IN THE SUPREME COURT
STATE OF MISSOURI

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

RESPONDENT'S BRIEF

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ATTORNEYS FOR RESPONDENT

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CASE SUMMARY

John Stapleton, Jr. is a well-respected attorney who has been practicing in the Kansas City area for more than 30 years. Mr. Stapleton has led a distinguished and exemplary career, and has been recognized by his peers for his ability and community involvement.

Mr. Stapleton is now before this Court because he made unintentional and unknowing mistakes in the handling of his client trust accounts. Specifically, he acknowledges that he deposited earned fees into the trust accounts and that he forgot about a number of them and allowed them to linger. He further acknowledges that he failed to adequately supervise the reconciliation of the firm's client trust account on a monthly basis. Mr. Stapleton did not knowingly or intentionally violate the Rule of Professional Conduct. Once Mr. Stapleton learned that he had made mistakes in some of his settlement distributions and trust accounting, he tried to make amends. Mr. Stapleton is a passionate advocate and considers his clients to be family and friends. As such, he felt terrible about his mistakes. He wrote checks to those who he learned had been shorted, to make up for the shortfall, and with interest when appropriate. He then apologized to the clients. No clients were ultimately harmed by his conduct.

A Disciplinary Hearing Panel heard the evidence in this matter, including considerable evidence in mitigation and evidence that Mr. Stapleton had taken numerous steps to remedy the issues that led to the violations. The Hearing 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.

While Respondent accepted the Panel's recommendation, Informant rejected the recommendation on April 4, 2019.

STATEMENT OF FACTS

1. Background Information Regarding Respondent

The OCDC has characterized certain facts at issue in this proceeding in an argumentative manner to suggest that Mr. Stapleton "knowingly" violated the trust account requirements and has failed to rectify his mistakes. Accordingly, consistent with Missouri Supreme Court Rule 84.04(c) and (f), Mr. Stapleton offers the following Statement of Facts:

Out of law school, Respondent worked at two small firms, for a total of approximately 2 ½ years. After that, in 1990, he opened his own practice. **R. 851, Tr. 109**. He did not have any education regarding trust accounting in law school. **R. 851, Tr. 110**. However, he did understand that he needed a separate account for client funds and he set up a separate account. **R. 851, Tr. 109-110**. At first, he did a little of everything in his practice, but his practice was primarily traffic tickets. Mr. Stapleton handled those cases on a flat fee basis and did not put the fees into trust. **R. 851, Tr. 111-112.** Mr. Stapleton put settlements and payments to be used for clients into the trust account. **(Tr. 112)**. Over time, his practice changed so that it is now primarily personal injury and workers' compensation. **(Tr. 112)**.

2. Respondent's Previous Trust Account Practice

When Mr. Stapleton settles a case, he prepares a settlement statement. **(Tr. 113)**. Respondent usually took his fees by check or transfer to his operating or personal account. **(Tr. 114-115)**. He kept a record of the transactions related to his trust account in a check register. He did not always include information about the specific client(s) to whom the

funds in the transaction related. **(Tr. 115)**. He did not always take his full fee out all at once. He tried to keep track of the amounts in his head. **(Tr. 115)**. Initially, he did a good job of keeping track of the amounts in his head, but it caught up with him. As his practice got busier, it became much harder to keep track. **(Tr. 116)**. Until early in 2018, he handled the bookkeeping for his trust account by himself. **(Tr. 116)**. Occasionally, his wife, Linda Stapleton, would do some bookkeeping **(Tr. 117)**, but she never did any of the bookkeeping on the trust account. **(Tr. 209)**. Linda Stapleton is also the office manager. (Tr. 209). She has a degree in business administration and a law degree. **(Tr. 207)**.

3. Audit of Respondent's Accounts

The overdraft that prompted the OCDC audit happened because Respondent was trying to transfer money between two accounts that were not trust accounts. Respondent accidentally transferred the funds from a trust account. The trust account did not have sufficient funds. **(Tr. 117)**. He realized his mistake within 30 minutes and tried to transfer it back. By then, the overdraft had registered and the process of reporting to OCDC had begun. **(Tr. 117-118)**. Prior to the OCDC investigation, Mr. Stapleton knew that client funds were supposed to be in the trust account. Respondent did not know what the requirements were regarding recordkeeping on the trust account and he was not reconciling his account. **(Tr. 118, 143-144)**.

4. Remedial Measures Taken Following Audit

After the investigation began, Kelly Dillon informed Respondent of a webinar on trust accounting, which he took. More recently, he took another webinar on trust accounting. **(Tr. 118-119, Exhibit RA)**. He had no obligation to take a webinar on trust accounting.

(Tr. 89). After Respondent learned of the issues with his trust account, he contacted an attorney who had been helping him with his taxes to help with the OCDC investigation. He closed one of his two trust accounts. **(Tr. 120-121)**. In February 2018, Mr. Stapleton opened and began using a new trust account at BMO Harris Bank. He hired Martha Buell, an outside bookkeeper, to do all of his trust account bookkeeping. **(Tr. 121-122, 195)**. Ms. Buell has a business degree and a paralegal degree. She has many years of experience doing trust accounting for many law firms. **(Exhibit RD)**. She has taken online courses specific to lawyer trust accounts. **(Tr. 194)**. She has her own company that performs legal bookkeeping. **(Tr. 195)**. When Respondent settles a case, he deposits the settlement checks into the US Bank client trust account. After this, he sends Ms. Buell the Settlement Summary, a copy of the settlement check, the receipt for deposit of the settlement check, and documents showing the amounts of liens or other claims on the settlement. **(Tr. 122-123, 196, Exhibit RF)**. Ms. Buell checks the Settlement Summary against the supporting documentation to make sure it matches. If anything does not match up, she asks for updated information. **(Tr. 197-198)**. Respondent and his wife have always been promptly responsive to her requests. **(Tr. 206)**. When she prepares the checks, she prepares a client ledger and delivers it with the checks. **(Exhibit RF, page 8)**.

Unless Respondent is still negotiating with third parties, Respondent emails the documentation to Ms. Buell when he deposits the settlement check. Ms. Buell writes all of the checks on the new trust account. **(Tr. 125)**. When Ms. Buell prepares the checks, she dates them on the ninth day after the date of the deposit. She delivers them to Respondent's office for signature and distribution. **(Tr. 126-127, 199).**

When the client comes in to get the settlement check, the client also signs the settlement summary. Respondent sends the signed copy to Ms. Buell to maintain in the records. **(Tr. 205)**. Ms. Buell reconciles the trust account for Respondent. **(Tr. 129, 200-201, Exhibit RE)**. As a part of the reconciliation process, she looks to see that checks that have been issued have been negotiated within a reasonable time. **(Tr. 202)**.

Once Respondent learned that he had made mistakes in some of his settlement distributions, he tried to make amends. He felt terrible, because he considered his clients to be his family and his friends. He wrote checks to those who he learned had been shorted, to make up for the shortfall, with interest when appropriate. He apologized to the clients. They addressed every situation listed in the Information. **(Tr. 129-130, 134-135, 213, 216)**. Respondent treats his clients like family and friends. It hurt him to learn that he had made mistakes that short-changed some of his clients. **(Tr. 131-132)**. Respondent does not believe these mistakes will happen again because he is not handling everything himself, has different procedures in his office and because he has Ms. Buell handling the bookkeeping for the trust account. **(Tr. 135)**. Most of his clients come to Respondent as referrals from previous clients. **(Tr. 131)**. Currently, all of the settlement summaries are prepared by someone else on his staff. All of the settlement statements are reviewed by at least two people before they are sent to Ms. Buell. **(Tr. 133-134)**.

As OCDC was conducting its investigation, Respondent worked with his attorney, Joel Krieger. Respondent thought he was providing all of the information that the OCDC wanted. **(Tr. 131)**. His wife/office manager assisted him in gathering and copying the documents he understood that OCDC was requesting. **(Tr. 212)**. Respondent has

outstanding taxes with the IRS and the Missouri Department of Revenue. He has hired a tax service in California to handle those matters and try to reach a compromise. At the time of the hearing, that firm expected to have all matters resolved within a few months. **(Tr. 132, 217-220, Exhibit RK)**. There is no evidence that any funds from Respondent's trust account were used to pay tax liens or taxes. No funds were ever garnished from the trust account. **(Tr. 77, 90)**. Respondent never used client funds to pay any of his debts and never would. **(Tr. 132)**.

Respondent has never had any complaints from clients. On the other hand, he has received positive feedback from clients. **(Tr. 135-136)**. Informant's investigation was not related to any complaints about Respondent. **(Tr. 105)**. The Stipulation states that Respondent had some cashier's checks made out to third parties in some client matters but subsequently redeposited those checks. **(Tr. 66-67)**. Respondent explained that the third parties informed him that there was a zero balance for that client. **(Tr. 154)**. Sometimes in the past, third parties have called Respondent because they have not been paid. That was during the period when he was relying on his memory instead of keeping records. Since the beginning of February 2018 when he changed his office procedures and hired Ms. Buell to do the bookkeeping for the trust account, that has not occurred. **(Tr. 155-156)**.

5. Character Witnesses and Affidavits

Lyle Gregory is an attorney who has been practicing law since 1992. He has had a solo practice since 1997. He has known Respondent for 9-10 years through the trial lawyer group. He is also a personal friend of Respondent and they have worked

cases together, including a case in which Respondent handled the settlement funds from one defendant. He has reviewed the Amended Information and the Answer. Mr. Gregory believes Respondent is an honest, decent person. He has observed that Respondent, and his wife/office manager, stand out for how they relate to and care about their clients. Mr. Gregory does not believe that Respondent would intentionally violate the Rules of Professional Conduct. **(Tr. 178-185)**.

Paul Oller is an attorney who has been practicing law since 1986. He has had his own firm since 1993. He has known Respondent since 2010 through a Kansas City based trial lawyer group that meets once a month. He has reviewed the Amended Information and the Answer. He sees Respondent as a person of high moral character, who is generous, giving, kind, and loyal. In his opinion, Respondent is a true and unselfish servant who is very open about his faith and wants to help everyone. He does not believe that Respondent would intentionally violate the Rules of Professional Conduct. He would trust Respondent with his own funds. **(Tr. 171-178)**.

Kim Benjamin is an attorney who has been practicing law since 1996. She has had her own firm since 2002. Ms. Benjamin has known Respondent since around 2010 and is also a member of the trial lawyer's group. Through that group, she is aware that Respondent cares tremendously for people. She believes Respondent is a very good person who only cares about helping people. Respondent's violations of the trust accounting standards do not change her opinion, because it is just a matter of training. She would trust Respondent with her own money. She has an accounting background and, if she had known Respondent was having problems with how he was handling his trust account, she would have given him

guidance or suggested that he get an outside bookkeeper to handle the accounting. She views the problems as a training issue, rather than a character issue. **(Tr. 185-192)**.

Angela Acree testified by affidavit that Respondent is "as good and true an individual as one could hope to know." In her opinion, Respondent is a highly ethical attorney who she does not believe would knowingly act unethically. Respondent "always acts professional and with the highest personal standards for decency and kindness to all." **(Exhibit R-G)**. Max Mitchell testified by affidavit that he has observed that Respondent truly cares about his clients and their wellbeing. He "cannot imagine that [Respondent] would do anything with the intent to cause damage to anyone." **(Exhibit R-I)**. Laura O'Sullivan testified by affidavit that Respondent "is concerned with the justice system and supports justice related non-profit endeavors." In her opinion. Respondent is honest and trustworthy and conducts himself professionally. **(Exhibit R-J)**. Vincent Esposito testified by affidavit that Respondent is "honest and trustworthy and would never intentionally steal from a client or anyone else for that matter." **(Exhibit R-H)**.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD ACCEPT THE RECOMMENDATION OF THE PANEL AS TO 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).

II.

THE SUPREME COURT SHOULD ACCEPT THE RECOMMENDATION OF THE PANEL AS TO DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULE 4-8.4(C) IN THAT RESPONDENT DID NOT INTENTIONALLY AND/OR RECKLESSLY MISAPPROPRIATE 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 NOT DISBAR RESPONDENT BECAUSE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, CASE LAW, AND AGGRAVATING FACTORS SUGGEST THAT DISBARMENT IS NOT THE APPROPRIATE DISCIPLINE.

ARGUMENT

I.

THE SUPREME COURT SHOULD ACCEPT THE RECOMMENDATION OF THE PANEL AS TO 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. Standard of Review

The twin aims of the Missouri lawyer discipline system are "to protect the public and maintain the integrity of the legal profession," not to punish the lawyer. *In re Coleman*, 295 S.W.3d 857, 869 (Mo. banc 2009). In assessing the proper sanction, this Court has recognized that ABA Standards for Imposing Lawyer Sanctions (the "ABA Standards") provide useful guidance for appropriate discipline. *In re Madison*, 282 S.W. 3d 350, 360 (Mo. banc 2009). Consideration is given to the nature of the conduct at issue, as well as any evidence in aggravation or mitigation. ABA Standard 9.1. "But the ABA Standards are merely guidance, and they do not supplant this Court's prior decisions." *In re Farris*, 472 S.W.3d 549, 563 (Mo. banc 2015). Informant has the burden to prove its allegations by a preponderance of the evidence. Rule 5.15(d). We consider only the allegations of the Information in determining whether Respondent has committed violations that subject him to discipline. Rule 5.15(b).

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

Informant cites to *Black v. California State Bar*, 368 P.2d 118, 225-26 (Cal. 1962), stating, "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." In that case, the attorney failed to maintain proper office records and failed to keep client funds separate from the attorney's personal accounts, in a bank or trust

company authorized to do business in the state and without the client's direction in writing. *Id* at 227. The Court further opined that:

> Petitioner's record as an attorney since his admission to practice in 1928 is without previous blemish. He has served in a number of public capacities, including his present position as city attorney of the Town of Atherton and his former position as city judge of that community. His reputation for integrity and honesty is of the highest, and was attested to in these proceedings [****15] by several witnesses. He has demonstrated his good faith by undertaking the reorganization of his office procedures in accordance with the recommendations of an established accounting firm.

Id. (finding the appropriate discipline to be a public reprimand). Here, Informant alleged that, "Respondent violated Rule 4-1.15(a) when he did not withdraw his attorney fees in one lump sum for" several clients. Informant's witness acknowledged that the rules do not require attorneys to withdraw their fees in a lump sum. **(Tr. 91)**. The Panel did not find that Respondent committed this violation. Informant alleged that Respondent wrote checks to cash from the trust account, in violation of Rule 4-1.15(a)(5). The Stipulation establishes that Respondent wrote a check to cash for several clients. However, the Panel did not find a violation, but noted that the lump sum withdrawals do enhance clarity and transparency in understanding trust account practices, and that this is the preferable practice. As such, an inference should not be deduced that Respondent was commingling funds. **App. 246-254.** The Panel's decision is sufficient guidance to Respondent in his future practice of withdrawing his fee.

Informant's Brief states that The Panel misinterpreted Ms. Dillon's testimony and that while Rule 4-1.15(a) does not specifically prohibit an attorney from taking out a lump sum, that when the attorney only withdraws a portion of the fees, the remaining fees are mixed or commingled with client and third party funds in violation of Rule 4-1.15(a). In support of this, Informant's Brief cites to *In re Spears*, 72 So.3d 819 (La. 2011), which states that leaving attorney fees in the trust account and withdrawing the attorney fees incrementally is a violation of Rule 4-1.15(a).

Informant's Brief notes that the audit revealed nine settlements in which a partial withdrawal of attorney fees occurred. In *In re Spears*, the disciplinary board found that the attorney violated Rule 4-1.15(a) because he commingled funds by leaving his attorney's fees in his trust account and withdrawing them incrementally over a long period of time and because he converted third party funds. This demonstrates that the instant error is less egregious than that of *In re Spears*. Further, as will be set forth more fully in Section III, *infra*, the attorney in *In re Spears* received a fully deferred suspension with instructions to retain a CPA. In the instant case, Respondent has already made restitution and hired an accountant to prevent future negligence.

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. Informant alleged that Respondent wrote checks to cash from the trust account, in violation of Rule 4-1.15(a)(5). The Stipulation establishes that Respondent wrote a check to cash for several clients. Respondent acknowledges that there were eleven settlement checks written

to "cash" instead of writing checks to a named payee. **App. 246-254; 255-26-; 268-280; 288-293; 302-303; and 303-304**. Respondent now understands that the trust account was not being reconciled and acknowledges that this amounts to a violation of the trust account rules. However, this violation was based upon, a good faith although mistaken, belief, rather than a knowing, intentional failure on the part of Respondent.

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. Informant alleged that Respondent violated Rule 4-1.15(a)(7) when he failed to reconcile Trust Account XXXXXXXX-6268. Respondent admits that he did not reconcile his trust account when he was doing the bookkeeping for the account. **App. 15 (Tr. 50-52); 38 (Tr. 144)**. Respondent now understands that the trust account was not being reconciled and acknowledges that this amounts to a violation of the trust account rules. However, this violation was based upon, a good faith although mistaken, belief, rather than a knowing, intentional failure on the part of Respondent.

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

Informant alleges that Respondent violated Rule 4-1.15(f) by failing to keep required records related to his trust account. Respondent admitted that he kept only a check register and that he did not always record specific information in that register, but kept track of the information in his head. **App. 15 (Tr. 50-52); App. 254-255; 264-268; 273-277; 295-297; 300-301; 311-313; 326-328.** Respondent admits that he did not reconcile his trust account when he was doing the bookkeeping for the account. Respondent now understands that the

trust account was not being reconciled and acknowledges that this amounts to a violation of the trust account rules. However, this violation was based upon, a good faith although mistaken, belief, rather than a knowing, intentional failure on the part of Respondent.

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

Informant alleges that Respondent violated Rule 4-1.15(f) by failing to keep required records related to his trust account. Respondent admitted that he kept only a check register and that he did not always record specific information in that register, but kept track of the information in his head. Specifically, Informant alleges that Respondent violated Rule 4-1.15(d) when he delayed in paying clients and lienholders.

Rule 4-1.15(d) provides, in part:

> Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as provided in Rules 4-1.145 to 4-1.155 or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive….

Informant's Brief argues that delivery of funds to a client or third party within one month is presumed reasonable, citing comment 6 of Rule 4-1.15. However, comment 6 of Rule 4-1.15 states that, "funds belonging to the lawyer must be disbursed to the lawyer reasonably promptly… Disbursement within a period of one month shall be presumed to be reasonably promptly." The comment adds that the disbursement to the lawyer shall be reasonably prompt after the client has been billed, has had an opportunity to dispute the

disbursement, and otherwise agreed to the disbursement. and does not reference this specific timeline for delivery of funds to a client or third party. Rule 4-1.15 Cmt 6. While Respondent does not dispute that Rule 4-1.15(d) requires prompt notification and delivery of funds to clients and third parties, the one-month baseline in comment 6 is not the appropriate standard.

Respondent's actions are distinguishable from the attorney in *Taylor* who: (i) failed to notify his client about the receipt of the checks until two months later; (ii) provided no excuse for the delay; (iii) had his wife forge the client's signature on the check to deposit them in the account; and (iv) wrote two checks drawn on the trust account for his fee and deposited them in the operating account on the same day he received the checks. Respondent acknowledges that he failed to disburse correct amounts and at times failed to timely disburse funds to clients and third parties, but this violation was based upon, a good faith although mistaken, belief, rather than a knowing, intentional failure on the part of Respondent.

II.

THE SUPREME COURT SHOULD ACCEPT THE RECOMMENDATION OF THE PANEL AS TO DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULE 4-8.4(C) IN THAT RESPONDENT DID NOT INTENTIONALLY AND/OR RECKLESSLY MISAPPROPRIATE 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.**

As stated above, Respondent acknowledges the errors he made in violation of Rule 4-1.15, but these were errors and not intentional actions involving fraud, deceit, dishonesty, or misrepresentation. *Farris* makes it clear that a respondent's explanation can be disbelieved and an adverse inference may be drawn when there is a failure to comply with Rule 4-1.15(d). *In re Farris*, 472 S.W.3d 549, 561 (Mo. 2015). However, in this case The Panel determined not to apply this adverse interest and to hold that the violations were not intentional or knowing based on Respondent's testimony, and the testimony of the other attorneys. Respondent's actions to repay all clients and third parties for his mishandling of the trust account, as well as his hiring of an accountant to handle these manners demonstrates that they were borne of negligence rather than any intentional act.

III.

THE SUPREME COURT SHOULD NOT SUSPEND RESPONDENT BECAUSE ABA MITIGATING FACTORS FOR IMPOSING LAWYER SANCTIONS, CASE LAW, AND AGGRAVATING FACTORS SUGGEST THAT SUSPENSION IS THE APPROPRIATE DISCIPLINE.

Respondent did not intentionally or knowingly violate the rules. Respondent's lack of knowledge of the requirements, and interpretations, of the rules does not excuse his conduct but his mental state is important in determining the appropriate discipline.

We note that the Supreme Court has, in recent years, addressed many cases similar to this case by placing the respondent attorney on probation. The following cases are a few recent examples:

The Supreme Court placed an attorney on probation for one year in *In re Norsigian,* SC97130 (Order of 7/3/18). Norsigian disbursed funds he knew or should have known had not been actually collected. He advanced funds from the trust account to pay a third-party lien using other clients' funds. The attorney's trust account balance fell below the amount that should have been in trust to pay lienholders. He failed to maintain complete records of client trust accounts including client ledger records and reconciliations of the client Trust Account and further failed to reconcile his trust account as required. He did not have a selfish or dishonest motive and had consulted with an accountant and other attorneys regarding proper trust account practices.

The Supreme Court placed two attorneys on probation for two years in *In re Boggs*, SC96897 (Order of 3/6/18) and *In re Boggs*, SC96896 (Order of 3/6/18). The Boggs commingled personal funds with client funds and failed to maintain complete records of the trust account. Their actions were the result of negligence and recklessness.

The Supreme Court stayed an indefinite suspension and placed an attorney on probation for one year in *In re Williams,* SC96752 (Order of 5/22/18). Williams failed to promptly notify the clients of such settlements or such receipts or failed to promptly deliver

those client funds to the clients. He failed to deposit settlement proceeds belonging to clients into a client trust account, failed to promptly pay to clients the settlement amounts belonging to such clients, and failed to supervise a non-lawyer employee who forged clients' names on settlements and releases.

The Supreme Court suspended an attorney indefinitely and placed the attorney on probation for two years in *In re Risler*, SC96742 (Order of 11/21/2017). Risler did not regularly perform a reconciliation of his trust account. He sometimes placed personal funds into his firm's trust account, and at times deposited unearned legal fees paid by his clients into his law firm's operating account, resulting in commingling of personal funds with client funds. He deposited earned fees into his trust account and left them there for at least a couple of months, periodically making withdrawals. He failed to pay a third party, did not account for those funds, and had inadequate funds in his trust account to pay that third party. He did not keep records of this trust account as required and did not reconcile his account as required. He also failed to comply with a lawful demand for information from OCDC.

The Supreme Court has often referenced the ABA Standards as providing guidance for appropriate discipline. *In re Ehler,* 319 S.W.3d 442, 451 (Mo. banc 2010). The Standard that applies to this case is 4.1 Failure to Preserve the Client's Property:

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

4.12 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.

4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

Probation

The ABA Standards' failure to address probation in the analysis of specific violations is a distinct weakness. In light of our conclusion about the reasons for Respondent's violations, suspension or reprimand would be appropriate under Standard 4.1. Suspension would be appropriate under this Standard because Respondent should have known that he was handling his trust account improperly. Of course, all attorneys should know the Rules. If this Standard were applied literally, there would not be an option to impose lesser discipline when the attorney's actions are considered negligent. We also observe that, if the Standards thoroughly addressed the discipline analysis, probation would be a discipline listed between suspension and reprimand. Standard 2.7 defines probation: "Probation is a sanction that allows a lawyer to practice law under specified conditions." Missouri Supreme Court Rule 5.225(a)(2) establishes the criteria for an attorney to be eligible for probation:

(A) Is unlikely to harm the public during the period of probation and can be adequately supervised;

(B) Is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; and

(C) Has not committed acts warranting disbarment.

We believe Respondent meets the criteria to be eligible for probation, particularly in light of the remedial steps he has taken.

The following mitigating factors found in Standard 9.32 of the ABA Standards for Imposing Lawyer Sanctions (ABA Standards) apply in this case:

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

* * * *

(d) timely good faith effort to make restitution or to rectify consequences of misconduct;

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

* * * *

(g) character or reputation;

* * * *

(l) remorse;

Here, Respondent did not act out of a dishonest or selfish motive.

Although Respondent was briefly suspended under the tax suspension rule, his suspension was very brief and the only disciplinary action over a long career. Respondent's brief suspension as a factor that slightly lessens the mitigating factor of having had no

discipline during the rest of his career. Respondent's character witnesses established that Respondent is of excellent character. In sum, their testimony establishes that, despite his errors in the management of his trust account, Respondent is a highly respected and valuable member of the legal profession. He is an honest attorney who cares deeply about his clients. He would not intentionally violate the Rules of Professional Conduct.

Respondent was cooperative in the disciplinary process. He had no obligation to stipulate to any facts in this case. His agreement to a 101-page stipulation of facts, which greatly facilitated the course of the hearing and decision process, amply demonstrates his cooperation. He believed that he was providing the documentation requested by Informant during the investigation. Although Informant presented testimony that Respondent did not produce all of the records Informant requested, Informant also alleges that Respondent failed to maintain appropriate records. Failure to produce records that do not exist is not a lack of cooperation.

Respondent expressed remorse regarding his conduct. It hurt him terribly when he found out that he had short-changed clients. **(Tr. 131-132)**. "I feel terrible, because I never set out to hurt any of these clients." **(Tr. 134-135)**. "I might have given the wrong amount, but as soon as I found out what the right amount was, I turned around and I wrote them a check immediately to cover, to make everything right. Because these are people that -- we consider these people our family members and our friends." **(Tr. 135)**.

Certain aggravating factors also apply under Standard 0.22. Respondent engaged in a pattern of misconduct by failing to properly handle accounting tasks related to his trust account. We do not find that he engaged in multiple acts of misconduct as an aggravating

factor because a pattern of misconduct inherently includes multiple acts. We therefore believe that the aggravating factor of multiple acts is intended for multiple unrelated acts. Respondent also has substantial experience in the practice of law. Respondent practiced for many years without disciplinary problems, but he was not following the requirements of the Rules. Therefore, the length of his experience as an attorney is an aggravating factor. We are also mindful that he has now taken the best action he can take regarding performing accounting for his trust account -- he has turned it over to a bookkeeper who is an expert in lawyer trust accounts.

Respondent has been cooperative and voluntarily attended two trust account webinars presented by representatives of the attorney discipline system. His conduct demonstrates that of a professional and concerned attorney who is lacking in bookkeeping skills and knowledge and who relied too much on his memory. He has taken substantial and effective remedial steps by making sure that at least two people within his firm review all settlement summaries and by outsourcing his trust account bookkeeping to a bookkeeper who is an expert in bookkeeping for lawyer trust accounts.

Taking into consideration the Supreme Court's recent actions described above and considering the mitigating and aggravating factors present in this case, Respondent requests a stayed suspension with probation as the appropriate discipline.

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 impose a stayed suspension with probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August 2019, a copy of the Respondent's Brief is being served upon Informant's counsel through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08.

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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 6,470 words, according to Microsoft Word, which is the word processing system used to prepare this Brief.

Respectfully submitted,

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