IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
JOHN W. STAPLETON	)	**Supreme Court #SC97922**
	)	
Respondent.	)	

INFORMANT'S BRIEF

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ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

STATEMENT OF JURISDICTION

This action is one in which Informant, the Chief Disciplinary Counsel, is seeking to discipline an attorney licensed in the State of Missouri for violations of the Missouri Rules of Professional Conduct. 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 2016.

STATEMENT OF FACTS

1. General Information Regarding Respondent

Respondent was licensed on April 8, 1987. **App. 244, para. 1**. Respondent's license is in good standing. **App. 244, para. 3**.

Respondent has had his own firm in the Kansas City, Missouri area since 1990. **App. 30 (Tr. 109).** Initially, Respondent had a general practice with a heavy emphasis on traffic matters. **App. 30 (Tr. 111).** Since 2002, Respondent has limited his practice to personal injury and workers' compensation matters. **App. 31 (Tr. 113).**

During the relevant time, Respondent was a solo practitioner. **App. 244 para. 5**. Respondent now has one associate working for him. **App. 33 (Tr. 124).** Respondent's wife is his office manager and she has served in this position since 2001. **App. 45 (Tr. 169); 54 (Tr. 208).** Besides his wife, Respondent has two legal assistants and a paralegal working for him. **App. 55 (Tr. 210).**

Respondent was tax suspended pursuant to Rule 5.245 on October 15, 2014. This Court reinstated Respondent's license on October 30, 2014. **App. 244, para. 4**.

2. Overdraft of Respondent's Trust Account No. 1

As required by Rule 4-1.15(a)(2), and the supporting Advisory Committee Regulation, US Bank notified Informant on February 11, 2016, that Account No.

XXXXXXXX6268 ("Trust Account No. 1")[1] had insufficient funds to cover a $1,988.11 check. **App. 245, para. 6.** Informant opened an investigation into the matter.

3. Audit Of Respondent's Accounts

As part of Informant's investigation into the overdraft, Informant audited: (1) Trust Account No. 1, (2) Account No. XXXXXXXX7883 ("Respondent's Operating Account"), and (3) Account No. XXXXXXXX6243 ("Respondent's Personal Account").[2] **R. 1515-1592; App. 74-163.** The audit covered the period from May 2014 to January 2018.

Informant's Investigative Examiner, Kelly Dillon, performed the audit. Initially, Ms. Dillon requested bank and trust account records for the prior three months. **App. 9 (Tr. 27).** Ms. Dillon expanded her audit when Respondent's initial response indicated he was keeping extra money in the account. **R. 1625-1627; App. 10 (Tr. 29).** On February

[1] Respondent had two trust accounts. To distinguish the accounts, Informant designated Account No. XXXXXXXX6268 as Trust Account No. 1.

[2] Informant also did a cursory review of Respondent's second trust account. Informant did not learn of the second trust account until Respondent's sworn statement on January 19, 2017. **R. 1838; App. 27 (Tr. 98-99); 28 (Tr. 102-103).** Respondent did not provide Informant with any records for the account until shortly before Informant filed the Information. Due to this fact, Informant's Information did not address the second trust account. Respondent also has at least two other accounts that were not audited by Informant. **App. 341, (para. 44); 342, (para. 46).**

19, 2016, Ms. Dillon wrote to Respondent and explained that he should not be keeping extra money in his trust account. Ms. Dillon encouraged Respondent to watch a prerecorded, on-demand continuing legal education ("CLE") program on trust accounting. Ms. Dillon provided Respondent with a brochure regarding the seminar. She further requested that Respondent provide her with written confirmation that he had viewed the seminar. **R. 1622-1624; App. 10 (Tr. 30).** Respondent never responded to this request. **App. 10 (Tr. 31).** Respondent may have attended a trust accounting CLE in November 2016. **App. 10 (Tr. 31).**

Ms. Dillon had difficulty getting Respondent to provide bank and client records. Ms. Dillon made multiple requests for Respondent's bank records to Respondent's attorney. **App. 11 (Tr. 33).** Respondent only provided part of the records even though Ms. Dillon encouraged Respondent to request the records directly from the bank if he did not have a complete set of bank records. **App. 11 (Tr. 33).** Ms. Dillon ultimately had to subpoena Respondent's bank records after Respondent failed to provide the requested documents in a timely manner. **App. 11 (Tr. 33-36).** After Ms. Dillon received the applicable bank records, she requested Respondent provide her with his internal trust accounting records such as settlement statements, client ledgers, trust account reconciliations, etc. **App. 11 (Tr. 35).** Ms. Dillon had difficulty getting internal trust account records from Respondent. **App. 11 (Tr. 36).**

To assist Respondent with producing the requested documents, Ms. Dillon provided Respondent's counsel with a detailed list of client records she needed for each deposit into Trust Account No. 1. **App 63-72; 11-12 (Tr. 36-37).** Respondent's

counsel provided Respondent with the list. **App. 40 (Tr. 151).** Respondent failed to provide Ms. Dillon with many of the documents she requested. **App. 63-72; 11 (Tr. 36).**

Early in the audit, Ms. Dillon noticed that in many cases, Respondent had not paid the client in full or had not paid certain third-party lienholders. **App. 12 (Tr. 37-38).** Ms. Dillon provided Respondent's attorney with a list whereby she requested proof of payments to certain clients and lienholders. **App. 63-72.** Ms. Dillon updated the list each time Respondent provided her with additional documents or proof of payments. **App. 12 (Tr. 39-40); 13 (Tr.43-44).** In both June and November 2016, Ms. Dillon encouraged Respondent to pay his clients and lienholders any money that they were owed. **App. 13 (Tr. 44).** For many of the clients and lienholders, Respondent waited to pay them until after Informant filed his Information on September 27, 2017.[3] **App. 246-254; 260-271; 273-277; 278-280; 281-285; 300-303; 309-311; and 324-331.** In addition, at the time of the hearing, Respondent had not paid all clients and lienholders the money he owed them. **App. 246-254; 260-264; 268-271; 278-280; 281-285; 291-293; 298-299; 304-308; 309-313; and 328-331.**

[3] Respondent paid the client and/or lienholders in the following settlements after Informant filed the Information: (1) Salah Salah, (2) Issa Hersi, (3) Rachel Corleone, (4) Amy Potts, (5) Donnie Jackson, (6) Foye Moore, (7) Sade Abdi, (8) Amina Yakub, (9) Devon Herron, (10) Taelor Willis, (11) Gregory Seton, (12) Muhammed Salah, and (13) Abue Jeilani. **R. 1838.**

In two instances, Respondent represented to Ms. Dillon he had paid lienholders when, in fact, he had not done so. During the audit, Respondent provided Ms. Dillon with a copy of a cashier's check, dated November 24, 2017, made payable to the Kansas City Medical Bureau for $213.75 relating to the Tionne Gillians settlement and a copy of a cashier's check, dated November 24, 2017, payable to Trover Solutions for $350 relating to the McKayla Robinson settlement. **App. 291-293, (para. 25); 304-316, (para. 30).**

Respondent, however, did not provide the lienholders with the cashier's checks. Instead, he endorsed the checks and deposited the checks into his Operating Account on November 28, 2017, and December 1, 2017, respectively. **R. 1546-1592; App. 194-197.** Respondent never told Ms. Dillon of his actions. **App. 19 (Tr. 67-68).** She learned of Respondent's actions when she subpoenaed the bank records for Respondent's Operating Account and then traced the route of the cashier's checks. **App. 19 (Tr. 67-68).**

In the following settlements, Respondent also provided Ms. Dillon with cashier's checks payable to lienholders without providing any documentation that he had used the checks to pay the lienholders: (1) Salah Salah, (2) Issa Hersi, (3) Sade Abdi, (4) Amina Yakub, (5) Taelor Willis, (6) Ibrahim Mohamed, (7) Patrick Johnson, and (8) Abu Jeylani. **App. 246-254; 278-280; 281-285; 306-308; 309-313; and 328-331.**

4. Informant's Audit Findings

A. Respondent's Lack of Recordkeeping

Up until February 2018, Respondent handled all the bookkeeping for his trust accounts. **App. 31-32 (Tr. 116-17).** Prior to Informant auditing Trust Account No. 1,

Respondent's only written record regarding the account was a check register. **App. 31 (Tr. 115).** Sometimes Respondent did not write transactions down in the check register. **App. 31 (Tr. 115)**. Respondent did not have individual client ledgers and he did not reconcile Trust Account No. 1. **App. 15 (Tr. 50-52).** Respondent relied upon his memory to ascertain what the balance was in Trust Account No. 1 and whether he had paid the client or third-party lienholders. **App. 31 (Tr. 115-16).** Respondent sometimes did not have settlement statements for personal injury matters[4] or the settlement statements were inaccurate.[5]

Respondent routinely moved funds from Trust Account No. 1 to his other accounts without keeping appropriate records. Between May 14, 2014, and October 21, 2016, Respondent made 207 internet transfers totaling $323,260.79 from Trust Account No. 1 to his other accounts. Respondent did not document the reason for the transfers or for which clients the transfers related. **App. 331-343**.

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[4] Respondent did not have settlement statements for the following settlements: (1) Amy Potts, **App. 264-268;** (2) Kennae Briscoe, **App. 295-297;** and (3) Devon Herron, **App. 300-301**.

[5] The following settlement statements were inaccurate: (1) Abdiwali Mahamed, **App. 254-255;** (2) Foye Moore, **App. 273-277;** (3) Patrick Johnson**, App. 311-313;** and (4) Muhammed Saleh, **App. 326-328**.

B. Respondent's Handling of His Attorney Fees

The audit disclosed thirteen times when Respondent did not document the withdrawal of his attorney fees.[6] The audit revealed nine settlements for which Respondent only documented a partial withdrawal of his attorney fees.[7] One check Respondent wrote for attorney fees provided it was for a particular client and "others."[8]

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[6] Respondent failed to document the withdrawal of any of his attorney fees in the following settlements: (1) Abdiwali Mahamed, **App. 254-255;** (2) Amy Potts, **App. 264-268;** (3) Sade Abdi, **App. 278-280;** (4) Amina Yakub, **App. 281-285;** (5) Yvonne Boyd, **App. 285-289;** (6) Antoine Moody, **App. 293-295;** (7) McKayla Robinson, **App. 304-306;** (8) Chantell Brown, **App. 316-318;** (9) Ta'Shay Horton, **App. 318-319;** (10) Tanesha Horton, **App. 319-321;** (11) Yohannah Laws, **App. 323-324;** (12) Gregory Seton, **App. 324-326;** and (13) Mohammad Saleh, **App. 326-328**.

[7] For the following settlements, Respondent only documented a partial withdrawal of his attorney fees: (1) Salah Salah, **App. 246-260;** (2) Issa Hersi, **App. 250-254;** (3) Catherine Foster, **App. 271-273;** (4) Foye Moore, **App. 273-277;** (5) Jerome Banks, **App. 288-291;** (6) Tionne Gillians, **App. 291-293;** (7) Brenita Combs, **App. 303-304;** (8) Patrick Johnson, **App. 311-313;** and (9) Karen Boggess, **App. 316-318**.

[8] In the Taelor Willis settlement, Respondent wrote a check for $10,087.94 payable to himself. The notation on the check stated "Taelor Willis and others". **App. 309-311.** Respondent could not identify the other clients for which he was withdrawing attorney fees. **App. 309-311**.

Respondent could not identify who the other clients were. In eleven settlements, Respondent wrote checks to "cash" instead of writing checks to himself.[9] In five matters, Respondent withdrew attorney fees in excess of the amounts he was owed. [10] The total amount that he withdrew in excess was $4,982.28. In one matter, Respondent claimed he was entitled to reimbursement for $5,000 in expenses but only had documentation for payment of $3,432.50 in expenses.[11]

[9] For the following settlements, Respondent wrote checks to "cash" when withdrawing his attorney fees: (1) Salah Salah, **App. 246-250;** (2) Issa Hersi, **App. 250-254;** (3) Rachel Corleone, **App. 255-258;** (4) Sharise Aubrey, **App. 258-260;** (5) Donnie Jackson, **App. 268-271;** (6) Catherine Foster, **App. 271-273;** (7) Foye Moore, **App. 273-277;** (8) Jerome Banks, **App. 288-291;** (9) Devon Herron, **App. 302-303;** (10) Tionne Gillians, **App. 291-293;** and (11) Brenita Combs, **App. 303-304.**

[10] For the following settlements, Respondent withdrew attorney fees in excess of what he was owed: (1) Rachel Corleone, $643.68, **App. 255-258;** (2) Sharise Aubrey, $1,333.33, **App. 258-260;** (3) Devon Herron, $2,069.34, **App. 302-303;** and (4) Brittany Dukes, $485.93, **App. 321-323.** In addition, in the Tracy Hawkins matter, Respondent wrote a $450 check to "cash" from Trust Account No. 1 when there were no funds in Trust Account No. 1 which related to the Tracy Hawkins matter. **App. 278.**

[11] This was the Foye Moore settlement. **App. 273-277.**

C. Respondent's Handling of Clients' Funds

The audit showed that for eight settlements, Respondent deposited the settlement funds into Trust Account No. 1 but paid the clients from a source other than Trust Account No. 1.[12] For one settlement, Respondent's wife paid various bills owed by the client and periodically sent money to the client via money grams instead of giving the funds to the client in a lump sum.[13] For another settlement, Respondent failed to maintain any records of his payment to the client other than a December 22, 2017, affidavit from the client stating that the client had received the settlement funds.[14] For another settlement, the only record of the payment to the client was an undated letter from Respondent's wife to the client. In the letter, Respondent's wife asked the client to sign the settlement statement and referenced Respondent providing the client with cash.[15]

[12] For the following settlements, Respondent paid the clients all or a portion of their funds from a source other than Trust Account No. 1, where the funds had been deposited:

Client	Alternative Source of Funds	Amount	Exhibit
Amy Potts	Cashier's check from unknown source	$310.85	**App. 264-268**
Donnie Jackson	Cashier's check / unknown source	$216.00	**App. 268-271**
Foye Moore	Cashier's check /unknown source	$13,082.52	**App. 273-277**
Kennae Briscoe	Wife's funds	$9,936.21	**App. 297-298**
Devon Herron	Unknown Source	$3,353.54	**App. 302-303**
Taelor Willis	Cashier's check / unknown source	$3,757.10	**App. 309-311**
Patrick Johnson	Unknown source	$5,000.00	**App. 311-313**
Muhammed Saleh	Cashier's check / unknown source	$750.00	**App. 326-328**

[13] The client was Kennae Briscoe. Ms. Briscoe is Respondent's niece. **App. 297-298.**

[14] The client was Patrick Johnson. **App. 311-313.**

[15] The client was Devon Harris. **App. 302-303.**

The audit showed that for seven clients Respondent delayed in paying the clients their share of the proceeds.[16] These clients waited between 6 months and 31 months to get their money after Respondent deposited the settlement checks. The total amount that Respondent delayed in paying these clients was $29,085.83. Respondent did not pay any of these clients until after Informant started his audit and for five of the clients Respondent did not pay them until after Informant filed the Information. At the time of

[16] For the following clients, Respondent delayed in paying the client either all or a portion of their share of the settlement proceeds:

Client	**No. of Mos. Until Paid &When Paid in Audit Process**	**Amount Paid Late**	**Exhibit**
Sharise Aubrey	23 months - All proceeds paid after audit started	$2,666.67	**App. 258-260**
Amy Potts	31 months -Portion of proceeds paid after Information filed	$301.85	**App. 264-268**
Donnie Jackson	31 months -Portion of the proceeds paid after Information filed	$216.00	**App. 268-271**
Foye Moore	29 months -Portion of the proceeds paid after Information filed	$13,082.50	**App. 273-277**
Amina Yakub	6 months - All proceeds paid after audit started	$8,317.71	**App. 281-285**
Taelor Willis	20 months -Portion of proceeds paid after Information filed	$3,751.10	**App. 309-311**
Muhammed Saleh	19 months -Portion of proceeds paid after Information filed	$750.00	**App. 326-328**

the hearing, Respondent had not paid three other clients the full amounts they were owed.[17] The amount owed to the clients totaled $4,381.51.

D. Respondent's Handling of Lienholders' Funds

The audit divulged seven instances in which Respondent paid lienholders from sources other than Trust Account No. 1 even though the settlement funds had been deposited into Trust Account No. 1.[18] In sixteen settlements, Respondent did not pay the

[17] The following clients were owed settlement proceeds at the time of the hearing:

Client	**Date Settlement Deposited**	**Amount Owed**	**Reason Funds Owed**	**Exhibit**
Amina Yakub	Sept. 17, 2015	$2,165.17	Lien Reduced	**App. 281-285**
Kennae Briscoe	May 8, 2017	$1,747.16	Never Paid Client	**App. 298-299**
Abu Jeilani & Samira Jeylani	Sept. 20, 2016	$469.18	Lien Reduced	**App. 328-331**

[18] For the following settlements, Respondent paid lienholders from a source other than Trust Account No. 1:

Client	**Lienholder**	**Amount of Payment**	**Alternative Source of Payment**	**Exhibit**
Salah Salah	Truman Medical Center Truman Academic Physicians	$763.83 $62.98	Operating Account Operating Account	**App. 246-250**
Issa Hersi	Truman Medical Center Kansas City Medical Bureau	$464.14 $245.92	Operating Account Operating Account	**App. 250-254**
Rickiey Dunn	Benchmark Rehab	$1,044.00	Credit Card	**App. 260-264**

lienholders in a timely manner.[19] The delay varied from two months up to 34 months and involved a total of $51,477.49 in settlement fees. In six of the settlements, Respondent

Amina Yakub	North Kansas City Hospital Progressive Insurance Kansas City Medical Bureau	$2,500.00 $3,000.00 $559.29	Credit Card Cashier's Check purchased with funds from unknown source Cashier's Check purchased with funds from unknown source	**App. 281-285**
Jerome Banks	KC Fire Department University Physicians Associates	$570.80 $26.23	Credit Card Credit Card	**App. 288-291**
Kennae Briscoe	City of St Louis EMS	$250.00	Credit card	**App. 295-297**
Gregory Seton	First Recovery Group	$617.74	Operating Account	**App. 324-326**

[19] For the following settlements, Respondent delayed in paying the lienholders:

Client	**Lienholder**	**Amt. Paid to Lienholder**	**Time Delay & When Paid in Audit Process**	**Exhibit**
Salah Salah	Marvin's Midtown Chiropractic Clinic Truman Academic Physicians	$282.20 $62.98	14 months (paid after audit started) 34 months (paid after Information filed)	**App. 246-250**

Issa Hersi	Marvin's Midtown Chiropractic Clinic Kansas City Medical Bureau	$255.74 $245.92	14 months (paid after audit started) 34 months (paid after Information filed)	**App. 250-254**
Rachel Corleone	Mathew Richards Banyan Finance	$12,667.27 $3,422.00	4 months (paid before audit started) 4 months (paid before audit started)	**App. 255-258**
Amina Yakub	North Kansas City Hospital Progressive Insurance KC Fire Department	$2,500.00 $3,000.00 $248.48	26 months (paid after Information filed) 27 months (paid after Information filed) 26 months (paid after Information filed)	**App. 281-285**
Jerome Banks	KC Fire Department University Physicians	$559.28 $26.33	4 months (paid after audit started) 4 months (paid after audit started)	**App. 288-291**
Kennae Briscoe	Various lienholders	$5,080.00	3 months (partially paid before audit started)	**App. 295-297**
Devon Herron	St. Louis University Hospital City of St. Louis EMS	$3,550.00 $550.00	25 months (paid after Information filed 25 months (paid after Information filed)	**App. 300-301**
McKayla Robinson	Waldo Wellness Group	$865.80	6 months (paid after audit started)	**App. 304-306**
Ibrahim Mohamed	Marvin's Midtown Chiropractic Clinic	$700.00	6 months (paid after audit started)	**App. 306-308**

did not pay the lienholders until after Informant filed charges against Respondent. The audit also exposed twelve cases whereby Respondent had not paid all the lienholders by the time of the hearing.[20] The amount that remained unpaid totaled $24,490.65.

Karen Boggess	Akeis Capital Marvin's Midtown Chiropractic Clinic	$650.00 $2,000.00	15 months (paid after audit started) 3 months (paid after audit started)	**App. 313-316**
Chantell Brown	Marvin's Midtown Chiropractic Clinic	$1,000.00	2 months (paid after audit started)	**App. 316-318**
Ta'Shay Horton	Marvin's Midtown Chiropractic Clinic	$500.00	2 months (paid after audit started)	**App. 318-319**
Tanesha Horton	Marvin's Midtown Chiropractic Clinic	$500.00	2 months (paid after audit started)	**App. 319-321**
Brittany Dukes	Marvin's Midtown Chiropractic Clinic	$1,000.00	2 months (paid after audit started)	**App. 321-323**
Greg Seton	First Recovery Group	$617.74	19 months (paid after Information filed)	**App. 324-326**
Abu Jeilani	St. Luke's Hospital	$1,088.82	20 months (paid after Information filed)	**App. 328-331**

[20] For the following settlements, Respondent could not provide proof of payment to the following lienholders at the time of the hearing:

Client	Lienholder	Amount Not Paid	Exhibit
Salah Salah	University Physicians Kansas City Medical Bureau	$27.32 $196.40	**App. 246-250**
Issa Hersi	University Physicians	$34.20	**App. 250-254**
Rickiey Dunn	Alliance Radiology, P.A. Carondelet Rehab Physicians Encompass Medical Group St. Joseph's Medical Center	$100.60 $157.99 $48.49 $1,995.74	**App. 260-264**
Donnie Jackson	St. Luke's Hospital	$658.52	**App. 268-271**
Sade Abdi	University of Kansas Hospital	$1,500.00	**App. 278-280**
Amina Yakub	Midwest Emergency Physicians University of Kansas Physicians	$205.85 $135.89	**App. 281-285**
Tionne Gillians	KC Fire Department	$213.75	**App. 291-293**
McKayla Robinson	Trover Solutions	$350.00	**App. 304-306**
Ibrahim Mohamed	Sunflower Health Plan	$168.12	**App. 306-308**
Taelor Willis	CAC Financial	$167.00	**App. 309-311**
Patrick Johnson	First Recovery Group	$17,500.00	**App. 311-313**
Abu Jeilani & Samira Jeylani	Gauthier Chiropractic Clinic	$1,030.82	**App. 328-331**

For clients Salah Salah, Issa Hersi, Sade Abdi, Amina Yakub, Tionne Gillians, McKayla Robinson, Ibrahim Mohamed, Taelor Willis, Patrick Johnson, and Abu Jeilani Respondent purchased cashier's checks payable to the lienholders. Respondent provided Informant with a copy of the checks but Respondent did not provide any proof that he actually used the checks to pay the lienholders.

E. Respondent's Tax Liens and Levies

The audit revealed Respondent has tax liens and that in recent years the Internal Revenue Service ("IRS") and the Missouri Department of Revenue ("DOR") have levied or garnished Respondent's Operating and Personal accounts numerous times.[21] **R. 1640; 1641-1669; 1827-1837; App. 14 (Tr. 46-48).** Generally, the garnishments/levies have been less than $2,000 because Respondent only maintains small balances in his Operating and Personal accounts. **R. 1827-1837.**

Respondent currently owes both State and Federal taxes. Respondent's wife estimated the taxes were around $200,000. **App. 59 (Tr. 226).** Currently Respondent does not have the ability to pay the taxes in full. **App. 37 (Tr. 138).**

F. Respondent's Use of Cashier's Checks As A Way to Hold His Funds

The audit revealed that Respondent had a practice of depositing funds into either his Operating or Personal Accounts, then immediately withdrawing the funds by obtaining cashier's checks made payable to himself or his wife. Then later when

[21] On April 11, 2016, August 22, 2016, November 13, 2017, and February 26, 2018, the DOR garnished Respondent's Operating Account. On October 2, 2015, April 11, 2016, August 22, 2016, November 13, 2017, and April 2, 2018, the DOR garnished Respondent's Personal account. On June 20, 2016, the IRS levied on Respondent's Operating and Personal Accounts. **App. 1827-1837.**

Respondent needed the funds to pay bills, Respondent would deposit the cashier's checks back into his Operating or Personal Accounts. **App. 37 (Tr. 70-77).**

One example of this is Respondent's handling of a $108,213.02 deposit.[22] **App. 164-193.** On October 25, 2016, Respondent deposited a check for $108,213.02 into his Operating Account. **R. 1546-1592; App. 164-193.** On October 26, 2016, Respondent wrote check no. 2877 for $108,213.02 payable to himself. **App. 164-193.** Respondent used the proceeds from the check to obtain $4,000 in cash, transferred $2,000 into his Personal Account and obtained eight cashier's checks. One cashier's check was for $60,231.02 and was payable to Respondent's wife. **App. 164-193.** The other seven cashier's checks were payable to Respondent and were for $6,000 each. **App. 164-193.**

One day later, on October 27, 2016, Respondent deposited one of the $6,000 cashier's check back into his Operating Account. **R. 1546-1592.** He then withdrew $5,608.99 in cash. **App. 164-193.** Then on October 28, 2016, two days later, Respondent deposited the second $6,000 cashier's check back into his Operating Account. **App. 164-193.** He then used the funds to pay various bills. **R. 1546-1592.** By October 31, 2016, Respondent's Operating Account only had a balance of $541.48. **R. 1546-1592.**

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[22] **R. 1789-1826** provides another example whereby Respondent wrote a check for $75,000 from Trust Account No. 1 and deposited it into his Personal Account. He then obtained ten cashiers checks payable to himself or his wife and then redeposited the checks or obtained new checks to pay bills within a few months of the initial deposit.

On November 14, 2016, nineteen days after Respondent obtained the cashier's checks, Respondent deposited the third $6,000 cashier's check into his Personal Account**. App. 74-163; 164-193.** He then withdrew $3,000 in cash from the Personal Account and transferred $3,000 to the Operating Account. **R. 1546-1592; App. 164-193.** Before transferring the $3,000 back to the Operating Account, the Operating Account had a balance of $367.53. **R. 1546-1592.**

On November 28, 2016, thirty-three days after Respondent obtained the cashier's checks, Respondent deposited the fourth $6,000 cashier's check into his Operating Account and his Personal Account. **R. 1546-1592; App. 164-193.** He split the deposit with $5,700 going to the Operating Account and $300 going to the Personal Account. Respondent then withdrew $4,700 in cash from the Operating Account. **App. 164-193.**

Finally, on December 9, 2016, forty-four days after Respondent obtained the cashier's checks, Respondent deposited the sixth $6,000 cashier's check into his Operating Account. **R. 1546-1592; App. 164-193.** He then withdrew $4,000 in cash from the Operating Account and transferred $700 to his Personal Account. **R. 1546-1592; App. 74-163; 164-193.** At the close of business on December 9, 2016, Respondent's Operating Account had a balance of $798.58.[23] **R. 1546-1592.**

[23] It is unknown what Respondent did with the remaining $6,000 cashier's check or what Respondent's wife did with the $60,000 cashier's check.

5. Informant Files An Information Against Respondent

On September 27, 2017, Informant filed an Information alleging that Respondent violated various Rules of Professional Conduct concerning his handling of Trust Account No. 1. **R. 1-36.** On January 10, 2018, shortly after Respondent filed his Answer, the Chair of the Advisory Committee appointed a Disciplinary Hearing Panel ("Panel") to conduct a hearing on the matter. **R. 101.** On September 27, 2018, Informant filed an Amended Information. **R. 112-251.**

6. Changes to Respondent's Trust Accounting Practices After Informant Filed His Information

In February 2018, four months after Informant filed his Information, Respondent closed Trust Account No. 1 and opened a new trust account at a different bank. **App. 33 (Tr. 121).** Respondent also hired an outside bookkeeper to handle his trust accounting. **App. 33 (Tr. 121-22).** Now when Respondent settles a case, Respondent's wife or another office support person prepares the settlement statement and Respondent reviews it for accuracy. Respondent then sends the bookkeeper a copy of the settlement statement, a copy of the settlement check, a copy of the deposit slip, and any correspondence he has with lienholders regarding the reduction of their liens. **R. 1866-1873; App. 34-35 (Tr. 125-29)**. The bookkeeper then prepares the checks for disbursement and sends them to Respondent for his signature and distribution to the appropriate parties. **App. 34-35 (Tr. 125-29).** The bookkeeper now reconciles Respondent's trust account monthly. **App. 34-35 (Tr. 125-29).**

The bookkeeper does not handle the bookkeeping for Respondent's Operating Account or his Personal Account, so she would not know if Respondent was depositing settlements into either of these accounts. **App. 53 (Tr. 203).** The bookkeeper does not verify the accuracy of the settlement statements, so she would not know whether Respondent claimed excessive attorney fees or whether he had left off a lienholder from the settlement statement. **App. 53 (Tr. 204).**

In September 2018, Respondent attended a rebroadcast of the Missouri Bar's Trust Account Rules and Best Practices CLE. **R. 1847-1849.**

7. Respondent's Disciplinary Hearing

On October 24, 2018, the Panel held a hearing. **App. 3 (Tr. 1).** Informant was represented by Nancy Ripperger. **App. 3 (Tr. 1).** Respondent was represented by Sara Rittman. **App. 3 (Tr. 1).** Informant offered 18 exhibits into evidence, and all were admitted. **App. 6 (Tr. 15); 8 (Tr. 22); 9 (Tr. 27-28); 10 (Tr. 29); 12 (Tr. 37); 13 (Tr. 42); 14 (Tr. 48); 21 (Tr. 74, 76); 22 (Tr. 78-79); 24 (Tr. 85, 87); and 37 (Tr. 139).** Exhibit B was a Joint Stipulation of Facts ("Stipulation") which addressed 35 client personal injury or workers' compensation settlements and one client referral fee matter. The Stipulation also served as an Answer to Informant's Amended Information. **App. 244-344.** Informant put on testimony from one witness. **App. 7-29 (Tr. 19-107).** During the hearing, Respondent offered 11 exhibits, all of which were admitted into evidence. **App. 7 (Tr. 19).** Respondent put on testimony from five witnesses and testified on his own behalf. **App. 29-62 (Tr. 108-238).**

A. Pertinent Testimony from Ms. Dillon

During the hearing, Ms. Dillon testified on behalf of Informant. Ms. Dillon testified that she believed that Respondent's practice of depositing funds into his accounts, immediately withdrawing funds by obtaining cashier's checks and then depositing the cashier's checks back into one of Respondent's accounts at a later date was done so that Respondent could keep the amounts in his accounts low and avoid tax liens or garnishments on his accounts. **App. 22-23 (Tr. 78-81).**

B. Pertinent Testimony From Respondent

Respondent testified on his own behalf. He attributed the errors he made regarding Trust Account No. 1 to a lack of training. **App. 30 (Tr. 110).** He claimed that until after Informant initiated the audit, he had no understanding about the recordkeeping requirements of Rule 4-1.15. **App. 32 (Tr. 118).** Respondent, however, admitted that he knew that the trust account was to be used exclusively for client funds and once he deposited a settlement check into a trust account he had an obligation to disburse the amounts owed to the client and third parties. **App. 32 (Tr. 118); 39 (Tr. 144).** Respondent testified that when Ms. Dillon advised him that he had shorted either a client or a lienholder it really "hurt him" because his clients were his friends. **App. 35 (Tr. 130).** He claimed that he never intended to cheat anyone. **App. 35 (Tr. 130).** He claimed that he merely forgot to pay some lienholders but Respondent also admitted that he sometimes waited for third-party lienholders to call him and demand payment before he paid them. **App. 39 (Tr. 146).**

Respondent denied ever using client or lienholder funds to pay his own debts. **App. 35 (Tr. 132).** Respondent testified that all clients and lienholders had been paid.[24] **App. 35 (Tr. 130); 39 (Tr. 146).** Respondent testified that he redeposited the cashier's checks he had obtained for paying lienholders in the Tionne Gillians and McKayla Robinson settlements because "the bills were no longer in existence." **App. 41 (Tr. 154).**

Respondent also denied using cashier's checks as a means of avoiding levies and garnishments to his accounts. Respondent claimed that he preferred to keep his funds in cash rather than keeping his funds in the bank and he merely obtained cashier's checks when the bank did not have cash to give him. **App. 42 (Tr. 159-60).**

C. Character Witness Testimony and Affidavits

At the hearing, Respondent put on testimony from three character witnesses. **App. 45-50 (Tr. 170-191).** The witnesses met Respondent several years ago when they all attended a trial lawyer's college. Respondent and the three character witnesses continue to meet monthly to work on improving their trial skills. The character witnesses all found Respondent to be honest and trustworthy. **App. 45-50 (Tr. 170-191).**

Respondent also entered into evidence the affidavits of four other attorneys. **R. 1874-1882.** Three of the attorneys knew Respondent from the trial lawyer's college referenced above. **R. 1874-1876; 1879-1882.** The fourth attorney is a long-time friend

[24] Respondent's testimony contradicts the Joint Stipulation where Respondent admitted that he had not paid Kennae Briscoe and that he had not paid all the lienholders for the Rickiey Dunn and Donnie Jackson settlements. **App. 260-264; 268-271; and 295-299.**

of Respondent. **R. 1877-1878.** The attorneys providing affidavits also found Respondent to be honest and trustworthy. **R. 1874-1876; 1879-1880; App. 45-50 (Tr. 170-190).**

8. The Panel's Decision

On April 3, 2019, the Advisory Committee served the Panel's Decision on the parties. The Panel found that Respondent violated Rules 4-1.15(a)(5), (7), (d), and (f). Informant had also charged Respondent with violating Rules 4-1.15(a) and 4-8.4(c). The Panel did not find a violation of Rules 4-1.15(a) and 4-8.4(c). **R. 1885-2030.**

The Panel recommended that Respondent be suspended indefinitely with no leave to apply for reinstatement for two years, with said suspension stayed and Respondent placed on probation for a period of two years. **R. 1927.**

On April 4, 2019, Informant rejected the Panel's recommendation. **R. 2032.** On April 12, 2019, Respondent accepted the Panel's recommendation. **R. 2033.**

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULE 4-1.15 IN THAT:

1. RESPONDENT FAILED TO HOLD CLIENT AND LIENHOLDER PROPERTY SEPARATE FROM HIS OWN PROPERTY IN VIOLATION OF SUBSECTION (A);

2. RESPONDENT WROTE CHECKS TO "CASH" WHEN HE WITHDREW HIS ATTORNEY FEES FROM HIS TRUST ACCOUNT IN VIOLATION OF SUBSECTION (A)(5);

3. RESPONDENT FAILED TO RECONCILE HIS TRUST ACCOUNT IN VIOLATION OF SUBSECTION (A)(7);

4. RESPONDENT FAILED TO KEEP COMPLETE TRUST ACCOUNT RECORDS IN VIOLATION OF SUBSECTION (F); AND

5. RESPONDENT FAILED TO PROMPTLY DELIVER SETTLEMENT FUNDS TO CLIENTS AND THIRD PARTIES IN VIOLATION OF SUBSECTION (D).

In re Taylor, 4 P.3d 1242 (Okla. 2000)

Black v. California State Bar, 368 P.2d 118 (Cal. 1962)

In re Maran, 402 A.2d 924 (J.J. 1979)

In re Spears, 72 So.3d 819 (La. 2011)

Rule 4-1.15

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULE 4-8.4(C) IN THAT RESPONDENT INTENTIONALLY AND/OR RECKLESSLY MISAPPROPRIATED CLIENT AND LIENHOLDER FUNDS.

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

In re Hamilton, 118 A.3d 958 (Md. 2015)

In re Abbey, 169 A.3d 865 (D.C. 2017)

In re Anderson, 778 A.2d 330 (D.C. 2001)

Rule 4-8.4(c)

III.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, CASE LAW, AND AGGRAVATING FACTORS SUGGEST THAT DISBARMENT IS THE APPROPRIATE DISCIPLINE.

In re Ehler, 319 S.W.2d 442 (Mo. banc 2010)

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

In re Grimes, 297 P.3d 564 (Utah 2012)

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

ABA Standards for Imposing Lawyer Sanctions (1992)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULE 4-1.15 IN THAT:

1. RESPONDENT FAILED TO HOLD CLIENT AND LIENHOLDER PROPERTY SEPARATE FROM HIS OWN PROPERTY IN VIOLATION OF SUBSECTION (A);

2. RESPONDENT WROTE CHECKS TO "CASH" WHEN HE WITHDREW HIS ATTORNEY FEES FROM HIS TRUST ACCOUNT IN VIOLATION OF SUBSECTION (A)(5);

3. RESPONDENT FAILED TO RECONCILE HIS TRUST ACCOUNT IN VIOLATION OF SUBSECTION (A)(7);

4. RESPONDENT FAILED TO KEEP COMPLETE TRUST ACCOUNT RECORDS IN VIOLATION OF SUBSECTION (F); AND

5. RESPONDENT FAILED TO PROMPTLY DELIVER SETTLEMENT FUNDS TO CLIENTS AND THIRD PARTIES IN VIOLATION OF SUBSECTION (D).

1. The Standard of Review

In matters of attorney discipline, the Panel's decision is only advisory. *In re Shelhorse,* 147 S.W.3d 79, 80 (Mo. banc 2004). This Court reviews the evidence de novo and reaches its own conclusions of law. *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). Professional misconduct is established by a preponderance of the evidence. *Id.* An attorney must comply with the Rules of Professional Conduct as set forth in Supreme Court Rule 4 as a condition of retaining his or her license. *In re Shelhorse*, 147 S.W.3d at 80. Violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *Id.*

2. Violation Of Subsection (a) of Rule 4-1.15

Rule 4-1.15(a) provides: "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." The basis for this rule stems from the attorney's fiduciary obligation to act in the best interest of the client and not to benefit personally from holding client property. *In re Taylor,* 4 P.3d 1242, 1249 (Okla. 2000).

Commingling of funds is committed when a client's money is intermingled with that of his attorney and its separate identity lost. When other people's money is mixed with money belonging to the lawyer it is in danger of being used for the lawyer's own expenses, as well as vulnerable to claims by the lawyer's creditors. *Black v. California State Bar,* 368 P.2d 118, 225-26 (Cal. 1962). "Complete separation of a client's money from that of the lawyer is the only way in which proper accounting can be maintained." *In re Taylor*¸ 4 P.3d at 1250.

Rule 4-1.15(a) is violated when an attorney fails to timely transfer earned fees from the trust account. As the New Jersey Supreme Court stated in, *In re Maran*, 402 A.2d 924, 925 (N.J. 1979), "where there was no dispute as to the attorney's fee it may be withdrawn immediately when due and, in any event, should not remain in the trust account any longer than reasonably required by the circumstance. This avoids unnecessary commingling in the trust account and deceptive financial recording in the law firm's books." *See also State v. Black,* 368 P.2d at 522-23 ("when he held his client's funds, part of which he subsequently became entitled to take for himself, he should have separated his money from the balance at the earliest reasonable time after his own interest became fixed.")

In this case, the audit revealed nine settlements in which Respondent documented a partial withdrawal of attorney fees but did not document when he withdrew the remaining fees. **App. 246-254; 271-277; 288-293; 303-304; 311-313; and 316-318.** The Panel did not find a violation of Rule 4-1.15(a) because Ms. Dillon agreed on cross-examination that Rule 4-1.15 does not require attorney fees to be taken out in in a lump sum. **App. 25 (Tr. 91).** The Panel misinterpreted Ms. Dillon's testimony. While it is true that Rule 4-1.15(a) does not state specifically that attorney fees must be taken out in a lump sum, when the attorney only withdraw a portion of his fees, the remaining fees are then mixed or commingled with client and third party funds in violation of Rule 4-1.15(a). *See In re Spears,* 72 So.3d 819 (La. 2011) (attorney violated Rule 1.15 by leaving attorney fees in the trust account and withdrawing the attorney fees incrementally).

The audit also revealed thirteen times when Respondent had no documentation of his withdrawal of attorney fees and disclosed numerous internet transactions from the trust account for which Respondent could not identify the reasons for the transfers or for which clients the transfers related. **App. 254-255; 264-268; 278-288; 293-295; 304-306; 316-321; 323-326; 331-341; and 342.** This fact coupled with the fact that Respondent often paid clients and third parties from sources other than Trust Account No. 1 strongly suggests that Respondent was commingling funds on a widespread basis. **App. 246-254; 260-271; 273-277; 281-285; 288-291; 295-299; 302-303; 309-313; and 324-328.**

3. Violation of Subsection (a)(5) of Rule 4-1.15

Rule 4-1.15(a)(5) provides withdrawals from a trust account shall be made only by checks payable to a named payee, and not to cash, or by authorized electronic transfer. In eleven settlements, Respondent wrote checks to "cash" instead of writing checks to a named payee. **App. 246-254; 255-260; 268-277; 288-293; 302-303; and 303-304.** Respondent's actions were in violation or Rule 4-1.15(a)(5).

4. Violation of Subsection (a)(7) of Rule 4-1.15

Rule 4-1.15(a)(7) provides that a reconciliation of a trust account shall be performed reasonably promptly each time an official statement from the financial institution is provided or available. Respondent failed to reconcile Trust Account No. 1 and violated Rule 4-1.15(a)(7). **App. 15 (Tr. 50-52); 38 (Tr. 144).**

5. Violation of Subsection (f) of Rule 4-1.15

Rule 4-1.15(f) provides that an attorney shall keep complete trust account records. It further provides that complete records shall include, among other things: (1) individual client ledgers, (2) accountings to clients or third persons showing the disbursement of funds to them or on their behalf, and (3) records of all electronic transfers from client trust accounts.

The audit revealed that: (1) Respondent did not have client ledgers, **App. 15 (Tr. 50-52; (**2) Respondent failed to have settlement statements for three clients and had four inaccurate settlement statements, **App. 254-255; 264-268; 273-277; 295-297; 300-301; 311-313; and 326-328**; (3) Respondent failed to keep accurate records concerning his attorneys' fees and expenses in 22 settlements, **App. 246-255; 264-268; 271-277; 278-295; 303-306; 309-318; 318 (para. 36b); 323-324; and 326-328**; (4) Respondent made 207 internet transfers from Trust Account No. 1 without documenting the reasons for the transfers, **App. 331-343;** and (5) in two instances Respondent had inadequate records regarding payments to clients. **App. 302-303; 311-313.** Respondent's actions were in violation of Subsection (f) of Rule 4-1.15.

6. Violation of Subsection (d) of Rule 4-1.15

Rule 4-1.15(d) provides that upon receiving funds in which a client or third person has an interest, a lawyer shall promptly notify the client or third person, and shall promptly deliver to the client or third person any funds that the client or third person is entitled to receive. Notification to clients and third parties is important because it allows

the client or third party the opportunity to request an accounting and to dispute the respective interests before distribution is made of the funds. *In re Taylor*, 4 P.3d at 1249.

The duty to notify and to deliver funds to a third party is the same as the duty owed to the client. *In re Taylor*, 4 P.3d at 1250. Delivery of funds to a client or third party within one month is presumed reasonable. Cmt 6 to the current version of Rule 4-1.15. Delaying in paying the client or third party more than one month is not reasonable unless there are circumstances which support the delay. *Id.*

In this case, the audit showed that for seven clients Respondent delayed in paying the clients their share of the proceeds. **App. 258-260; 264-271; 273-277; 281-285; 309-311; and 326-328.** These clients waited between 6 months and 31 months to get their money. The total amount involved was $29,085.83. At the time of the hearing, Respondent still had not paid three clients the full amounts owed to them. **App. 281-285; 298-299 (para. 27d); and 328-331.** In sixteen settlements, Respondent delayed in paying lienholders their portion of the settlement proceeds. **App. 246-254; 255-258; 281-285; 288-291; 295-297 (para. 27b); 300-301 (para. 28a); 304-308; and 313-319.** The delay varied from 2 months up to 34 months and involved a total of $51,447.49 in settlement proceeds. At the time of the hearing, Respondent owed lienholders in twelve settlements. The amount that remained unpaid totaled $24,232.77. **App. 246-254; 260-264; 268-271; 278-285; 291-293; 304-313; and 328-331.**

Respondent provided no reason for the delay in paying clients or lienholders except to say that he tried to keep track of who he had paid and who he needed to pay in his head and the trust account bookkeeping was overwhelming him. **App. 31-32 (Tr.**

115-120). Respondent's excuses for failing to pay clients and third parties were not reasonable and his actions are in violation of Rule 4-1.15(d).

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULE 4-8.4(C) IN THAT RESPONDENT INTENTIONALLY AND/OR RECKLESSLY MISAPPROPRIATED CLIENT AND LIENHOLDER FUNDS.

Rule 4-8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Informant contends that Respondent intentionally and/or recklessly misappropriated client and third-party funds when: (1) he withdrew attorney fees for more than what he was entitled, **App. 255-260; 278; 302-303 (para. 28b); and 321-323.** and (2) he failed to pay clients and lienholders the amounts owed to them. **App. 246-254; 255-271; 273-277; 278-285; 288-293; 295-303; 304-323; and 324-331.** Informant further contends that Respondent's acts constitute dishonest or deceitful behavior as envisioned by Rule 4-8.4(c).

Respondent admits that he overpaid himself in certain cases and he failed to pay clients or lienholders in a prompt manner, but contends he was merely acting in a negligent manner instead of in an intentional manner. The Panel viewed Respondent's failure to pay clients "as a close call" but found Respondent's failure to pay clients was "generally unintentional." **R. 1920-923.** The Panel further noted that Respondent's absence of records made the determination difficult. **R. 1923.** The Panel found that Respondent's failure to pay lienholders was deliberate and systematic but that Respondent's actions did not rise to the level of dishonesty contemplated by Rule 4-8.4(c). **R. 1923.**

Both Respondent and the Panel are wrong in their assertions. First, the Panel should not have given Respondent any break or benefit of the doubt regarding Respondent's failure to pay clients or third parties. Respondent's lack of records should have created an inference that Respondent's actions were intentional, not merely negligent. In *In re Farris*, 472 S.W.3d 549 (Mo. banc 2015), this Court noted:

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

Id. at 561 (italics added for emphasis.)

Misappropriation is generally defined in attorney disciplinary cases as "any unauthorized use of client's funds entrusted to [the lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he

derives any personal gain or benefit therefrom." *In re Abbey*, 169 A.3d 865, 872 (D.C. 2017). Misappropriation occurs when the balance in the attorney's trust account falls below the amount due the client or lienholder.[25] *Id.*

While negligent misappropriation does not involve dishonesty, the intentional or reckless misappropriation of client or third-party funds "is an act infected with deceit and dishonesty." *In re Hamilton,* 118 A.3d 958, 975 (Md. 2015); *See also In re Ehler,* 319 S.W.3d 442, 451 (Mo. banc 2010) (intentional misappropriation involves deceit); *In re Mungin,* 96 A.3d 122, 133 (Md. 2014) (no violation of Rule 4-8.4(c) when misconduct results from negligence).

Negligent misappropriation is "a good-faith, genuine, or sincere, but erroneous belief that entrusted funds have properly been paid" or "an honest or inadvertent but mistaken belief that entrusted funds have been properly safeguarded." *In re Abbey,* 169 A.3d at 872. With negligent misappropriation, the attorney treats the entrusted funds "in a way that suggests the unauthorized use was inadvertent." *In re Cloud,* 939 A.2d 653, 660 (D.C. 2008).

Negligent misappropriation is limited to situations whereby the attorney unintentionally uses client or third-party funds generally in a single instance or during a short period of time. It does not include the systematic and repeated misuse of client or

[25] When Informant began his audit on February 11, 2016, the balance in Trust Account No. 1 was a negative $1,395.55 and Respondent owed substantial funds to clients and lienholders. Thus, Respondent misappropriated client and third party funds.

third-party funds. For example, in *In re Robinson*, 74 A.3d 688 (D.C. 2013), the bank where the law firm's operating and trust account funds were held was purchased by another bank. After the purchase, the account numbers for the operating and trust accounts changed. Because of the account number changes, a retainer fee was inadvertently deposited into the operating account instead of the trust account. This subsequently caused two overdrafts to the trust account. The Court found that the attorney had engaged in negligent misappropriation when he overdrew the account. Similarly, in *In re Choroszej*, 624 A.2d 434 (D.C. 1992), the Court found negligent misappropriation when the attorney failed to pay one lienholder. The attorney had recently moved and lost his support staff which contributed to the error.

With reckless or intentional misappropriation, a court's inquiry is to whether the lawyer handled the entrusted funds "in a way that reveals either an intent to treat the funds as the attorney's own or a conscious indifference to the consequences of his behavior for the security of the funds." *In re Anderson,* 778 A.2d 330, 339 (D.C. 2001).

Courts have looked at the following factors when determining whether an attorney acted intentionally or recklessly when failing to pay a client or third party: (1) whether the attorney indiscriminately commingled personal and entrusted funds, (2) whether the attorney failed to track settlement proceeds, (3) whether the attorney failed to reconcile the trust account, (4) whether the attorney indiscriminately moved money between his trust account and his other accounts, (5) whether there was a pattern and practice of failing to paying clients or lienholders, (6) whether the attorney repaid clients or third parties immediately after discovering the error, and (7) whether the attorney took

immediate action to correct problems with his trust accounting practices once the issues were brought to his attention. *In re Abbey*, 169 A.3d at 872*; In re Cloud,* 939 A.2d at 661; *In re Nave,* 180 A.3d 86, 90 (D.C. 2018); *In re Ahaghotu*, 75 A.3d 251, 257 (D. C. 2013).

Respondent's actions meet all the factors for intentional or reckless misappropriation. As discussed more fully under Argument I of this Brief: (1) Respondent indiscriminately commingled client and third-party funds with his own funds, **App. 246-254; 271-277; 288-291; 303-304; 311-313; and 316-318**; (2) Respondent failed to track settlement funds, **App. 32 (Tr. 115-116)**; (3) Respondent did not have settlement statements for some settlements and in other settlements the sheets were incorrect, **App. 254-255; 264-268; 273-277; 295-297 (para. 27b); 300-301 (para. 28a); 311-313; and 326-328**; (4) Respondent did not accurately track when he withdrew his own attorney fees, **App. 246-254; 271-277; 288-293; 303-304; 309-313; and 316-318**; (5) Respondent never reconciled his trust account, **App. 15 (Tr. 50-52);** (6) Respondent indiscriminately moved money from his trust account to other accounts without keeping records regarding the transfers, **App. 331-341 (para. 43); 341-342**; (7) Respondent engaged in a pattern and practice of failing to pay both clients and lienholders, **App. 246-254; 255-271; 273-277; 278-285; 288-293; 295-303; 304-323; and 324-331;** (8) when Informant's staff encouraged Respondent to pay clients and lienholders, Respondent did not pay five clients and five lienholders until after Informant filed its Information and still owes money to three clients and seventeen lienholders, **App. 246-254; 260-271; 273-277; 278-286; 288-293; 298-299 (para. 27d); 300-301 (para. 28a); 304-313; and 324-331;** (9) Respondent

delayed in obtaining trust account training even though Informant's staff had directed him to get such training at the beginning of the audit, **App. 10 (Tr. 31);** and (10) Respondent did not make any significant changes to his trust accounting practices until after Informant filed his Information despite Informant advising him of the issues with his trust accounting for over two years, **App. 33-35 (Tr. 121-29)**. These factors strongly point to the fact that Respondent either intentionally or recklessly misappropriated client and third-party funds and as a result acted in a dishonest and deceitful manner.

While not specifically articulated by other courts, Informant asserts that Respondent's actions in providing false information to Informant regarding the payment of certain lienholders is also relevant to show Respondent's intent. As discussed in the Facts section of this Brief, in two instances Respondent provided Ms. Dillon with copies of cashier's checks as proof of payment to lienholders when in fact he did not pay the lienholders. **App. 19 (Tr. 67-68).** This shows that Respondent has no interest in paying clients or third parties and was trying to keep the funds for himself. [26]

Informant also believes Respondent's use of cashier's checks as a means to avoid tax levies and garnishments cuts against his argument that he was financially

[26] During the hearing, Respondent claimed that he deposited the cashier's checks back into his Operating Account because after he obtained the checks he discovered the money was not really owed. **App. 41 (Tr. 154).** What Respondent ignores is if this was the case, he should have sent the money to the client rather than keeping it himself. He also should have alerted Informant as to his actions.

unsophisticated and did not understand the need to keep good trust accounting records. *See United States v. Clements*, 73 F.3d 1330 (5th Cir. 1996) (enhancement of defendant's sentence for tax evasion justified because of the use of "sophisticated means" to avoid detection when defendant used cashier's checks to hide funds from IRS). Furthermore, even if Respondent did not understand all the intricacies of Rule 4-1.15, he knew that he had a duty to pay his clients and lienholders the money owed to them. **App. 32 (Tr. 118).**

Thus, the evidence shows that Respondent's actions were intentional or reckless and Respondent engaged in the type of dishonest and deceitful conduct covered by Rule 4-8.4(c).

III.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, CASE LAW, AND AGGRAVATING FACTORS SUGGEST THAT DISBARMENT IS THE APPROPRIATE DISCIPLINE.

The purpose of attorney disciplinary proceedings is "to protect the public and maintain the integrity of the legal profession." *In re Ehler,* 319 S.W.3d 442, 451 (Mo. banc 2010). When determining an appropriate sanction for violations of the Rules of Professional Conduct, this Court assesses the gravity of the misconduct, as well as mitigating or aggravating factors that tend to shed light on Respondent's moral and intellectual fitness as an attorney. *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003).

The Panel is recommending that this Court suspended Respondent's license indefinitely with no leave to apply for reinstatement for two years and that the suspension be stayed and Respondent be placed on probation for two years. The Panel asserts that Respondent meets the criteria for probation as set out in Rule 5.225(a)(2). Rule 5.225(a)(2) provides that an attorney is eligible for probation only if the attorney: (1) is unlikely to harm the public during the period of probation and can be adequately supervised; (2) is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; and (3) has not committed acts warranting disbarment. Informant does not believe a stayed suspension with probation is

justified because ABA Standards for Imposing Lawyers Sanctions (1992) ("ABA Standards") and case law suggests that disbarment is warranted.

Since its decision in *In re Storment,* 873 S.W.2d 227 (Mo. banc 1994), this Court has consistently turned to the ABA Standards for guidance in deciding what discipline to impose. Per the ABA Standards, when imposing a sanction, a court should consider the: (1) duty violated, (2) lawyer's mental state, (3) potential or actual injury caused by the lawyer's misconduct, and (4) the existence of aggravating or mitigating factors.

When an attorney has committed multiple acts of misconduct, as Respondent has, the ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct. *In re Ehler* 319 S.W.3d at 451.

The most important ethical duties are those obligations which a lawyer owes to clients. *In re Ehler,* 319 S.W.3d at 451. This includes the safeguarding of client property. ABA Standard 4.11 addresses the failure of an attorney to preserve a client's property. It provides that disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client. "Knowledge" is "the conscious awareness of the nature of attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." *In re Farris*, 472 S.W.3d 549, 570 (Mo. banc 2015). "Knowledge" when used in the context of determining the appropriate attorney discipline includes misconduct that is reckless. *See In re Zakrzewski*, 560 N.W.2d 150, 156 (Neb. 1997). As discussed in Argument II of this Brief, Respondent knowingly or recklessly converted client and third-party funds when he failed to pay clients and third parties their portion of settlements. Respondent's

actions caused potential harm to clients in that clients did not have access to their settlement funds for several years. In addition, many of the client's medical providers were without their portion of the settlement funds for extended periods of time. This raised the possibility that the medical providers could have sought payment directly from the clients. In addition, Respondent's actions caused harm to the administration of justice. As the Washington Supreme Court noted in *In re Simmerly*¸ 285 P.3d 838, 851 (Wash. 2012):

> [T]he administration of justice, which includes the disciplinary process, is harmed every time a trust account is misused. Trust accounts are essential to the way lawyers conduct their clients' business, and to the extent the public loses trust and confidence in trust accounts, the administration of justice is harmed.

When determining what level of discipline to impose, case law is also instructive. While disbarment is not automatic when there is misappropriation, case law shows that disbarment is the baseline sanction for misappropriation. *In re Mentrup,* 665 S.W.2d 324 (Mo. banc 1984); *In re Belz,* 258 S.W.3d 38 (Mo. banc 2008); *See also Matter of Mendell*, 693 S.W.2d, 76 (Mo. banc 1985). As explained by this Court in *In re McMillin,* 521 S.W.3d 604, 611 (Mo. banc 2017), "there simply is no room in this profession for attorneys who take property held in trust for others and use it as their own."

Although disbarment is the presumptive discipline, this Court also looks at mitigating and aggravating circumstances to see if any of these factors might suggest

either increasing or decreasing the level of discipline.[27] Mitigating factors do not serve as a defense to a finding of misconduct, but may justify a downward departure from the presumptively proper discipline. *In re Farris*, 472 S.W.3d at 562.

[27] ABA Standard 9.32 sets forth the following mitigating factors: (1) absence of prior disciplinary records; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify the consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward the proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical disability; (9) mental disability or chemical dependency when certain conditions are met; (10) delay in disciplinary proceedings; (11) interim rehabilitation; (12) imposition of other penalties or sanctions; (13) remorse; and (14) remoteness of prior offenses.

ABA Standard 9.22 sets forth the following aggravating factors: (1) prior disciplinary offenses; (2) dishonest or selfish motive; (3) pattern of misconduct; (4) multiple offenses; (5) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency; (6) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (7) refusal to acknowledge wrongful nature of conduct; (8) vulnerability of victim; (9) substantial experience in the practice of the law; and (10) indifference to making restitution.

Informant asserts that departure from the presumptive sanction of disbarment for cases of intentional misappropriation such as this case, should occur only when there are "truly compelling mitigating circumstances." *See In re Grimes,* 297 P.3d 564, 568-69 (Utah 2012).

During the hearing, Respondent provided evidence of his good character in the legal community, interim rehabilitation, and remorse. This Court should give little weight to the opinion of Respondent's character witnesses. **R. 1874-1882; App. 45-50 (Tr. 170-191).** While the character witnesses found Respondent to be honest and trustworthy they had no personal knowledge of his trust accounting practices or his attempt to evade taxes. **App. 47 (Tr. 177-78); 48-49 (Tr. 184-85); 50 (Tr. 192).**

Respondent asserts that he is now rehabilitated because he has hired a bookkeeper to handle his trust account. **App. 33 (Tr. 121-22).** This Court also should give little weight to this factor. First, Respondent was aware of the issues with his trust account for over two years before he attempted to alleviate the problems with his trust accounting. Respondent did not take any action to correct the problems with his trust accounting until after Informant filed his Information and Respondent realized he might lose his license.

Second, hiring a bookkeeper is not an "end all" safeguard. The bookkeeper is dependent upon Respondent depositing settlement proceeds into his trust account and providing her with accurate information regarding lienholders, the costs he is subtracting from the settlement and his fee agreement with clients. **App. 53 (Tr. 203-04).** In summary, hiring the bookkeeper was "too little and too late" for this Court to consider it as a mitigating factor.

This Court should also give little weight to Respondent's self-proclaimed remorse. **App. 35 (Tr. 130).** Respondent showed no remorse until the time of the hearing. "Remorse presented for the first time at trial is irrelevant because remorse must be linked to the acknowledgement of wrongful conduct and motivation to make amends *prior* to being caught. *In re Grimes, 297* P.3d at 570. Furthermore, if Respondent was truly remorseful for his actions, he would have immediately made up shortfalls to clients and third parties. Respondent did not do this.

There are many aggravating factors. Respondent has a prior tax suspension, which is considered discipline by this Court. **App. 244, para. 4.** There is a pattern of misconduct and multiple offenses. Respondent used deceptive practices during the disciplinary practice process when he provided Informant with false proof of payment to lienholders in the Tionne Gillians and McKayla Robinson cases. **App. 19 (Tr. 67-68).** An attorney who provides false evidence to Informant should not be a candidate for probation. In order for probation to work the disciplined attorney must want to change his bad habits and behaviors. Providing false evidence indicates an unwillingness to change. Respondent also has substantial experience in the law as he has been licensed since 1987. **App. 244, para. 1.** While Respondent made restitution to some clients and lienholders he did so only after Informant started the investigation and in many cases did not make restitution until after Informant filed an Information. **App. 246-254; 264-271; 273-277; 281-285; 300-301 (para. 28a); 309-311; and 324-331.** Finally, Respondent has not made restitution to all clients or lienholders. **App. 246-254; 260-264; 268-271; 278-285; 291-293; 298-299 (para. 27d); 304-313; and 328-331.**

Although not listed by the ABA as an aggravating factor, Informant believes this Court should also consider Respondent's efforts to avoid paying his taxes and his tax liens as aggravating factors. **App. 20-22 (Tr. 70-77); App. 164-193.** As the Panel noted, Respondent's ongoing tax liens do not constitute a violation of the Rules of Professional Conduct per se, but Respondent's "hopscotching" of funds through and among various accounts, including his trust account, appears designed to systematically evade tax garnishments. Respondent's efforts to evade the liens indicate Respondent's lack of honesty. Respondent's lack of honesty puts the public at risk if Respondent's license is put on probation. Thus, the aggravating factors greatly outweigh any mitigating factors. As a result, this Court should disbar Respondent.

CONCLUSION

For the reasons set forth above, this Court should find that Respondent violated Rules 4-1.15(a), (a)(5), (a)(7), (d), (f) and 4-8.4(c), disbar Respondent, and impose the $2,000 fee and costs provided for by Rule 5.19(h) against Respondent.

Respectfully submitted,

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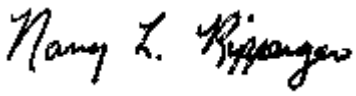
Chief Disciplinary Counsel



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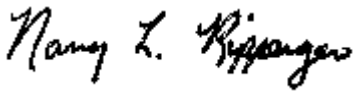
CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July 2019, a copy of Informant's Brief is being served upon Respondent's counsel through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08.

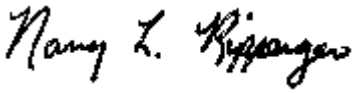


Nancy L. Ripperger

CERTIFICATION: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b) and;
3. Contains 11,018 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



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