

IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:

JOHN KEVIN SHEEHAN
104 117 N. Kirkwood Road
St. Louis, MO 63122-4326

Missouri Bar No. 29928

Respondent.

Supreme Court #SC98027

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

This action is one in which 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 this Court's inherent authority to regulate the practice of law, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Procedural History

Informant filed an Information on January 18, 2019, charging Respondent with violating the following Rules: Rules 4-1.1, 4-1.3, 4-1.15 and 4-8.4(c). **Rec. 1.**¹ Respondent filed Respondent's Answer and Affirmative Defenses to the Information on February 14, 2019. **Rec. 73.**

Via a letter dated February 21, 2019, the Advisory Committee chair appointed a disciplinary hearing panel to hear the case. **Rec. 87.** A hearing was held in this matter on April 26, 2019, in Clayton, Missouri, before Elizabeth D. McCarter, Presiding Officer, Kenneth Brison, and Susan Schlueter. Respondent Sheehan testified at the hearing. **Rec. 93.** The parties submitted a Joint Stipulation of Facts, Conclusions of Law, Recommended Discipline, and Analysis in Support of the Stipulation finding violations of Rules 4-1.1, 4-1.3, and 4-1.15. Within the Joint Stipulation, Informant dismissed the allegation that

¹ Citations to the Record are denoted by page reference followed by a description of the cited material if it's not obvious from the preceding text, for example, "**Rec. _** (Inf. ¶ _)." Citations to Respondent's testimony before the Disciplinary Hearing Panel are denoted by the appropriate page reference, followed by the specific transcript page reference in parentheses, for example, "**Rec. _** (Tr. _)." Citations to the Appendix are denoted by page reference followed by a description of the cited material if it's not obvious from the preceding text, for example, "**App. A_** (Stip. ¶ _)."

Respondent had violated Rule 4-8.4(c).² **App. A12, A16; Rec. 193, 197** (Stip. ¶¶ 33, 48). In the Stipulation, the parties proposed that Respondent be suspended indefinitely with no leave to apply for reinstatement for two years. **App. A12, A16; Rec. 193, 197.**

The panel issued its decision on May 22, 2019, and Legal Ethics Counsel served the decision on the parties by letter dated May 28, 2019. **Rec. 273, 350 and App. A3.** The panel concluded Respondent Sheehan violated Rules 4-1.1, 4-1.3, 4-1.15 and 4-8.4(c), and recommended that he be suspended indefinitely with leave to apply for reinstatement after two (2) years. **Rec. 273 - 74 and, App. A3.** By letter dated June 18, 2019, Respondent rejected the hearing panel's decision. **Rec. 351.** The record was filed with the Supreme Court of Missouri on July 29, 2019.

Facts Underlying Disciplinary Case

Respondent John Kevin Sheehan was licensed to practice law in Missouri on September 1, 1979. **App. A7** (Stip. ¶ 2). John K. Sheehan practices law as the Sheehan Law Firm, LLC, a limited liability company active in the State of Missouri. **App. A9** (Stip. ¶ 18). His license to practice law is in good standing. **App. A7** (Stip. ¶ 3). Respondent has no prior disciplinary history. **App. A7** (Stip. ¶ 5).

Respondent's Representation of Carl and Geraldine Weber

Respondent represented husband and wife clients Carl and Geraldine Weber for many years -- since at least 1995. **App. A8** (Stip. ¶ 6). Carl Weber was born in 1928. **App. A8**

² In the Information, Informant alleged Respondent violated Rule 4-8.4(c) only in Count I with regard to the Scott Weber Estate.

(Stip. ¶ 7). Geraldine Weber was born in 1934. **App. A8** (Stip. ¶ 7). Mr. and Mrs. Weber had three children: Scott Weber, Nancy Itzkowitz, and Cindy Newman. **App. A8** (Stip. ¶ 8). Jack Itzkowitz is the husband of Nancy Itzkowitz and a licensed attorney in the State of Missouri since 1979. **App. A8** (Stip. ¶ 9).

In the course of representing Mr. and Mrs. Weber, Respondent prepared a Revocable Trust for Mr. and Mrs. Weber in 2001 (Trust I) and prepared a second Revocable Trust for Mr. and Mrs. Weber on August 10, 2010 (Trust II). Trust II was amended on September 19, 2013. **App. A8** (Stip. ¶ 11). Respondent also prepared wills for Carl and Geraldine Weber that were executed on August 10, 2010, each Will being a “pourover” Will in which the assets of any probate estate would be transferred to Trust II. **App. A8** (Stip. ¶ 12).

Respondent also represented Mr. and Mrs. Weber’s son Scott Weber, preparing a Will for Scott Weber on July 24, 2002. **App. A8** (Stip. ¶ 10). Scott Weber died on June 24, 2011, predeceasing his parents. **App. A8** (Stip. ¶ 13).

Carl Weber died on October 4, 2014. Geraldine Weber died on March 26, 2015. **App. A8** (Stip. ¶ 14). Prior to their respective deaths, Carl and Geraldine Weber’s daughter, Nancy Itzkowitz, had filed applications for guardianship and conservatorship regarding each of them, requesting she be appointed guardian and conservator. **App. A9** (Stip. ¶ 15). The Carl Weber guardianship and conservatorship case number was designated as St. Louis County No. 14SL-PR02660. The application for letters of guardianship and conservatorship was filed by Nancy Itzkowitz on September 9, 2014. The case was dismissed without a determination of capacity because of Mr. Weber’s death on October 4, 2014. Suggestions of death were filed on

November 19, 2014 and the case was dismissed on January 12, 2015. **App. A9** (Stip. ¶ 16); **App. A25 – A27** (Docket sheet for Carl Weber guardianship Case no. No. 14SL-PR02660).

The Geraldine Weber guardianship and conservatorship case number was designated as St. Louis County No. 14SL-PR02672. The application for letters of guardianship and conservatorship was filed by Nancy Itzkowitz on September 21, 2014. After litigation, Geraldine Weber was declared incapacitated on February 25, 2015. No further action was taken in her estate because of her death on March 26, 2015. Suggestions of death were filed on March 27, 2015 and an order of no further process was issued on January 6, 2016 because there were no estate assets. **App. A9** (Stip. ¶ 17); **App. A28 – A33** (Docket sheet for Geraldine Weber guardianship Case no. No. 14SL-PR02672).

Respondent's Representation of Scott Weber

Scott Weber was born in 1961. **App. A10** (Stip. ¶ 19). Scott Weber died on June 24, 2011, predeceasing his parents. **App. A8** (Stip. ¶ 13). Mr. Weber had no spouse or children. **App. A10** (Stip. ¶ 19).

Respondent also represented Scott Weber, preparing a Will for him on July 24, 2002. **App. A10** (Stip. ¶ 20). Mr. Weber's Will provided that \$1,500 would go to each of his three nephews and niece, (Jonathan and Robert Itzkowitz and Julie Newman), and the rest of his estate would go to Carl and Geraldine Weber. The Will provided that Carl or Geraldine Weber were to serve as personal representatives, but if they were unwilling or unable to serve, then Respondent John Sheehan would serve as successor personal representative. **App. A10** (Stip. ¶ 20). Respondent filed an application for letters testamentary for the Scott Weber Estate in St. Louis County Case No. 11SL-PR02223 on

August 15, 2011. **App. A10** (Stip. ¶ 21). Respondent requested that he be appointed independent personal representative. **App. A10** (Stip. ¶ 21). Letters testamentary were issued on September 13, 2011 appointing Respondent as the independent personal representative. **App. A10** (Stip. ¶ 22).

Prior to his 2011 death, Scott Weber ceased filing tax returns and paid no taxes. As successor personal representative operating under independent administration, Respondent had to file several years of tax returns and negotiate and settle several years of back taxes. Back taxes were owed both to the Internal Revenue Service and the Missouri Department of Revenue. Also, multiple claims were filed against the Scott Weber Estate. The tax issues and the claims filed took considerable time and expense, delaying the closing of the estate. **App. A12** (Stip. ¶ 31).

Respondent filed an inventory on November 15, 2011 showing the estate having a value of \$457,446.00. **App. A10** (Stip. ¶ 23). Respondent failed to close the Scott Weber Estate. It remains open to this date. Between the years 2011 and 2016 there were multiple notices from the Court advising that the estate could be closed and to notify the Court accordingly. **App. A10** (Stip. ¶ 24).

The St. Louis County Circuit Court, Probate Division, removed Respondent as personal representative on August 23, 2016 for failure to perform his duties. **App. A11** (Stip. ¶ 25). The Court appointed Jack Itzkowitz as successor personal representative on December 22, 2016. Mr. Itzkowitz filed a Petition for Discovery of Assets against Respondent on February 14, 2017. Litigation ensued thereafter. **App. A11** (Stip. ¶ 26).

On September 11, 2017 the Court entered a judgment against Respondent for \$50,195.95. Of that sum, \$46,620 was for unaccounted for and/or unauthorized expenditures as set forth in the petition; the remainder was for attorney fees awarded in favor of the successor personal representative and costs. **App. A11** (Stip. ¶ 27). Respondent had a full and fair opportunity to litigate the issues set forth in the Judgment against him. The Judgment is now binding and conclusive herein against Respondent under the doctrine of non-mutual offensive collateral estoppel made applicable to attorney disciplinary actions by the Missouri Supreme Court in *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997). **App. A11** (Stip. ¶ 28).

Thereafter, Mr. Itzkowitz as personal representative proceeded with numerous garnishment actions. **App. A11** (Stip. ¶ 29). On August 8, 2018 the court, as a result of one of the garnishment actions, entered a judgment against the Sheehan Law Firm, LLC in the amount of \$52,724.34, plus court costs. **App. A11** (Stip. ¶ 30).

The Carl and Geraldine Weber Trusts and the Geraldine Weber Estate

Geraldine Weber died on March 26, 2015. Pursuant to her Will, executed on August 10, 2010, Respondent was designated to serve as her successor independent personal representative (Carl Weber having predeceased her). **App. A13** (Stip. ¶ 34). Respondent did not make an application for letters testamentary to open a decedent's estate for the Geraldine Weber until almost one year later, on March 21, 2016. The Geraldine Weber decedent's estate was opened with St. Louis County Case No. 16SL-PR00888 and Respondent appointed independent personal representative on March 25, 2016. **App. A13** (Stip. ¶ 35).

A petition to revoke letters testamentary issued to Respondent and appoint a successor personal representative was filed on November 8, 2016 by Jonathan and Robert Itzkowitz, grandchildren of the decedent, alleging Respondent had not timely filed a statement of account and fulfilled his duties as independent personal representative. **App. A13** (Stip. ¶ 36). Litigation ensued thereafter. **App. A13** (Stip. ¶ 37). Respondent resigned as personal representative on June 21, 2018, one day prior to a hearing date that had been scheduled to present evidence on his removal. **App. A13** (Stip. ¶ 38).

At the same time Respondent had been serving as personal representative in the Geraldine Weber decedent's estate, Respondent also was serving as trustee of the Carl and Geraldine Weber Trusts. The Carl and Geraldine Weber Revocable Trust dated June 1, 2001 (Trust I) and the Carl and Geraldine Weber Revocable Trust dated August 10, 2010, as amended on September 19, 2013 (Trust II), both provided that Respondent would serve as successor trustee were Carl and Geraldine Weber unable or unwilling to so serve. Respondent took on the duties as trustee of Trusts I and II on March 5, 2015. **App. A13 – A14** (Stip. ¶ 39).

A petition to remove Respondent as trustee was filed on October 31, 2016 by Nancy, Jonathan, and Robert Itzkowitz, in the case of *Geraldine Weber and Carl Weber Trusts*, St. Louis County Case No. 16SL-PR03415, alleging in various ways that Respondent had failed in his duties as trustee, including failing to account for assets and properly manage the funds of the Trust. **App. A14** (Stip. ¶ 40). Extensive litigation followed thereafter. **App. A14** (Stip. ¶ 41).

On January 16, 2018, after a court hearing, Respondent was removed as trustee of Trusts I and II, and a judgment was issued against Respondent in the amount of \$224,734 plus attorney fees in the amount of \$10,000. **App. A14, A75 – A79** (Stip. ¶ 42; January 16, 2018 Order and Judgment). As part of the judgment, the court made the following findings:

- a) Respondent breached his fiduciary duties in that he failed to communicate, failed to account, and failed to effectively administer Trusts I and II [Count II];
- b) Respondent's breaches of trust as to Trust I were serious and warranted his removal as successor trustee [Count IV];
- c) Respondent's breaches of trust as to Trust II were serious and warranted his removal as successor trustee [Count VII];
- d) Respondent failed to properly account to beneficiaries of Trust I and Trust II regarding the existence, investment, disposal, and disbursement of assets constituting the corpus of Trust I and Trust II during the course of his administration of the trusts and Respondent is liable, in his capacity as successor trustee of Trust I and Trust II, for an itemized list of fees,

payments, and expenses resulting in a money judgment against him³

[Section entitled “Plaintiffs’ objections to Accountings”].

App. A14, A75 – A79 (Stip. ¶ 43; January 16, 2018 Order and Judgment).

Respondent did not appear at the January 16, 2018 court hearing, and he did not present any evidence to defend against the objections of the successor personal representative to his inventory. **App. A15** (Stip. ¶ 45). He didn’t have the money to pay a lawyer to represent him, and he didn’t believe he could represent himself because he “wasn’t a trial lawyer.” **Rec. 122 – 24** (Tr. 30 – 32). When asked whether he could have shown up with canceled checks and receipts, Respondent said: “I probably could have. Yeah.” **Rec. 124** (Tr. 32). The monetary judgment of the court on January 16, 2018 remains a civil obligation of the Respondent regardless of the disciplinary sanction imposed in this case. **App. A15** (Stip. ¶ 46).

Respondent had a full and fair opportunity to litigate the issues set forth in the Judgment against him. The Judgment is now binding and conclusive herein against Respondent under the doctrine of non-mutual offensive collateral estoppel made applicable to attorney disciplinary actions by the Missouri Supreme Court in *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997). **App. A15** (Stip. ¶ 44).

³ The court noted that Respondent did not appear at trial and offered no evidence to defend against the objections to his accounting.

The Parties' Stipulation

The parties entered into and executed a Joint Stipulation of Facts, Conclusions of Law, Recommended Discipline and Analysis in Support of the Stipulation on or about April 22, 2019. **App. A3 - 79**. In that stipulation, the parties agreed that Respondent had violated Rules 4-1.1, 4-1.3, and 4-1.15. **App. A12, A16** (Stip. ¶¶ 32, 44). Also in that stipulation, Informant dismissed his allegations the Respondent had violated Rule 4-8.4(c). **App. A12, A16** (Stip. ¶¶ 33, 48). The parties specifically stipulated that there was insufficient evidence that Respondent had engaged in dishonesty, fraud, deceit and misrepresentation. **App. A12, A16** (Stip. ¶¶ 33, 48).

The Disciplinary Hearing Panel's Decision

A disciplinary hearing was held on April 26, 2019. **App. A3**. The Disciplinary Hearing Panel found that Respondent violated the following Rules of Professional Responsibility:

1. Rule 4-1.1 by not providing competent representation with regard to the Scott Weber Estate and Carl and Geraldine Weber Trusts and the Geraldine Weber Estate;
2. Rule 4-1.3 by not acting with diligence in his representation of the Scott Weber Estate and Carl and Geraldine Weber Trusts and the Geraldine Weber Estate;
3. Rule 4-1.15 by failing to safekeep the property of the Scott Weber Estate and the Carl and Geraldine Weber Trust, resulting in money judgments against Respondent; and

4. Rule 4-8.4(c) by engaging in conduct involving dishonesty, fraud, deceit and misrepresentation in his behavior as Personal Representative of the Scott Weber Estate.

App. A3. The Disciplinary Hearing Panel's decision adopted the parties stipulation with the exception of the Panel's finding that Respondent had violated Rule 4-8.4(c) by engaging in conduct involving dishonesty, fraud, deceit and misrepresentation in his behavior as personal representative of the Scott Weber Estate. The Disciplinary Hearing Panel made this finding despite Informant's dismissal of any alleged Rule 4-8.4(c) violation.

Aggravating and Mitigating Factors

The Disciplinary Hearing Panel adopted the parties' stipulation that the applicable aggravating factors are: a pattern of misconduct, substantial experience in the practice of law, and failure to make restitution. **App. A3, A23.** Respondent had handled the Scott Weber Estate since 2011 and been involved in the management of the Carl and Geraldine Weber matters for many years, yet the estate has not been resolved and he was found by the Court to have breached fiduciary duties he owed the beneficiaries of both trusts. Respondent has been licensed since 1979, thus having years of experience. He also has outstanding judgments against him involving the Scott Weber Estate and the Carl and Geraldine Weber Trusts of over \$274,000. **App. A23.**

The Disciplinary Hearing Panel adopted the parties' stipulation that the applicable aggravating factors are: the absence of a prior disciplinary history, full and free disclosure

to the OCDC and a cooperative attitude toward the proceedings, and evidence of good character and reputation in the community. **App. A3, A23.**

The Disciplinary Hearing Panel's Recommendation

The Disciplinary Hearing Panel accepted the sanction recommended by the parties of an indefinite suspension with leave to apply for reinstatement after two (2) years. **App. A3; Rec. 273.** Respondent rejected the Panel's decision. **Rec. 351.**

POINT RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE HE VIOLATED RULES 4-1.1, 4-1.3, AND 4-1.15 IN THAT RESPONDENT FAILED TO COMPETENTLY SERVE AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTT WEBER AND AS THE TRUSTEE OF THE CARL AND GERALDINE WEBER TRUSTS, HE FAILED TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS TO CLOSE THE SCOTT WEBER ESTATE, AND HE FAILED TO PROPERLY ACCOUNT FOR ALL OF THE ESTATE AND TRUST ASSETS OF THE SCOTT WEBER ESTATE AND THE CARL AND GERALDINE WEBER TRUSTS.

In re Charron, 918 S.W.2d 257 (Mo. banc. 1996)

In re Crews, 159 S.W.3d 355 (Mo. banc 2005)

In re Gardner, 565 S.W.3d 670 (Mo. banc 2019)

Rule 4-1.1

Rule 4-1.3

POINT RELIED ON

II.

THE SUPREME COURT SHOULD ENTER AN ORDER INDEFINITELY SUSPENDING RESPONDENT BECAUSE HE KNOWINGLY VIOLATED MULTIPLE RULES OF PROFESSIONAL CONDUCT, INCLUDING OBLIGATIONS HE OWED HIS CLIENTS, AND CAUSED AN INJURY OR POTENTIAL INJURY.

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

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

In re Snyder, 35 S.W.3d 380 (Mo. banc 2000)

In re Charron, 918 S.W.2d 257 (Mo. banc 1996)

ABA Standards for Imposing Lawyer Sanctions (1986 ed., as amended 1992)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE HE VIOLATED RULES 4-1.1, 4-1.3, AND 4-1.15 IN THAT RESPONDENT FAILED TO COMPETENTLY SERVE AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTT WEBER AND AS THE TRUSTEE OF THE CARL AND GERALDINE WEBER TRUSTS, HE FAILED TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS TO CLOSE THE SCOTT WEBER ESTATE, AND HE FAILED TO PROPERLY ACCOUNT FOR ALL OF THE ESTATE AND TRUST ASSETS OF THE SCOTT WEBER ESTATE AND THE CARL AND GERALDINE WEBER TRUSTS.

“The findings of fact, conclusions of law, and the recommendations from the DHP are advisory. This Court reviews the evidence *de novo*, independently determining all issues pertaining to the credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed.” *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005), citing *In re Snyder*, 35 S.W.3d 380, 382 (Mo. banc 2000

Informant and Respondent agreed to be bound by the factual stipulations contained in the Joint Stipulation of Facts, Conclusions of Law and Recommended Discipline regardless of whether the Disciplinary Hearing Panel or the Missouri Supreme Court

accepted or rejected the recommended discipline. The parties' stipulated that Respondent violated Rules 4-1.1, 4-1.3, and 4-1.15.

Missouri Rule of Professional Conduct 4-1.1 provides that a lawyer shall provide competent representation to a client. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonable necessary for the representation." Rule 4-1.1. In *In re Ehler*, 319 S.W.3d 442, 448-49 (Mo. banc. 2010), this Court found that the respondent demonstrated a lack of competence requiring discipline where she failed to properly calculate and disburse proceeds from the sale a marital property. Ehler also was found to have acted incompetently because she failed to provide her client interrogatories to complete and such failure resulted in the court entering a default judgment against her client. *Id.* In *In re Charron*, 918 S.W.2d 257, 261 (Mo. banc. 1996), this Court found that Charron violated Rule 4-1.1 when he failed to file an annual settlement in the probate estate, failed to timely complete the settlement revocation, failed to file settlement vouchers when he made distributions from an estate, and failed to seek court approval before paying himself attorney's fees that exceeded the statutory allowance.

Respondent did not competently serve as personal representative of the Scott Weber Estate and violated Rule 4-1.1 by delaying and failing to timely close the estate and failing to account for all of the assets of the estate and thereby being adjudged liable for \$50,195.95. Respondent did not competently serve as trustee of the Carl and Geraldine Weber Trusts, resulting in delays, failure to properly administer the trust, and failure to properly account for the trust assets resulting in a \$224,734 judgment against Respondent.

Respondent admitted these violations as to the Scott Weber Estate and the Carl and Geraldine Trusts. **App. A12, A16** (Stip. ¶¶ 32, 47).

Missouri Rule of Professional Conduct 4-1.3 provides that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” In *In re Crews*, 159 S.W.3d 355, 359 (Mo. banc 2005, Crews was found to have violated Rule 4-1.3 by failing to adequately investigate the plaintiffs’ claim, failing to diligently pursue the plaintiffs’ claim, failing to respond to the summary judgment motion, and failing to prepare an acceptable appellate brief. Respondent Sheehan violated Rule 4-1.3 by not timely closing the Scott Weber Estate. Respondent admits violating Rule 4-1.3 in his capacity as personal representative of the Scott Weber Estate. **App. A12** (Stip. ¶ 32).

Rule 4-1.15(d)⁴ provides: “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

⁴ Scott Weber died in 2011, Respondent became the personal representative of the Scott Weber Estate in 2011, Geraldine Weber died in 2015, Respondent became trustee of the Carl and Geraldine Weber Trusts in 2015, Respondent became the personal representative of the Geraldine Weber Estate in 2016, Respondent was removed as trustee of the Carl and Geraldine Weber Trusts in 2016, and he resigned as the personal representative of the Geraldine Weber Estate in 2016. Various versions of Rule 4-1.15 were in effect during those years, but the text of Rule 4-1.15(d) remained constant.

funds or other property that the client or third person is entitle to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.” In his capacity as personal representative of the Scott Weber Estate, Respondent filed an inventory of assets but failed to close the estate. The heirs filed a Petition for Discovery of Assets against Respondent. The court found that Respondent failed to account to the court for all of the assets inventoried and he was found liable for \$50,195.95.

Respondent also was found to have not properly accounted for the inventoried assets in the Carl and Geraldine Weber trusts. Respondent did not appear at the hearing regarding the trust assets. He testified that he “wasn’t a trial lawyer....” He, therefore, did not present any evidence to defend against the objections of the successor personal representative and the court found him liable for failing to properly account to the beneficiaries of the trusts regarding the existence, investment, disposal, and disbursement of assets of those trusts and he was found liable in the total amount of \$234,734.00.

In *In re Gardner*, 565 S.W.3d 670, 676 - 77 (Mo. banc 2019), this Court noted that the respondent had not engaged in misappropriation or self-dealing, but he had violated Rule 4-1.15 “by failing to safekeep property when he withdrew money for personal representative fees without court authorization.” Respondent’s failure to account for the trust and estate assets of the Webers violates Rule 4-1.15(d).

The Disciplinary Hearing Panel adopted “the facts, conclusions, and recommendation set forth in the stipulation... with the exception of Paragraphs 33 and 45.” The Panel found “sufficient evidence exists to find that the respondent engaged in conduct involving dishonesty, fraud, deceit and misrepresentation in his behavior as

Personal Representative of the SCOTT WEBER ESTATE in violation of Rule 4-8.4(c).”

App. A3 (emphasis original). Informant, however, in the stipulation, had dismissed the Rule 4-8.4(c) misconduct allegation and did not present evidence of a Rule 4-8.4(c).

App. A12, A16 (Stip. ¶¶ 33, 48). The probate court found that Respondent had “failed to properly account to this court for all assets inventoried in this estate,” but did not find dishonesty, fraud, deceit, and misrepresentation. **App. A48** (Stip. Ex. 5 (incorporated into DHP decision), Order Determining Liability of Defaulting Fiduciary and Judgment). There is, therefore, no support in the record for the Panel’s finding of a Rule 4-8.4(c) violation.⁵

⁵ At the hearing, the Presiding Officer asked Respondent about the attorneys’ fees he had charged in the Scott Weber matter. Respondent did not know the amount of his fee and he did not know how the money judgment entered by the probate court was calculated. **Rec. 116 – 19** (Tr. 24 – 27). Neither party presented evidence regarding those amounts. The Presiding Officer stated “[s]o we can assume, based on that, that a portion of this \$50,000 was unapproved fees above the statutory fee.” **Rec. 117** (Tr. 25). Respondent testified that he did not know. This was evidence the parties did not present because Informant had dismissed the Rule 4-8.4(c) allegation.

II.

THE SUPREME COURT SHOULD ENTER AN ORDER INDEFINITELY SUSPENDING RESPONDENT BECAUSE HE KNOWINGLY VIOLATED MULTIPLE RULES OF PROFESSIONAL CONDUCT, INCLUDING OBLIGATIONS HE OWED HIS CLIENTS, AND CAUSED AN INJURY OR POTENTIAL INJURY.

Informant and Respondent jointly recommended that the discipline imposed be an indefinite suspension with no leave to apply for reinstatement for two (2) years. Informant and Respondent made their joint recommendation for discipline with the understanding that it was only a recommendation and is not binding on the Disciplinary Hearing Panel or the Supreme Court of Missouri. Informant and Respondent also agreed to be bound to the joint recommended discipline for presentation of that stipulated discipline before either the Disciplinary Hearing Panel or this Court if case was briefed and argued. The Disciplinary Hearing Panel accepted the sanction recommended by the parties in the stipulation and recommended that Respondent be suspended indefinitely with no leave to apply for reinstatement for two (2) years. **App. A3.**

In determining the appropriate sanction for attorney misconduct, this Court relies on several sources. First and foremost, the Court applies its own standards to maintain consistency and fairness and, ultimately, to accomplish the overriding goal of protecting the public and maintaining the integrity of the legal profession. *In re Kazanas*, 96 S.W.3d

803, 807 (Mo. banc 2003). When determining an appropriate sanction, the Court's opinions in attorney discipline cases are always the first source for analysis.

The Court also looks to the *ABA Standards for Imposing Lawyer Sanctions* (1986 ed., as amended 1992) (hereinafter "*ABA Standards*") for guidance when imposing discipline but considers the *ABA Standards* advisory. See *In re Ehler*, 319 S.W.3d 442, 451 (Mo. banc 2010). The Court considers aggravating and mitigation circumstances. *Kazanas*, 96 S.W.3d 808

The Court considers as advisory the Disciplinary Hearing Panel's findings of fact, conclusions of law, and recommendation of sanction. *Ehler*, 319 S.W.3d 448. In this instance, the Panel recommended that Respondent be indefinitely suspended with leave to apply for reinstatement after two (2) years.

Pursuant to Missouri case law and the *ABA Standards*, suspension is warranted in this case. Respondent violated multiple Rules of Professional Conduct. He violated Rule 4-1.3 on diligence by failing to complete the Scott Weber Estate in a timely manner. He violated Rule 4-1.1 on competence by mismanaging the Scott Weber Estate and the Carl and Geraldine Weber Revocable Trusts, resulting in civil judgments against him of \$50,195.95 and \$224,734, respectively. Likewise, those same civil judgments show Respondent failed to safekeep client property, in violation of Rule 4-1.15, because he failed to properly account to the court for all of the inventoried assets.

A. Case Law

This Court's prior opinions support the imposition of an indefinite suspension in this case. In *In re Belz*, 258 S.W.3d 38, 40 - 41 (Mo. banc 2008), the respondent was

sanctioned for violation of Rules 4-1.15 and 4-8.4(c) after he became the successor trustee of trusts drafted by him for clients. Rule 4-1.1 was not charged. In the course of his service as trustee Mr. Belz made unauthorized withdrawals from his client's trust account and he paid for his mortgage and other personal obligations with that money. *Id.* at 40. Mr. Belz later repaid the misappropriated monies in restitution while at the same time self-reporting his conduct to the OCDC. *Id.* The Court gave Mr. Belz an indefinite suspension with leave to apply for reinstatement after three years, noting this was a misappropriation case and would have been disbarable except for mitigation evidence of mental health problems suffered by the respondent. *Id.* at 47. Mr. Belz had no prior disciplinary history and a distinguished career as a lawyer prior to his misappropriation. *Id.* at 46.

Unlike *Belz*, this is not a misappropriation case; rather, it is a competence case involving Respondent's handling of the Scott Weber Estate and the Carl and Geraldine Weber Trusts. The liability adjudged to Respondent, however, over \$274,000 (\$50,195 plus \$224,734), is larger than the *Belz* misappropriation. In addition, restitution was paid in *Belz* while, in this case, the Scott Weber Estate civil judgment has been partially satisfied in the amount of \$10,324.23, and the Weber Trusts judgment remains wholly outstanding. Like *Belz*, Respondent has no prior disciplinary history. Given the lack of a misappropriation finding, a two year suspension rather than the three years in *Belz* is appropriate, notwithstanding the larger sum the courts found were not properly accounted for.

In *Crews* the respondent failed to competently and diligently represent a client by failing to timely process a case, such that there were dismissals at the trial and appellate

levels because of ineffective and untimely filings. *Crews*, 159 S.W.3d at 359. Mr. Crews previously had practiced law for thirty-nine (39) years with only one (1) minor disciplinary action. *Id.* at 361. Mr. Crews was suspended indefinitely with leave to apply for reinstatement after one (1) year. *Id.*

Like *Crews*, Respondent committed Rule 4-1.1 violations in the handling of client matters. Before this case, Respondent had no disciplinary history. Unlike *Crews*, Respondent has been found to be liable for a large sum because of his failure to properly account for client assets. That injury or potential injury warrants a lengthier sanction, two (2) years instead of the one (1) year in *Crews*.

In *Snyder*, the Respondent was sanctioned for violation of Rule 4-1.1, among other violations, because he failed to adequately represent a client in a bankruptcy proceeding, incurring unnecessary charges and making frivolous appeals. *Snyder*, 35 S.W.3d at 384. His failure resulted in bankruptcy sanctions against him and his client, and further depleted his client's bankruptcy estate. *Id.* Mr. Snyder had practiced law for twenty-five years without prior disciplinary action. *Id.* at 385. He was suspended indefinitely with leave to apply for reinstatement after six (6) months. *Id.*

Like *Snyder*, Respondent has no prior disciplinary history. Unlike *Snyder*, there are judgments against Respondent of over \$274,000. Respondent's failure to properly account for a large amount of assets warrants a longer suspension, two (2) years as opposed to six (6) months.

In *Charron*, the respondent served as personal representative of a deceased client's estate and also as trustee of that client's trust. *Charron*, 918 S.W.2d at 259 – 60. In the

course of serving in those roles, Mr. Charron depleted the estate and trust assets. *Id.* He also failed to file annual settlements, failed to follow proper procedures to obtain the re-payment of a loan he had made to his deceased client, and failed to seek court approval before paying himself attorney fees. *Id.* The Court determined that Mr. Charron actually was owed the money that he had taken in re-payment of the loan and noted that factor in mitigation. *Id.* at 262. The Court found that Mr. Charron's taking of attorneys' fees without court authorization was a violation of Rule 4-1.1, among other rule violations. *Id.* at 261. The respondent received an indefinite suspension with leave to apply for reinstatement after one (1) year. *Id.* at 262.

Like *Charron*, Respondent in this case appears to have mismanaged his estate and trust responsibilities, resulting in judgments against him of over \$274,000. The judgments remain outstanding. A two year suspension, rather than the one year suspension of *Charron*, is appropriate. Case law suggests the stipulated sanction of an indefinite suspension with leave to apply for reinstatement after two (2) years in this case is within the range of discipline imposed by this Court in previous cases.

ABA Standards

Besides case law, for discipline and sanction analysis, this Court often looks to the *ABA Standards for Imposing Lawyer Sanctions* (1986 ed., as amended 1992) (hereinafter "*ABA Standards*") for guidance when imposing lawyer discipline but considers the standards advisory. *In re Ehler*, 319 S.W.3d 442, 451 (Mo. banc 2010). The *ABA Standards* provide a standard for the violation of a particular rule. Section II of the *ABA Standards* states in part:

The Standards do not account for multiple charges of misconduct.

The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it may well be and generally should be greater than the sanction for the most serious violation.

In this case, the evidence shows that the Respondent has violated multiple Rules multiple times. *ABA Standard 3.0* provides:

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

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

The duty violated. Under Section II, The Theoretical Framework, the *ABA Standards* provide that the most important ethical duties are those obligations that an attorney owes the client. Respondent violated multiple ethical duties to his client: competence, diligence, and safeguarding client funds. Most significantly, however, Respondent failed to safeguard client funds when he failed to provide a full accounting of estate and trust assets.

The sanction standard for violation of Rule 4-1.15 is Sanction Standard 4.1 entitled "Failure to Preserve the Client's Property."

ABA Standard 4.11 states:

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

ABA Standard 4.12 states:

Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property or causes injury or potential injury to a client.

ABA Standard 4.13 states:

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

Mental state. The *ABA Standards* define the mental states used in the *ABA Standards* as follows:

The most culpable mental state is of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct but without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

ABA Standards, Sec. II. Respondent's mental state was that of knowledge. There is no evidence that Respondent had a scheme where he knowingly converted client property as required in Sanction Standard 4.11, although there was client injury due to delay and lack of accounting. Respondent's conduct is more than the negligence of Sanction Standard 4.13 because he represented the Scott Weber Estate, and the Carl and Geraldine Weber Trusts, for long periods of time without taking appropriate action. He received numerous notices from the courts to take action, as shown by the docket sheets in the respective cases. He had an opportunity to litigate his conduct as personal representative and trustee, but he chose not to do so. Respondent knew or should have known he was inappropriately handling the Scott Weber Estate and the Carl and Geraldine Weber Trusts. The applicable sanction standard for Respondent's misconduct is 4.12, suspension.

Injury or potential injury caused by Respondent's misconduct. There was delay, incompetence, and a failure to account for estate and trust assets; thus, there was injury or potential injury. There were judgments against Respondent for his acts. The base sanction under the *ABA Standards* is suspension.

Aggravating and mitigating factors. Once a base sanction has been established, in this case suspension, this Court has stated it is appropriate to consider any mitigating and aggravating factors in *ABA Standards* 9.22 and 9.32. *In re Ehler*, 319 S.W.3d at 451. Certain aggravating and mitigating factor are applicable in this case. "Aggravation or aggravating circumstances are any considerations, or factors that may justify an increase in the degree of discipline to be imposed." *ABA Standard* 9.21. In the case at bar, aggravating factors include a pattern of misconduct (*ABA Standard* 9.22 (c)); substantial

experience in the practice of law (*ABA Standard 9.22 (i)*); failure to make restitution (*ABA Standard 9.22 (j)*). Respondent had handled the Scott Weber Estate since 2011 and been involved in the management of the Carl and Geraldine Weber matters for many years, yet the estate has not been resolved and he was found by the Court to have breached fiduciary duties he owed the beneficiaries of both trusts. Respondent has been licensed since 1979, thus having years of experience. He also has outstanding judgments against him involving the Scott Weber Estate and the Carl and Geraldine Weber Trusts of over \$274,000.

“Mitigation or mitigating circumstances are any consideration or factors that may justify a reduction in the degree of discipline to be imposed.” Mitigating factors from 9.32 are the absence of a prior disciplinary history (*ABA Standard 9.32 (a)*), full and free disclosure to the OCDC and a cooperative attitude toward the proceedings (*ABA Standard 9.32 (e)*), and evidence of good character and reputation in the community (*ABA Standard 9.32 (g)*). The parties stipulated that the above listed aggravating and mitigating factors applied but, after reviewing those factors, believe the aggravating and mitigating factors offset each other and do not change the base sanction of suspension.

The parties stipulated that the appropriate discipline for Respondent is an indefinite suspension with leave to apply for reinstatement after two (2) years. The Disciplinary Hearing Panel agreed with the discipline recommended by the parties. Informant continues to believe that, given the totality of the record, an indefinite suspension with leave to apply for reinstatement after two (2) years is the appropriate sanction.

CONCLUSION

WHEREFORE, the Chief Disciplinary Counsel requests this Court to enter an order finding that Respondent violated Rules 4-1.1, 4-1.3, and 4-1.15, and suspending Respondent's license indefinitely with leave to apply for reinstatement after two (2) years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Informant's Brief has been sent via the Court's electronic filing system on this 6th day of September, 2019 to:

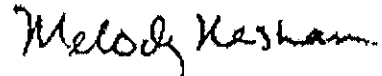
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CERTIFICATE OF COMPLIANCE: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;
2. Was served on Respondent via the Missouri electronic filing system pursuant to Rule 103.08;
3. Complies with the limitations contained in Rule 84.06(b);
4. Contains 6864 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Melody Nashan, Staff Counsel