)**. Plaintiff asked the Court to enter a judgment against Ms. Fox for her failure to respond to discovery requests. **(App. 707; 404).** Respondent told the Panel "I didn't really have anything more that I could do." **(App. 406)**. At one point Respondent sent an email to the Circuit Court conditionally agreeing to Plaintiff's motion, in the event he (Respondent) failed to file discovery responses within another ten days. **(App. 408)**. The Court entered an order, setting that ten-day condition, in accordance with Respondent's email. **(App. 698-703; 707)**. Respondent did not tell his client, Ms. Fox,

about Plaintiff's Motion to Compel, or about his request for more time, or about his failure to comply with the discovery requests. **(App. 410)**. And, he took no action to prevent a final ruling against his client, Ms. Fox. **(App. 408-410; 707)**. He told the Panel he was hoping to set up Ms. Fox with a defense based on his incompetence. **(App. 411)**. Default judgment was entered against Ms. Fox. **App. 698-703; 708)**.

When initially asked about his actions by the Office of Chief Disciplinary Counsel, Respondent explained that he tried but failed to reach Ms. Fox concerning the discovery requests. **(App. 558-560)**. In response to the OCDC's initial inquiry, Respondent wrote that "he was *unable* reach her [Ms. Fox]" to discuss the discovery requests. **(App. 558-560; 403)**. (emphasis added).

The DHP found that: "Respondent's explanations concerning his handling of the Fox matter are not credible." **(App. 905)** The Panel described his explanation about trying but failing to reach Ms. Fox as "false". **(App. 905)**.

Respondent told the DHP that he made multiple mistakes in handling the Fox matter. **(App. 425-427)**. The DHP asked Respondent whether he wanted his unethical conduct to provide a basis for more time for his client to deal with her debt. Respondent acceded to that interpretation of his intent. **(App. 429-430).** And, he said: "Nothing I did in this case was appropriate." (**App. 427)**. But he continued to argue that his decision to refrain from telling Ms. Fox was strategic. **(App. 521-522; 756-757)**.

The DHP found that "Respondent's explanations for his conduct while representing Ms. Fox lack both logic and credibility." **(App. 906).** During the hearing, he again said that "Ms. Fox was hard to get ahold of", but also confessed that he didn't try to reach her.

(App. 403; 416). Respondent argued that his claim that he couldn't reach her did not imply that he actually tried to reach her. **(App. 416)**.

According to the DHP, "Respondent seemed to acknowledge that by seeking more time to file discovery responses with no plan to obtain discovery or timely respond, that he was committing a fraud on the Court". **(App. 428-432; 906)**.

Although Respondent based his default strategy on the idea that nothing could be done to help Ms. Fox, she eventually obtained successor counsel. That lawyer negotiated with lawyers for Bank of America and obtained relief for Ms. Fox. **(App. 430-432)**.

As to Count II, The DHP concluded that Respondent violated Rules 4-1.1 (competence), 4-1.3 (diligence), and Rule 4-1.4 (communication). **(App. 906).**

Gordon Funk - Count III

Gordon Funk initially retained Respondent to represent him on debt and foreclosure matters in 2012. **(App. 191-193)**. In June 2013, Funk was arrested for child pornography charges. He was immediately jailed; bond was set at $500,000.00. **(App. 191-193).** After his arrest, and while in jail, Funk hired Respondent to represent him in the criminal case and to continue representing him with his debts. **(App. 130; 133-134; 170; 191; 194).** Funk told Respondent that he had $47,700.00 available for those matters. Respondent went to Funk's house, retrieved Funk's checkbook, and took it to the jail so that Funk could sign a check to pay fees and to pay some of Funk's debts. (**App. 133-135; 222)**. Respondent agreed to help Funk with a pending foreclosure matter. **(App. 170; 195; 229)**. Mr. Funk's understanding was that Respondent would place his money into a trust account, and get paid by drawing it out as needed for his defense and debt repayment. **(App. 196; 229)**.

While at the jail, Respondent prepared a handwritten note for Funk's signature. **(App. 561).** Part of the note provided directions to Respondent to hold Funk's mail and gave the locations of his truck keys. The note also provided a specific authorization for Funk's $47,700.00 to be deposited into Respondent's trust account:

> "June 12, 2013. I hereby request that all funds in my NOW account ending in _____ be written in a certified check to MLTA, Wiley Law Office. This amount is approximately $47,700." **(App. 561)**. (The original note left a blank line where Funk's NOW account was mentioned.)

Respondent acknowledged that he personally prepared the note for Funk's signature on June 13, 2013. (**App. 136).** Respondent said that "MLTA" meant his Missouri Lawyer Trust Account. (**App. 137).** Gordon Funk signed that note in Respondent's presence. (**App. 135).**

Despite Funk's directions, Respondent did not place the check proceeds into his trust account. Instead, he promptly placed it into his operating account and immediately started spending it as if it was his own money. (**App. 674; 682; 137)**. No funds were held back for Funk's creditors or for possible bail. (**App. 137-138)**. Except the note directing Respondent to deposit funds into his trust account, there was no engagement letter or other written explanation of how the funds were to be used. **(App. 138; 196)**. Respondent prepared only one record of tasks completed for Funk. **(App. 631-647; 139)**.

Mr. Funk signed a blank check for Respondent. **(App. 224-226)**. The amount entered on the check was $40,000.00. When depositing Funk's money, Respondent withheld $2,000.00 in cash. **(App. 674)**. Respondent told the Hearing Panel that he had

"no idea" why he took $2,000.00 as cash. **(App. 139-140)**. Respondent falsely told Funk that he deposited the $40,000.00 into his trust account. **(App. 199-201)**.

In June 2013, when Respondent gained access to Funk's funds, Respondent's operating account had been frequently overdrawn. **(App. 139; 122-123; 675-680; 681)**. Upon receiving Funk's $40,000.00, Respondent spent over $22,000.00 in the first three days. **(App. 681; 682)**. He spent the entire $40,000.00 within twenty days. **(App. 681; 682; 124-126; 137-138).** Respondent used Funk's funds to pay his own debts and a child support arrearage. (**App. 122-125; 681; 682)**. By that point, those funds had been deposited into one operating account, transferred to his trust account and then transferred to a different operating account. **(App. 674; 675-680; 681; 682)**.

On June 14, 2013, one day after depositing Funk's $40,000.00 into his operating account (less $2,000.00 taken as cash), Respondent transferred $30,000.00 to his other business account. **(App. 674; 678; 124).** That account had also been overdrawn at the time of the deposit. **(App. 675-680; 140)**. That same day, he also transferred $25,000.00 of that $30,000.00 into his client trust account. **(App. 675-680; 681; 121-122).**

After transferring $25,000.00 into his trust account, Respondent promptly transferred some of the funds back into his operating account. **(App. 681; 124).** He also used those funds to pay $3,200.00 toward his own back due child support obligation **(App. 124-125; 681)** and pay a $10,000.00 personal debt that he couldn't explain. **(App. 122; 681; 541).** He also used Mr. Funk's funds to pay $1,000.00 for an unrelated client's bond. **(App. 123; 676).** Regardless of which account he was using, Respondent continued to spend Funk's money for his own uses. **(App. 651-654; 675-680; 681).**

Respondent told the DHP that he believed, based on his mentor's advice, that Mr. Funk's funds belonged to him, because he had declared that they were "earned upon receipt". **(App. 184-186).** In fact, Respondent could not establish that he ever declared to Mr. Funk that his funds were "earned upon receipt." **(App. 138; 383).** Although he said he delivered a fee agreement (with that language) to Funk, Respondent could produce no records supporting that claim. **(App. 222-226).** The only copy of his purported fee agreement offered into evidence was in the body of an email he sent to his Mentor **(App. 780-786)**. That email referred to the fee as a "flat fee" and did not indicate that the fee was "earned upon receipt." **(App. 781).**

Respondent was asked why he transferred some of the funds from his operating account to his trust account - if he believed that the funds already belonged to him. He explained that he had learned at the recent seminar that he should deposit funds into trust and then withdraw them as they were earned. **(App. 184-186).**

Looking at Respondent's work records on the Funk case, it can be seen that he reported working 11.1 hours in the first three days of representing Mr. Funk. **(App. 127; 631-647).** In those same three days (June 12, 13, 14), Respondent had spent $22,050.00 of the $40,000.00 deposit **(App. 127)** at a rate of $1,986.48 per billable hour. Two weeks later, by July 3, Respondent had depleted Funk's $40,000.00 payment. **(App. 127)**. By that date, (twenty days after receiving Funk's money), he had recorded 62.35 hours working on Mr. Funk's criminal case. **(App. 128)**. If calculated over the period during which Funk funds remained in his hands, the $40,000.00 was expended over 62.35 hours, at a rate of just over $600.00 per billable hour. **(App. 128-129)**.

While in prison, Mr. Funk asked Respondent where his money had gone. **(App. 589-592; 176).** Mr. Funk had been relying on Respondent to use some portion of his payment to cover some of his debts. **(App. 219)**. Eventually, Respondent agreed to refund $5,000.00 to Mr. Funk for that purpose. **(App. 589-590; 150).** By the time he agreed to reimburse Funk, the funds were already spent and Respondent's accounts were overdrawn. But, he agreed to pay Mr. Funk $500.00 per month toward a promise to reimburse $5,000.00. He sent three $500 checks, for a total reimbursement of $1,500.00, and then stopped making payments. Respondent initially told the DHP he stopped paying because Mr. Funk filed this disciplinary complaint **(App. 150-151)**. He eventually acknowledged that he stopped paying Mr. Funk because: "I didn't have the money." **(App. 151-152)**.

Respondent was interrogated at length about his use of Funk's money. At the outset, he stipulated that he spent Mr. Funk's funds quickly because he believed the money was his own money at that time. **(App. 115)**. Respondent claimed that he relied on advice from an OCDC-approved mentor in deciding that Mr. Funk's money belonged to Respondent himself - upon receipt. **(App. 623-628; 144; 177).** The mentor had agreed to help Respondent improve his practice during a diversion program offered during OCDC investigations into five disciplinary complaints. At least one of those complaints related to Respondent's trust accounting practices, when Respondent failed to use his trust account to hold client funds intended to pay a client expense. **(App. 148)**.

Respondent was involved in the diversion program from early 2013 through the end of 2014. **(App. 147; 744-745).** He says he did not read the trust accounting rules during that period. **(App. 148-149).** The diversion program set up for Respondent included,

among other conditions, continuing education and the use of mentor. In May 2013, the Mentor reported that Respondent "indicated that he will keep separate client funds in a trust account as required by the rules." **(App. 747).**

Respondent and his mentor testified that Respondent sent a draft fee agreement (relating to his representation of Gordon Funk) to the mentor. **(App. 780-786).** They agreed that the mentor suggested Respondent could properly denominate Mr. Funk's fee as "earned upon receipt" and deposit it into his trust account. At the hearing, Respondent also said that his then attorney, Sara Rittman, provided the basis for the mentor's advice. **(App. 144-145; 535)**. The mentor refutes Respondent's claim that Ms. Rittman advised him that it was acceptable to place unearned fees into an operating account. **(App. 624; 744-745).**

Respondent testified that he initially intended to place Funk's money in his trust account, but that the mentor's advice changed his mind. **(App. 145; 172; 177).** In fact, by the time Respondent received the mentor's email on June 15, 2013, Respondent had already taken $2,000.00 in cash and deposited $38,000.00 into his operating account. And, by the time the mentor offered the advice that Respondent claims to have relied on, he had already spent over $22,000.00 of Mr. Funk's money. **(App. 182; 631-647).** By the time he received advice from his mentor, Respondent had also transferred $30,000.00 to a separate operating account, and then transferred $25,000.00 to his trust account and then made a $10,000.00 withdrawal to pay a person named Virginia Glossip – a transfer for a debt which Respondent could not explain. **(App. 541; 674; 675-680; 681).** By the time the mentor advised him, Respondent had refunded multiple other clients and paid his employees with

Mr. Funk's funds. **(App. 675-680; 681).** Respondent also used Mr. Funk's money to pay a tee shirt company that he had started, but he could not explain why that company needed funding. **(App. 140-141).** Respondent said at various times that his advice from the mentor was given earlier than June 2013. The mentor's advice that he described as changing his mind (about refraining from using his trust account for Funk's funds) was delivered on June 15, 2013. **(App. 172).** That was three days after Respondent prepared the hand-written document wherein Mr. Funk authorized Respondent to take up to $47,000.00 from Funk's NOW account and deposit it into Respondent's trust (MLTA) account. **(App. 177-178; 780-786; 561; 631-647).**

Respondent further explained that the weekend before Mr. Funk retained him, he had attended the Missouri Bar's Solo and Small Firm Conference. **(App. 184-185)**. Although he says he did not attend Ethics sessions, he heard two other speakers offer advice as to whether advance fees could be deposited into an operating account. **(App. 183).** He said one of the speakers explained that Missouri lawyers could deposit advance fees into their operating account, but the other insisted that advance funds must go into a client trust account.

Respondent admits he made no effort to read the rules of professional conduct or to better understand his obligation with client funds, either before or after he reported getting inconsistent advice from conference speakers. Further, despite previous disciplinary investigations and concerns about handling client funds, he acknowledged that he made no effort to read Rule 4-1.15, the key rule setting the requirements for handling client funds. **(App. 143-145; 184).** That rule mandates that advance fees be deposited into a client trust

account until earned. Rule 4-1.15(e). And, he did not reach out to the OCDC, despite being subject to a diversion agreement with the OCDC. Also, he did not try to contact the Legal Ethics Counsel. **(App. 390-402).** He conducted no other research. Respondent says he does understand that a trust account is a fiduciary account. **(App. 143).**

The fee agreement draft discussed by Respondent and his mentor was only offered into evidence as part of an email thread between Respondent and his mentor. Respondent's client, Gordon Funk, testified that he never received anything from Respondent about funds except the handwritten note. **(App. 196).** At one point, Respondent testified that he signed and sent a copy to Mr. Funk, but could provide no receipt, copies, notes of correspondence, or other documentation that it was sent. **(App. 383).** At another point in the hearing Respondent conceded that he did not provide Mr. Funk with any other explanation as to how his money was to be used other than the note requesting that he deposit $47,700 into his MLTA. **(App. 138; 561).**

The Panel asked Respondent whether he sent the document exactly as shown in the email identified as **(App. 767-769).** Respondent said that it was exactly the same, even after being asked if he was certain. Then, however, when the DHP pointed out that the email defined the agreement as a "flat fee," Respondent claimed that the agreement he purportedly sent to Mr. Funk had been amended to describe the fee as "earned upon receipt." **(App. 398-401).** The DHP found that "Respondent's explanations concerning his handling of the Funk matter are not credible". **(App. 912).**

The only written agreement between Mr. Funk and Respondent relating to fees and use of client funds was the handwritten note, drafted by Respondent and signed by Mr.

Funk. **(App. 561).** The DHP found that "Respondent quickly breached that agreement when he placed Mr. Funk's funds into his operating account, shifted it from account to account, and spent all of it within twenty days. **(App. 682; 912)**.

Respondent's financial difficulties at the time he took and spent Mr. Funk's fees are documented and admitted. He described a failed business venture in 2008. **(App. 469-470).** In 2017, he admitted tax liens with the Missouri Department of Revenue. **(App. 538; 549).** The IRS has imposed liens for unpaid back taxes of about $300,000.00. **(App. 538; 550).** He reported that he has no repayment plan with the IRS. **(App. 538; 550).**

Also, several creditors have judgments against Respondent. Respondent entered into a consent judgment with R. L. and Janice Maples for $54,000.00 for an unsecured personal loan. **(App. 538; 550).** FIA Card Services also has a judgment against Respondent; he has neither paid nor made arrangements to repay that debt. **(App. 538; 550).** American Express also has a judgment against Respondent, but he has no payment plan with any of those creditors. **(App. 538; 550).** He reported other personal unpaid loans related to his unfulfilled plans to write an environmental law book and to edit a Westlaw book for first year law students. **(App. 538; 550).**

He also described his unsuccessful plan to develop a foreclosure practice. Most recently, Respondent reports that "we started working on an idea that I had that I believe is a real winner as a TV show." **(App. 539; 551).** Respondent says he continues to practice law and that he is called on for foreclosure cases now and then. **App. 539; 551).**

As to Count III, the DHP concluded that Respondent violated Rule 4-1.15 (commingling) and 4-8.4(c) (misappropriation). (**App. 912-913).**

Donald and Kimberly Bolin - Count IV

Respondent represented Donald and Kimberly Bolin in a foreclosure matter. During Respondent's representation the Bolins' home was foreclosed. Respondent advised the Bolins to refrain from attending the foreclosure sale, so as to avoid their acknowledgement of the foreclosure notice. **(App. 525-527).**

After summary judgment was granted against the Bolins, Respondent filed a Motion for a New Trial, but did not call it up for a hearing. **(App. 527).** During his representation of the Bolins, Respondent encouraged them to post a bond for an appeal to the Eastern District Court of Appeals. **(App. 310-311).** Although his engagement letter had promised that they would not have expenses, an appeal bond was indeed required. **(App. 765-766; 260-262).** The Bolins posted the appeal bond at his suggestion, but Respondent did not file a brief. **(App. 311; 736-737; 738-743).** When asked why, Respondent told the DHP this: "Honestly, I don't remember that and I can't give any good reason why that was done, other than it was my belief that around that time that she told me she did not want me to represent her." **(App. 311).**

When asked why he didn't withdraw from the Bolin's case after Ms. Bolin expressed her frustration, Respondent said: "It was not a wise decision by me" and I don't have a good answer for that. I – I did not do that correctly." **(App. 312).**

Respondent gave a different answer when OCDC Representatives took Respondent's sworn statement. On September 6, 2017, OCDC asked Respondent whether he believed the Bolin case had merit and why he did not file a brief. Respondent said then that the case was meritorious, but that he didn't file a brief because:

> "Because the Eastern District has not been – not that any of these places have been our friend. The only place that comes close has been the Supreme Court. But I do not believe, having seen the rulings that the Eastern District has made . . . I don't believe that they would have even got close to the issues that I believe are still there for the right appellate court." **(App. 548).**

When Respondent initially agreed to represent the Bolins, they made their first payment with a $1,000.00 check. Respondent did not deposit the check into either his trust or operating account. Instead, he cashed the check within two or three hours of its receipt. When asked whether he had earned the $1,000.00 by the time he cashed the check, Respondent testified that he earned it within the following ten days of receiving it. **(App. 307).** Then, when reminded that he cashed the check within hours of receiving it, Respondent said: "Honestly, I don't remember the time frame and how much time developed on this case before meeting with her." **(App. 308).**

Respondent then claimed he had already gone to Jefferson County to meet the Bolins and he said: "I'd done different things to develop what we thought would be her case." **(App. 308).** He said he made no records of either his hours or tasks to support his claimed work in advance of receiving Ms. Bolin's check. **(App. 308-309).** Upon confrontation about his claim of advance legal work, Respondent admitted that the "things that could be of use" [in Ms. Bolin's case] were completed previously, for "everybody," and not specifically for the Bolins. **(App. 309).**

Respondent's fee agreement with the Bolins was sent approximately ten days after they paid him the first $1,000.00 of a $3,000.00 fee. **(App. 716; 754-755).** The agreement

indicated their $3,000.00 fee was non-refundable, but also that Respondent would receive 33% of any amount recovered by the Bolins. The agreement included a clause permitting him to take a lien of 1/3 interest in the Bolins' home, in the event they received their house free and clear. **(App. 754-755; 546).**

In this March 2012 Bolin matter, Respondent used a "non-refundable" fee agreement and promptly spent advance fees as his own. That Bolin fee agreement was used fifteen months before he said that his mentor changed his mind about placing advance fees in trust by advising him that it was an acceptable practice to deposit advance fees into this operating account as long as he described the fees as "earned upon receipt". **(App. 754-755; 780-786).**

The DHP found that "Respondent's explanations concerning his handling of the Bolin matter are not credible." **(App. 915).**

As to Count IV, the DHP concluded that Respondent violated Rule 4-1.1 (competence), Rule 4-1.3 (diligence), Rule 4-1.5 (claim for a non-refundable fee), and Rule 4-1.15 (taking unearned fees). **(App. 915).**

Previous Disciplinary Proceedings

Respondent accepted an admonition from the OCDC in 2009. The admonition indicates that he violated Rule 4-1.15 by distributing disputed funds from his trust account, contrary to directions from his client and contrary to Rule 4-1.15. In that case, Respondent claimed that he had oral authorization from his client; his client disputed that claim. Respondent offered no documentation, or notes of conversation to support his claim. **(App. 530-531).**

In 2013 and 2014, the OCDC and Respondent agreed to resolve five client complaints through the diversion program established by Rule 5.1015. That arrangement became relevant and public when Respondent offered evidence that an OCDC-approved Mentor advised him about language in his fee agreements. The complaints did not result in findings of professional misconduct. Respondent was monitored and mentored concerning his client communication and about separation of client and attorney funds. **(App. 744-748).**

POINT RELIED ON

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT AS FOUND BY THE DISCIPLINARY HEARING PANEL.

RULE 4-1.1

RULE 4-1.3

RULE 4-1.4

RULE 4-1.15

RULE 4-8.4

POINTS RELIED ON

II.

A. RESPONDENT'S LICENSE SHOULD BE SUSPENDED INDEFINITELY.

B. HE SHOULD NOT BE ALLOWED TO PETITION FOR REINSTATEMENT FOR AT LEAST ONE YEAR.

C. PROBATION SHOULD NOT BE GRANTED.

In re Frank, 885 S.W.2d 328 (Mo. banc 1994)

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

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

In re Donaho, 98 S.W.3d 871 (Mo. 2003)

RULE 5.225

ARGUMENT

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT AS FOUND BY THE DISCIPLINARY HEARING PANEL.

Count I: Steven Reed

Informant alleges and the DHP concluded that: Respondent violated Rule 4-1.1 (competence) by directing his stand-in counsel to allow a judgment against his client; Respondent violated Rule 4-1.3 (diligence) failing to appear at a scheduled hearing; Respondent violated Rule 4-1.4 (communication) by failing to inform Mr. Reed about significant developments in the case, including Respondent's decision to allow the Plaintiff to prevail with a summary judgment. **(App. 903)**.

Count II: Toni Fox

Informant alleges and the DHP concluded that: "Respondent violated Rule 4-1.1 (competence) by failing to provide discovery requests to his client and by allowing a judgment against her; He violated Rule 4-1.3 (diligence) by failing to respond to the discovery requests; Respondent violated Rule 4-1.4 (communication) by: (a) failing to provide discovery requests to his client; (b) by failing to tell his client in advance about his plan to agree to allow an imminent judgment against her; (c) by failing to tell his client that he had agreed with the court to allow a judgment against her if she didn't comply with discovery requests; and (d) by failing to tell his client that a judgment had been entered against her." **(App. 906)**.

Count III: Gordon Funk

Informant alleges and the DHP concluded that: "Respondent violated Rule 4-1.15 for failing to hold property of his client separate from his own property; Respondent violated Rule 4-1.15 for withdrawing funds as fees that were not earned; Respondent violated Rule 4-8.4(c) for misappropriating funds owned by his client by dishonesty, fraud, deceit or misrepresentation. **(App. 912-913)**. The DHP wrote that "the manner in which these funds were handled co-mingled and spent by Respondent and the lack of any clear communication of a fee agreement, as herein stated, was clearly inappropriate." **(App. 913)**. The DHP did not conclude that Respondent violated Rule 4-1.5 (excessive fees). **(App. 913)**. In light of that conclusion and in consideration of the evidence, Informant withdraws the allegation that Respondent violated Rule 4-1.5 (excessive fees) in the Funk matter.

Count IV: Donald and Kimberly Bolin

Informant alleges and the DHP concluded that:" Respondent violated Rule 4-1.1 (competence) and Rule 4-1. 3 (diligence) by failing to encourage the Bolins to pay an appeal bond and to appeal the trial court's rulings against them – and then failing to either withdraw or prepare an appellate brief. Respondent violated Rule 4-1.1 (competence) by filing a second motion for summary judgment in the Bolins' case after the first motion was denied by the court and when nothing had changed. Respondent violated Rule 4-1.15 by cashing the Bolin's $1,000.00 fee payment before earing that fee. Respondent violated Rule 4-1.5 by attempting in his engagement letter to charge a non-refundable fee.

Paragraph 28(E) of the Information, which is an allegation that Respondent violated Rule 4-1.4 by failing to adequately communicate with the Bolins, is withdrawn by Informant.

ARGUMENT

II.

A. RESPONDENT'S LICENSE SHOULD BE SUSPENDED INDEFINITELY.

B. HE SHOULD NOT BE ALLOWED TO PETITION FOR REINSTATEMENT FOR AT LEAST ONE YEAR.

C. PROBATION SHOULD NOT BE GRANTED.

DHP Recommends a Suspension

The DHP recommended that the Court suspend Respondent's license indefinitely with no leave to apply for reinstatement for at least one year. And, the DHP noted that probation should not be granted **(App. 926)**. Informant agrees with the DHP recommendation.

Suspension is appropriate because Respondent selfishly violated essential duties to his clients and left them in worse shape than before they retained and paid him. The case includes multiple violations involving incompetence, as well as communication and diligence failings. And, it involves selfish misuse of client funds exacerbated by repeated instances of dishonesty in the disciplinary process.

Baseline ABA Sanction Standards Support a Suspension

In fashioning discipline for individual cases, the Missouri Supreme Court routinely refers to ABA Standards for Imposing Lawyer Sanctions. References to relevant sanction standards are noted here.

Standard 4.42 suggests that suspension is appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or when a lawyer engages in a pattern of neglect and causes injury to a client.

In Counts I, II, and IV, Respondent's misconduct involved his purposeful failure to perform services for his clients. In both Count I (Reed) and Count II (Fox) Respondent made conscious and tactical decisions to abandon those clients' matters *after* receiving and spending the fees they paid. He accomplished nothing for Mr. Reed and Ms. Fox. As to Count I (Mr. Reed), Respondent directed his stand-in counsel to allow a judgment against his client; he then failed to tell his client about the judgment. In Count II, after agreeing to represent Ms. Fox, and after taking her fee, Respondent failed to respond to discovery requests; he then agreed to allow a judgment against her in the event he didn't complete the discovery responses within ten days. He still took no action to respond to those requests, despite being given several extra weeks. Per Respondent's consent, the court indeed ruled against Ms. Fox. In Count IV, Respondent abandoned the Bolins by failing to file a mandatory appellate brief. After they paid him, but before he failed to submit a brief, he encouraged his clients to file the appeal and deposit an appellate bond. Per Standard 4.42, those violations should result in a suspension.

In Count III (Funk), Respondent's intentional misuse of Mr. Funk's money breached Rule 4-1.15 and, as importantly, it breached the only written agreement he and Mr. Funk reached. He selfishly used Mr. Funk's funds before earning those funds; he then falsely told his client that he had deposited his funds into his trust account. Per Standard 4.12, that conduct should result in an actual suspension; Standard 4.12 indicates 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. By comparison, Standard 4.13 allows for a reprimand when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. In the Bolin matter (Count IV), Respondent cashed his client fee check before earning it; ABA Standard 4.12 suggests a suspension for that conduct.

The ABA Standards do not account for multiple charges of misconduct. But, per the Standards, the ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct. (ABA Standards: Theoretical Framework). *In re Coleman*, 295 S.W. 3d 857, 870 (Mo. banc 2009).

Even if the Court partially accepts Respondent's claim of ignorance as to proper handling of client funds, and considers a reprimand to be the applicable baseline sanction for his trust account violations, a suspension is nevertheless most appropriate, because the ABA Sanction Standards require courts to consider aggravating and mitigating circumstances, once a baseline sanction is determined. (ABA Standards: Theoretical Framework).

Minor Mitigating Circumstances Outweighed by Significant Aggravating Factors

Respondent could be fairly credited with remorse as to his failed representation of Ms. Fox (Standard 9.32(1)). And, two area lawyers report that Respondent has a favorable reputation. (Standard 9.32(g)).

The Mentor's Misguided Advice Provides Only Minimal Mitigation

After analysis, the DHP recommended that the mitigating value of the mentor's advice to Respondent should be minimal **(App. 919)**. Clearly, as he acknowledged to the DHP, the mentor's advice was wrong. In 2012-2013, Rule 4-1.15 and the Advisory Committee's Formal Opinion 128 required advance fees to be placed in trust. Rule 4-1.15 mandated the process: "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance to be withdrawn by the lawyer only as fees are earned or expenses incurred…" In 2012-2013, that rule had no exceptions for small fees. In any event, Respondent took a $40,000.00 fee from Mr. Funk. No exceptions are offered for lawyers who described their fees as "earned upon receipt" or "non-refundable." The Advisory Committee's Formal Opinion 128 reiterated clear language contained in Rule 4-1.15.

The mentor was wrong, but here are several reasons the DHP provided to explain why his incorrect advice should have minimal impact in this sanction analysis:

"Respondent should not be relieved of his own responsibility of reading clearly written rules – especially after he was forced to address the issue while on a diversion agreement for, among other allegations, a trust accounting problem, It is also relevant that Respondent's 2009 admonition for a trust accounting violation put Respondent on notice to take responsibility for complying with Rule 4-1.15 and segregating his clients' funds from his own." **(App. 917)**.

"Respondent offered multiple inconsistent and incredible explanations for choosing to treat Mr. Funk's funds as his own. Although he claimed he intended to place the funds

in the trust account until he received the mentor's advice, his own records and admissions establish that he routinely claimed non-refundable fees and treated advance fees as earned upon receipt years before the mentor sent an email suggesting he could place funds into his operating account as long as he denominated the funds as "earned upon receipt." **(App. 918).**

"Per Mr. Funk, some portion of the $40,000.00 was intended to be used to pay Funk's creditors. That amount, of course, is not a fee in any form, and must be held separate. The mentor had advised him that client expenses must be held in trust" **(App. 918)**.

"The only written direction from Mr. Funk required Respondent to deposit the funds into his trust account. **(App. 561).** Respondent prepared that document and immediately breached its terms." **(App. 918).**

"The mentor's advice came three days after Respondent agreed in writing to hold his client's money in trust, and Respondent never sent a differing explanation to his client. Also, Respondent spent $22,000.00 of Mr. Funk's funds before receiving the mentor's advice." **(App. 918)**.

"Respondent's quick and bizarre transfers of significant portions of Funk's funds between two operating accounts and his client trust account raise serious concerns about his purposes. He offered no real explanations for transferring funds in and out of the various accounts." **(App. 918)**.

The DHP summarized, noting: "For these reasons and more, the mitigating value of the mentor's advice should be minimal." **(App. 919).**

Two additional points counter Respondent's reliance on bad advice for mitigation. First, Respondent claims to understand that he owed a fiduciary duty in handling Mr. Funk's money. Keeping another person's money separate from the fiduciary's own funds is a fundamental fiduciary concept.

Second, Respondent's overdrawn accounts and his immediate use of Mr. Funk's funds to cover his own debts and back due child support obligations provide an obvious motive for his decision to spend Mr. Funk's money as his own.

Aggravating Circumstances Support an Actual Suspension

Several aggravating circumstances weigh heavily against the minor mitigators. First, Respondent has engaged in multiple offenses, involving four clients. Standard 9.22(d).

Second, Respondent's selfish motive in taking and spending the Funk, Fox and Bolin fees before they were earned is evidenced by his admission that he used Mr. Funk's money to repay past-due personal debts and child support arrearages. ABA Standard 9.22(b).

Third, Respondent has previous discipline. He was admonished in 2009 for a trust accounting violation. **(App. 530-531)**. Also in 2013, Respondent was granted the opportunity to participate in the diversion program created in Rule 5.105. The five complaints that led to the diversion program resulted in no finding of professional misconduct, so the complaints establish no additional violations. But, Respondent has argued that advice he received from a mentor during his participation in that program should mitigate. The issues addressed during the mentorship are remarkably similar to his

later misconduct. As examples, the violations involving communication and diligence found in Count I (Reed) and Count II (Fox) occurred in 2015, after Respondent completed the diversion program. During that program, the mentor reported to the OCDC on a quarterly basis. **(App. 746-753)**. The mentor recognized that Respondent's clients were frustrated with his communication and with his use of their funds. **(App. 746-747).** And, as to his misuse of client funds in the Funk matter, the mentor reported to the OCDC that he advised Respondent to hold some advance client fees in his trust account, until a final determination was made of the appropriate fee. **(App. 747).** Also, upon recognizing that, in 2011, Respondent had placed funds held for client expenses into his operating account, the mentor reported that he explained to Respondent the need to keep client funds in his trust account. (**App. 746).** The mentor first reported addressing those topics with Respondent in May 2013 (one month before Respondent's representation of Mr. Funk and almost two years before his representation of Mr. Reed and Ms. Fox.) In reaction to a complaint about missing court dates, the mentor told Respondent that "failing to appear is disrespectful to the Court and cannot be tolerated." **(App. 747).** Also significant to this sanction analysis, the mentor repeatedly encouraged Respondent to enhance client communication and to document that communication. **(App. 746-747).** Those lessons also occurred before Respondent failed to communicate with Mr. Reed and Ms. Fox, and before he failed to document his claimed delivery of a fee agreement to Mr. Funk. **(App. 746-753)**. ABA Standard 9.22(a). Those previous lessons, even if not aggravating factors, should refute Respondent's apparent plea that his ignorance of the rules should somehow mitigate.

Perhaps the most significant aggravating factor is a lack of candor in the disciplinary process. ABA Standard 9.22(f). Among the inconsistent stories Respondent told in an effort to explain his failings are these: In attempting to justify his behavior in representing Steven Reed (Count I) Respondent argued at various times that a consent judgment against Reed was the best strategy; he said that he consented to the judgment but did not "specifically" consent to it. He consistently denied in the three Answers that Mr. Reed did not give his informed consent to the summary judgment. He argues that those denials should not give inference that he actually obtained informed consent from Mr. Reed.

As to Count II (Toni Fox), Respondent told the OCDC in his initial response that he tried to reach Ms. Fox to discuss the discovery requests made to her, but could not reach her. **(App. 558).** He told the DHP, however, that he strategically decided to refrain from telling Ms. Fox about the discovery requests so that she might have a better chance to blame him for her failure to respond to the plaintiff's discovery requests. He seeks credit for "falling on the sword" for Ms. Fox, after he failed to take any steps to protect her interests. **(App. 549).**

In the Gordon Funk complaint (Count III), Respondent immediately breached his written agreement to deposit Funk's funds into his trust account and later falsely told Mr. Funk that he had done so. When responding to Mr. Funk's complaint, Respondent blamed his mentor for his decision to place funds in his operating account; he claimed that he had intended to make the deposit into his trust account until he was advised differently by his mentor. Later, he acknowledged that he had not used his trust account for advance fees, even before that email discussion with his mentor. Records from his previous

representations of the Bolins (and the clients whose complaints led to diversion) establish that he had been asserting that his fees were non-refundable for years before the mentor advised him. At various points, he argued that the mentor changed his mind but also that the mentor did not change his mind. Respondent claimed that his trial counsel, Ms. Rittman, had counseled his mentor that unearned advance fees could be properly deposited into an operating account. The mentor refutes that claim.

In responding to Panel questions, Respondent initially testified that he sent an exact copy of the fee agreement draft contained in an email to Mr. Funk. He reiterated his position until being confronted with an obvious inconsistency in his story.

As to Count IV (Kim Bolin), Respondent initially testified that he cashed Ms. Bolin's check because he earned the fee within ten days after she paid him. Then, when reminded that he cashed Ms. Bolin's check within two or three hours, Respondent changed his story and said that he couldn't remember the timeline. Then, he suggested that research previously completed for other clients justified for immediately cashing Ms. Bolin's check.

As to all four complaints, Respondent claimed that he sent documents and explanations to his clients. In most instances, he could provide neither copies nor other documentation of transmittals to support those claims.

Upon observing Respondent over two days, the DHP found that Respondent's explanations - as to all four complaints - were not credible.

Dishonesty in the Discipline Process Weighs Against Probation

Probation should not be granted. Respondent's dishonesty in the discipline process aggravates the underlying misconduct. Also, dishonesty in the investigation and

prosecution phase should be a red flag for supervised probation. Rule 5.225 does not permit probation if a Respondent cannot be adequately supervised. Practical probation conditions and adequate supervision methods that could monitor a person's honesty seem mere wishful thinking, (Rule 5.225(A)).

Missouri Cases Involving Neglect and Abandonment Support Suspension

Respondent failed to diligently and competently represent the four complainants in this case. He abandoned three of the four clients (Reed, Fox and Bolin) after taking their money and failing to respond to court orders and discovery requests; he also failed to tell them that he had not completed the work they paid him to complete. As to Mr. Funk, Respondent took $40,000.00 money to work on both his criminal case and to repay his debts, but did nothing to help with Funk's debts.

Previous Supreme Court opinions in attorney discipline cases involving neglect and abandonment support suspension in this case. In 1994, the Court suspended an attorney with leave to apply after two years, upon being found to have severely neglected eleven clients' cases. *In re Frank*, 885 S.W.2d 328 (Mo. banc 1994). Respondent Frank had been admonished twice for similar misconduct and had failed to cooperate with disciplinary authorities. The Court noted that the question as to suspend or disbar was a close call. The *Frank* opinion analyzes sanctions in varying degrees of neglect cases.

Earlier, in 1987, Attorney Dorsey was suspended for 90 days following a court finding that he had neglected four clients' cases. *In the matter of Dorsey*, 731 S.W.2d 252 (Mo. banc 1987) In Count I, he was charged with neglecting a client and the client's case and failing to return promptly the client's legal papers and documents upon request. In

Counts II and III, he was charged with neglecting legal matters in divorce cases. In Count IV, he was charged with neglecting a client's case and failing to make a prompt refund of a portion of the fee paid by the client after agreeing to do so.

In 1988, an attorney who allowed default judgments and garnishments against his clients was suspended for 60 days. *In the matter of Striebel*, 744 S.W.2d 778 (Mo. banc 1988). Unlike Respondent in the instant case, the *Striebel* matter involved a single client and an isolated instance of neglect.

In another case involving intentional neglect, Attorney Vails was suspended for six months. *In re Vails*, 768 S.W.2d 78 (Mo. banc 1989). This Court ruled "though the evidence does not demonstrate that Respondent is manifestly unfit to be at the Bar, he has clearly neglected his professional duties.

More recently, Attorney Crews was suspended upon a finding that he violated his duties of competence, diligence, and communication. *In re Crews*, 159 S.W.3d 355, 359 (Mo. banc 2005). Crews also failed to memorialize a contingency fee agreement in writing and he engaged in dishonest, fraudulent or deceitful conduct. *Id*. at 359-60. "Respondent's actions demonstrate a pattern of neglect with prosecuting Plaintiffs' cases that resulted in a potential injury to his clients and the legal profession." *Id.* at 361. This Court suspended Crews' license to practice law indefinitely with leave to apply for reinstatement in one year. *Id*.

Finally, just three years ago, this Court suspended an attorney, holding that Respondent Genuik had violated Rules 4-1.3 (diligence) and 4-1.4(a) (communication), *In re Genuik*, SC95726, (Mo. S. Ct., June 28, 2016). The *Genuik* case involved four clients'

complaints. Respondent Genuik had three previous admonitions, two of which were for communication violations; this Court suspended Genuik indefinitely with no leave to apply for reinstatement for one year.

Missouri Guidelines for Trust Accounting Violations Support a Suspension

Even unintentional mishandling of client funds by an attorney can justify disbarment. *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994).

Attorneys are accountable for the use and misuse of client funds. They are presumed to know that which Rule 4-1.15 requires them to know, *In re Farris*, 472 S.W.3d 549. (Mo. banc 2015).

"The most important ethical duties are those obligations which a lawyer owes to clients." ABA Standards for Imposing Lawyer Sanctions 423 (1992). Those duties include safekeeping of client property, Rule 4–1.15; the duty of diligence, Rule 4–1.3 and Rule 4–1.4; the duty of competence, Rule 4–1.1; and the duty of candor, Rule 4–8.4(c), *In re Ehler*, 319 S.W.3d 442, (Mo. 2010).

Misconduct Following Previous Discipline and Mentoring Warrants a Suspension

"The Supreme Court adheres to a practice of applying progressive discipline when imposing sanctions on attorneys who commit misconduct." *In re Forck*, 418 S.W.3d 437, 444 (Mo. banc 2014). In his representation of Mr. Funk, Respondent violated Rule 4-1.15; that is the same rule he was admonished for violating in the past. Additionally, Respondent failed to take advantage of his diversion opportunity. During that program, his mentor encouraged him to show up at court, improve his client communication and to segregate

his own money from funds intended for client expenses. His continued conduct of the same nature after an admonition and diversion for five similar complaints is troubling; the discipline system's interventions have not protected the public.

Previous probation for related misconduct aggravates. *In re Ehler,* 319 S.W.3d 442 (Mo. banc 2010).

Deception in Missouri Attorney Discipline Cases Leads to Suspensions

In Missouri, dishonesty during the discipline cases is an aggravating factor. As an example, in 2015, this court described as aggravating a lawyer's testimony about his trust accounting practices, upon finding the testimony "generally questionable and often bordering on the disingenuous." That attorney was disbarred. *In re Farris*, 472 S.W.3d 549, 566 (Mo. banc 2015).

In 1988, this Court suspended an attorney who received $1,500.00 from his client to pay for a transcript so that they could appeal an adverse verdict, but who failed to use the money for that purpose. The attorney then typed "*Trust Account*" on a bank statement to indicate (to the disciplinary investigators) that he had properly deposited the client funds. In fact, the check had been deposited into a personal account the attorney shared with his wife. *In re Forge*, 747 S.W.2d 141 (Mo. 1988). Significantly, the *Forge* Court found no other aggravating factors, but several factors in mitigation, including "unfortunate personal, emotional trauma during the early pendency of the complaint," no prior discipline, a new inexperienced secretary, and the death of his father-in-law, who had lived with the attorney. Also, the attorney's first wife and mother had died within a year, leading to "extreme mental strain which adversely affected his practice of law." *Forge*, 747 S.W.2d

at 145. In light of Attorney Forge's mitigating evidence, the Court decided a suspension would be an adequate sanction for misuse of client funds. As to Attorney Forge's attempted deception of the disciplinary committee the Court wrote:

> "We depend on our bar committees to investigate allegations of unethical misconduct and to bring attention to those attorneys whose regard for the norms of their profession falls below the standard membership in the profession demands. We members of the bar are to cooperate promptly and candidly with bar committees. Those who knowingly seek to mislead the committees, and in so doing, interfere with their work, do so at their peril."

Forge, 747 S.W.2d at 145-146. Attorney Forge was suspended for six months.

In 2003, the Court suspended a lawyer for twelve months, upon finding that he submitted a copy of a cashier's check as evidence of client restitution (while in a discipline matter) but then cashed the check instead of paying the client. *In re Donaho*, 98 S.W.3d 871 (Mo. 2003). The *Donaho* court referenced ABA Standard 6.11 in holding that disbarment is the presumptive sanction for making false statements in disciplinary investigations. *In re Donaho*, 98 S.W.3d at 875-876. But, in the *Donaho* decision, like the earlier *Forge* case, the Court found three mitigators and only one aggravator (refusal to acknowledge dishonesty). The mitigating factors included: no prior discipline; a drinking problem during the time of his misconduct; and remorse. Those mitigators provided the basis for deciding that disbarment was not necessary. *In re Donaho*, 98 S.W.3d at 876.

CONCLUSION

Informant asks the Court to follow the DHP's recommended findings, conclusions and sanction. Respondent violated rules related to competence, diligence, and communication as to three clients. He selfishly violated rules requiring him to protect a fourth client's funds. Respondent's license should be suspended indefinitely. He should not permitted to petition for reinstatement for at least one year. Probation is not appropriate because earlier efforts to re-educate Respondent about his duties to his clients failed and because his repeated efforts to mislead the OCDC and the DHP establish his unwillingness to truthfully cooperate with disciplinary authorities.

Dishonesty in the disciplinary process should be a significant aggravating circumstance, resulting in a suspension, even if the baseline sanction is deemed to be less. As the DHP found, Mr. Wiley repeatedly offered inconsistent and dishonest explanations for his failure to protect his clients and for using client funds for his own purposes.

Suspension is necessary to protect the public.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2019, the Informant's Brief was sent to Respondent via the Missouri Supreme Court e-filing system to:

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Respondent

_____
Sam S. Phillips

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. The brief was served on Respondent and Respondent's counsel through the Missouri electronic filing system pursuant to Rule 103.08.
3. Complies with the limitations contained in Rule 84.06(b);
4. Contains 9,826 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Sam S. Phillips