

IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:)	
)	
JOHN KEVIN SHEEHAN)	Supreme Court #SC98027
104 117 N. Kirkwood Road)	
St. Louis, MO 63122-4326)	
)	
Missouri Bar No. 29928)	
)	
Respondent.)	

RESPONDENT’S BRIEF

Respectfully submitted,

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Rule 4-1.3.....5, 7, 12
Rule 4-1.15.....5, 7, 8, 9, 12
Rule 4-8.4(c).....5, 7, 8, 10, 11

STATEMENT OF JURISDICTION

Respondent adopts and accepts Informant's Statement of Jurisdiction.

STATEMENT OF FACTS

Procedural History

Respondent adopts and accepts Informant's Procedural History section of its Statement of Facts.

Facts Underlying Disciplinary Case

Respondent adopts and accepts the Informant's Facts Underlying Disciplinary Case.

The Parties' Stipulation

Respondent adopts and accepts the Informant's statement concerning The Parties' Stipulation.

The Disciplinary Hearing Panel's Decision

Respondent adopts and accepts the Informant's statement concerning the Disciplinary Hearing Panel's Decision.

Aggravating and Mitigating Factors

Respondent adopts and accepts the Informant's statement concerning Aggravating and Mitigating Factors. Respondent adds that Respondent has made some restitution in that Respondent paid \$10,324.23 in response to a garnishment in Cause No.: 16SL-PR00888. **Rec. 159-60** (Tr. 66-68).

The Disciplinary Hearing Panel's Recommendation

Respondent adopts and accepts the Informant's statement concerning the Disciplinary Hearing Panel's Recommendation.

POINTS RELIED ON

I.

FOR THE REASONS SET FORTH IN INFORMANT'S FIRST POINT RELIED ON, THE COURT SHOULD DISCIPLINE RESPONDENT'S LAW LICENSE FOR VIOLATIONS OF RULES 4-1.1, 4-1.3, AND 4-1.15; HOWEVER, THE COURT SHOULD NOT DISCIPLINE RESPONDENT'S LICENSE FOR A VIOLATION OF RULE 4-8.4(c) BECAUSE (1) THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THAT VIOLATION, IN THAT THE PROBATE COURT FOUND THAT RESPONDENT FAILED TO ACCOUNT FOR EXPENDITURES, NOT THAT RESPONDENT COMMITTED DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION IN PAYING HIMSELF ATTORNEY'S FEES NOT APPROVED BY THE COURT; (2) SINCE THE RULE 4-8.4(c) ALLEGATION WAS DISMISSED PRIOR TO THE HEARING BEFORE THE DISCIPLINARY HEARING PANEL (DHP), THE PARTIES DID NOT PRESENT EVIDENCE AS TO A RULE 4-8.4 (c) VIOLATION; AND (3) THE EVIDENCE ADDUCED AT THE DHP HEARING WAS INCONCLUSIVE AS TO A RULE 4-8.4(c) VIOLATION.

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

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

POINTS RELIED ON

II.

THE COURT SHOULD ENTER AN ORDER INDEFINITELY SUSPENDING RESPONDENT'S LAW LICENSE WITH NO LEAVE TO REAPPLY FOR TWO YEARS BECAUSE SUCH DISCIPLINE IS CONSISTENT WITH THIS COURT'S PRIOR RULINGS AND THE A.B.A STANDARDS FOR IMPOSING LAWYER SANCTIONS.

ARGUMENT

I.

FOR THE REASONS SET FORTH IN INFORMANT'S FIRST POINT RELIED ON, THE COURT SHOULD DISCIPLINE RESPONDENT'S LAW LICENSE FOR VIOLATIONS OF RULES 4-1.1, 4-1.3, AND 4-1.15; HOWEVER, THE COURT SHOULD NOT DISCIPLINE RESPONDENT'S LICENSE FOR A VIOLATION OF RULE 4-8.4(c) BECAUSE (1) THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THAT VIOLATION, IN THAT THE PROBATE COURT FOUND THAT RESPONDENT FAILED TO ACCOUNT FOR EXPENDITURES, NOT THAT RESPONDENT COMMITTED DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION IN PAYING HIMSELF ATTORNEY'S FEES NOT APPROVED BY THE COURT; (2) SINCE THE RULE 4-8.4(c) ALLEGATION WAS DISMISSED PRIOR TO THE HEARING BEFORE THE DISCIPLINARY HEARING PANEL (DHP), THE PARTIES DID NOT PRESENT EVIDENCE AS TO A RULE 4-8.4 (c) VIOLATION; AND (3) THE EVIDENCE ADDUCED AT THE DHP HEARING WAS INCONCLUSIVE AS TO A RULE 4-8.4(c) VIOLATION.

The parties presented the DHP with a Joint Stipulation of Facts, Conclusions of Law, Recommended Discipline and Analysis in Support of the Stipulation (the Stipulation). The Stipulation included the parties' agreement that Respondent violated Rules 4-1.1, 4-1.3, and 4-1.15. But, as Informant noted in its brief, the

parties also specifically stipulated that there was insufficient evidence to find Respondent engaged in conduct involving dishonesty, fraud, deceit and misrepresentation in the Scott Weber Estate. **App. A12, A16** (Stip. ¶¶ 33, 48)¹. In accordance with that stipulation, Informant dismissed the alleged violation of Rule 4-8.4(c) in Count I of the Information.

The stipulation and dismissal were consistent with the probate court's finding that Respondent, "failed to properly account to this court for all assets inventoried in the estate" and charging Respondent with an amount for, "unaccounted for or unauthorized expenditures." **App. A48** (Stip. Ex. 5 (incorporated into DHP decision)). The probate court stopped short of finding dishonesty, fraud, deceit and misrepresentation. **App. A48** (Stip. Ex. 5 (incorporated into DHP decision)). And, the probate court did not mention, much less hold, that Respondent paid himself attorney's fees without court approval. **App. A48** (Stip. Ex. 5 (incorporated into DHP decision)).

Based on the Stipulation and dismissal, the parties did not adduce evidence related to Rule 4-8.4(c) at the DHP hearing. It was unnecessary to do so as that issue was no longer in the case.

At the hearing, however, the Presiding Officer questioned Respondent about attorneys' fees he paid himself in the Scott Weber Estate. **Rec. 116-19** (Tr. 24-27).

¹ For consistency, citations to the record in this brief follow the format provided in fn.1 of Informant's Brief.

Respondent acknowledged that he paid himself fees, but he did not know the total amount paid. **Rec. 116-19** (Tr. 24-27). Respondent testified that the amount was “probably” over the statutory allowance. **Rec. 116** (Tr. 24). And he stated that the Webers had not consented to payment of fees over the statutory allowance. **Rec. 116-17** (Tr. 24-25). Respondent did not know how much of the Judgment, if any, was for attorneys’ fees paid to himself. **Rec. 117** (Tr. 25).

After the above testimony was adduced, the Presiding Officer² made the following comments, “[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), and, “[B]ecause to me, as a probate attorney, when you pay yourself an excessive fee without the consent of the legatees or the heirs, you have misappropriated funds from the estate. That’s like stealing money.” **Rec. 126** (Tr. 34) (emphasis added) Based on applicable and relevant authority, however, Respondent respectfully disagrees with the Presiding Officer’s conclusions.

For example, in the matter of *In re Gardner*, 565 S.W.3d 670, 676-677 (Mo. 2019), this Court determined that the respondent violated Rule 4-1.15 by failing to safekeep client property when he withdrew money for personal representative fees without court authorization. And in the case of *In re Charron*, 918 S.W.2d 257, 261

² Respondent and his attorney want to make it clear to the Court that they have the highest personal and professional respect for the Presiding Officer and the other members of the DHP.

(Mo. 1996), this Court held that respondent's payment to himself for attorneys' fees above the statutory allowance without probate court approval was a violation of Rule 4-1.5 for taking an unreasonable fee.

In neither case did the Court find that the payment of attorneys' fees without consent of the legatees, heirs and/or probate court was a violation of Rule 4-8.4(c). For this reason, the holding in *In re Gardner*, 565 S.W.3d at 676-677, directs the outcome in this matter because the evidence before the DHP supports a finding of misappropriation under Rule 4-1.15 (d).³ The Presiding Officer appears to agree: “[y]ou have misappropriated funds from the estate.” There was no evidence adduced which supports the conclusion that Respondent was stealing.

Despite the lack of evidence, the DHP held that, “sufficient evidence exists to find that 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** But, the “sufficient evidence” is not identified by the DHP. For this reason, the Court and the Respondent can only speculate as to what evidence the DHP relied on. As the Informant notes in its brief, the DHP made its finding despite Informant's dismissal

³ There is no evidence that Respondent paid himself more in fees than what he earned. To the contrary, there was instead ample evidence that the Scott Weber Estate involved a great deal of work because of claims against the estate and the fact that Scott had not paid income tax for several years before he died. **App. A12** (Stip. ¶ 31).

of any alleged Rule 4-8.4(c) violation. And no evidence with regard to the unapproved payment of attorneys' fees was presented because Informant had dismissed the Rule 4-8.4(c) violation.⁴ On this record, there is not sufficient evidence to find a violation of Rule 4-8.4 (c).

II.

THE COURT SHOULD ENTER AN ORDER INDEFINITELY SUSPENDING RESPONDENT'S LAW LICENSE WITH NO LEAVE TO REAPPLY FOR TWO YEARS BECAUSE SUCH DISCIPLINE IS CONSISTENT WITH THIS COURT'S PRIOR RULINGS AND THE A.B.A STANDARDS FOR IMPOSING LAWYER SANCTIONS.

In an effort to save the Court's time, Respondent hereby advises that he accepts Informant's argument in support of Informant's Point Relied On II, and Respondent hereby adopts said argument as and for his argument in support of his Point Relied On II.

⁴ Informant's brief at p. 24, n. 5.

CONCLUSION

For the reasons set forth herein, Respondent prays that the Court enter its Order that Respondent violated Rules 4-1.1, 4-1.3, and 4-1.15, and suspend Respondent’s license to practice law 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 Respondent’s Brief has been sent via the Court’s electronic filing system on this 18th day of October, 2019:

Alan D. Pratzel, Chief Disciplinary Counsel
Melody Nashan, Staff Counsel
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Jefferson City, Missouri 65109
Attorneys for Informant

/s/ Richard C. Wuestling

CERTIFICATE OF COMPLIANCE

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 Informant via the Missouri electronic filing system pursuant to Rule 103:08;
3. Complies with limitation contained in Rule 84.06(b);
4. Contains 1524 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

/s/ Richard C. Wuestling