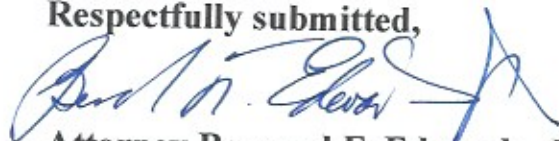


**IN THE SUPREME COURT OF MISSOURI  
EN BANC**

IN RE:	)	
	)	SC98943
JENNIFER H. FISHER	)	
	)	DHP-20-001
P.O.Box 3051	)	
St. Louis, Missouri 63044	)	
	)	
Mo. Bar #34360	)	

**RESPONDENT'S BRIEF**

Respectfully submitted,



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## TABLE OF CONTENTS

Cover Page	1
Table of Contents	2
Table of Authorities	3
Statement of Jurisdiction	4
Statement of Facts	5-6
Points Relied On	7
Arguments	
Point I	8-9
Point II	10-11
Point III	12-14
Conclusion	15
Certificate of Service	16
Certification	17

**TABLE OF AUTHORITIES**

	<b>Page</b>
4th Amendment US Constitution	
<b>Cases</b>	
State of Missouri v. Witherspoon, 460 S.W. 2d. 281 (S.Ct. 1970)	8
State v. Goff, 129 SW3d. 857.865. (Mo banc 2004).	9
In Re: Larry D. Coleman, 295 S.W.3d 857, (2009)	12/13
In Re: Nathan J. Forck, 418 S.W. 3d. 438, (Mo banc. 2014)	14
In Re: Sandford P. Krigel, 48 S.W.3d. 295, (Mo banc. 2016)	12
In Re: Wiles, 107 S.W. 3d 228 (Mo banc. 2003)	12
In Re: Scott Gardner, 565 S.W. 3d. 670 (Mo banc. 2019)	13
In Re: Mark Belz, 258 S.W. 3d 38, (2008)	12
<b>Other Authorities</b>	
OCDC Article March 1, 2018- Chief Deputy Counsel Sam Phillips	8
ABA Standards for Imposing Lawyer Sanctions (1991ed.)	

**All page references are to the Record on Appeal (hereinafter ROA)  
filed by Informant.**

## JURISDICTION

Respondent is satisfied with Informant's statement regarding jurisdiction.

## STATEMENT OF FACTS

This matter originated in June 2019. Respondent was the victim of a fraudulent transaction that occurred on Respondent's trust account through no fault of her own. ROA pg. 403 and 97. The fraudulent transaction resulted in an overdraft of Respondent's trust account in the amount of \$5.15. ROA 97 and 158. Informant and Respondent were notified by Respondent's bank of the overdraft. ROA 70. Informant requested an explanation from Respondent as to the reason for the overdraft. ROA page 119. Respondent advised Informant that she was the victim of a fraudulent transaction and provided supporting documentation, including a police report as to the fraud. ROA 403. There were no client or other complaints or returned checks as a result the overdraft. ROA 69.

In spite of the uncontroverted evidence that Respondent was the victim of fraud, Informant proceeded with an audit of Respondent's trust account for a period of one year prior. ROA 71.

Various violations were discovered as a result of the one-year audit. Respondent made no excuses for her conduct, however, through her testimony various explanations for the violations were offered which are more fully set out herein.

The parties Stipulated as to the Facts in this case. ROA pg. 402-406.

### Prior Disciplinary History

Respondent had prior admonitions regarding her trust account, the oldest being twenty-three (23) years prior and the most recent seven (7) years prior. None of those prior admonitions involved dishonesty or selfish motive. ROA pg. 231-238

## AGGRAVATING AND MITIGATING FACTORS

The Disciplinary Hearing Panel found no aggravating factors and that there were no complaints made against Respondent by any of the clients set out in the Information. ROA 465-478. In addition, they unanimously determined that Respondent (1) lacked a

selfish or dishonest motive, (2) made an effort to rectify her errors without involvement or complaint from any outside party (3) displayed remorse and (4) found the likelihood of any recurrence of the conduct remote. App Page 472-473. They also received evidence that during the period in question Respondent had six jobs which included four municipal courts, a consulting business and a private law practice; that Respondent was providing care for two family members, one with Alzheimer's and another with mental health issues; Respondent was volunteering with professional and civic organizations; all while dealing with her own undiagnosed brain tumor and multiple nerve impingements which caused her to be in almost constant pain. ROA 154-155 and ROA 414.

The panel, in their unanimous decision, determined that while the conduct in question might typically be grounds for more severe discipline, the facts and circumstances in the instant matter warranted a downward departure from the recommended discipline and that probation was more appropriate. App 472-473 Respondent accepted the recommendation of the DHP, Informant rejected the recommendation and filed this appeal. ROA 493, 494.

## POINTS RELIED ON

### I

#### **INFORMANT LACKED PROBABLE CAUSE FOR AN AUDIT**

4th Amendment US Constitution

State of Missouri v. Witherspoon, 460 S.W. 2d. 281 (S.Ct. 1970)

State v. Goff, 129 SW3d. 857.865. (Mo banc 2004).

Missouri Supreme Court Rules 5.11 and 5.12

OCDC Article March 1, 2018 authored by Chief Deputy Counsel Sam Phillips

### II

#### **RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE SHE ENGAGED IN PROFESSIONAL MISCONDUCT IN VIOLATION OF RULE 4**

Joint Stipulation of Facts-Record on Appeal Pages 402-406

### III

#### **APPROPRIATE SANCTION FOR RESPONDENT'S MISCONDUCT**

In Re: Larry D. Coleman, 295 S.W.3d 857, (2009)

In Re: Nathan J. Forck, 418 S.W. 3d. 438, (Mo banc. 2014)

In Re: Sandford P. Krigel, 48 S.W.3d. 295, (Mo banc. 2016)

In Re: Wiles, 107 S.W. 3d 228 (Mo banc. 2003)

## ARGUMENT

### I.

#### INFORMANT LACKED PROBABLE CAUSE FOR AN AUDIT

The 4<sup>th</sup> Amendment to the United States Constitution provides “The right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures, shall not be violated”. State of Missouri v. Witherspoon, 460 S.W. 2d. 281 (S.Ct. 1970). While this right is typically utilized in criminal cases, it is applicable in the instant case. Witherspoon involved a Motion to Suppress as there was no probable cause for search and seizure. Witherspoon at 281. This court held that the facts can only justify the conclusion that the officer embarked on an exploratory search, without any justification shown in the record that he had reasonable or probable cause and, therefore, the Motion to Suppress was granted. Witherspoon at 287.

In the instant case, the explanation and proof provided was uncontroverted. ROA 466. Respondent was the victim of a crime in that a fraudulent check was presented on her trust account. ROA 97 and 403. The Office of Chief Disciplinary Counsel, hereinafter, OCDC sets forth its policy for investigating cases involving an overdraft of an attorney’s trust account in an article written by Chief Deputy Counsel Sam Phillips and published March 1, 2018. App page 454. In an example on page 457 he states “when OCDC asked Attorney Doe to explain the overdraft, his response was not sufficient, so OCDC investigated further.” If the explanation had been sufficient, no further investigation would be warranted. Being the victim of a fraudulent act should have been a sufficient explanation and, as is the case with other attorneys, the case should have been closed without further investigation.

Instead, the auditor investigated further based upon a “hunch or fishing expedition” as she was aware Respondent had prior bookkeeping errors and had been



admonished in the past. ROA 71-73 and 111. Ms. Dillon the auditor from OCDC indicated she would not have investigated this case but for the previous admonitions. ROA 97. This court held in Goff that an officer must have more than a hunch to proceed with an unjustified intrusion. State v. Goff, 129 SW3d. 857.865. (Mo banc 2004). In addition, prior bad acts do not support probable cause for an investigation. Goff at 865. The investigation was unjustified, and any evidence obtained thereafter was fruit from the poisonous tree. Goff at 865.

When you become a lawyer, you are held to a higher standard, but you do not give up your Constitutionally protects rights. In the instant case, there were no client complaints or any complaints by anyone against the Respondent. ROA 69. She was a victim of fraud which caused her trust account to be overdrawn. ROA 73. Once Respondent provided evidence of what had occurred, the matter should have been closed as there was no probable cause to proceed further with the investigation.

## II

### RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE SHE ENGAGED IN PROFESSIONAL MISCONDUCT IN VIOLATION OF RULE 4

Respondent concedes by way of the Stipulation of Facts that she violated the Professional Rules of Conduct. ROA 402-406. While the Disciplinary Hearing Panel found evidence of misconduct, they were also persuaded by the testimony in the case. Both the DHP and OCDC concluded that none of the acts in question involved dishonesty, fraud, deceit or misrepresentation. ROA 472-473 and 187-188.

- a. Piolet-balance fell below amount that should have been in account June 29<sup>th</sup> and funds deposited to correct mistake July 5<sup>th</sup>. ROA 142.
- b. Hudson-balance fell below amount that should have been in account. All monies due client were paid in full. ROA 157.
- c. Collins-This case pre-dated audit and information requested, yet Informant alleges balance fell below amount for medical provider. ROA 89.
- d. Respondent received cash back from a deposit on two occasions, however, they were earned fees. ROA 164.
- e. Mingo-Respondent refunded money not held in trust account. Respondent performed work exceeding the amount deposited by client. Respondent reduced time for court appearance from 4.0 hours to 2.5 gratuitously and refunded client \$300.00. ROA 146-147.
- f. Seals-Settlement was transferred to Respondent's account and Respondent paid cash to client as client did not have a driver's license or bank account to cash check. ROA 155-157.
- g. Hudson-advance money to client to bury family member. Case had been settled,

- releases signed and check just had not been received. ROA 157.
- h. Jefferson-Respondent refunded money to client that had already been earned in full. Respondent had worked on case for several months prior to requesting any retainer and an additional five months after receiving retainer but refunded client 100% of the retainer. Should have been paid from general account. ROA 147-149.
  - i. Hinton, Watson, Mayes Piolet, Seals, Hudson all not “good funds”. All were personal injury cases. All had releases signed by clients and submitted to insurance companies. Respondent has spoken with her bank and been assured ten days was not necessary. Also, best practices indicates that attorney should contact their bank and determine when funds are considered “good funds”. There were no problems with the checks being paid. ROA 176-77.
  - j. Respondent mistakenly gifted her brother from money inadvertently deposited into trust account. ROA 166.
  - k. It is uncontroverted that not one of these clients or any other person submitted a complaint in any of these matters and all clients were paid all monies due them even though Respondent mistakenly wrote duplicate checks. ROA 145.

Respondent admitted that problems occurred during a time she was overextended professionally, personally and experiencing health problems. 161-164. As she identified the mistakes she was making, which included writing duplicate checks, she attempted to rectify the situation by purchasing a new accounting system, hiring a personal bookkeeper and CPA. ROA 166-167. In addition, she is in better health, has reduced her workload and attended a continuing education class regarding trust account record keeping. ROA 166-69 and 181 (Exhibit M-Medical Records).

### III

## SUSPENSION IS NOT THE APPROPRIATE SANCTION FOR RESPONDENT'S MISCONDUCT

### **Purpose of Disciplinary Rules**

When determining the appropriate sanction for attorney misconduct, this Court relies on its own decisions, disciplinary rules, ABA Standards and accepts the decision of the Disciplinary Hearing Panel as advisory. In Re Larry D. Coleman, 295 S.W.2d 857, (2009).

The fundamental purpose of an attorney disciplinary proceeding is not punitive but rather to protect the public and maintain the integrity of the legal profession. Coleman at 858.

### **Imposition of Discipline**

While disbarment is often the sanction in cases involving misappropriation, this court has held that mitigating factors are always considered in determining the correct sanction and that even in misappropriation cases, mitigating factors may warrant a sanction other than disbarment. In Re Mark Belz, 258 S.W. 3d. 38, (2008). Section 9.3 ABA Standards for Imposing Lawyer Sanctions. This court held in In Re Krigel, 48 S.W. 3d. 294 (2016) that disbarment is reserved for clear cases of gross misconduct and those in which the attorney is demonstrably unfit to continue in the profession. Krigel at 295.

In Belz the DHP concluded that the attorney was guilty of dishonesty, deceit and misrepresentation as well as conduct that was prejudicial to the administration of justice. Belz at 39. In Krigel the court found there was evidence of intentional acts involving misinformation to the court. Krigel at 295. In spite of those findings this court considered numerous mitigating factors in determining the appropriate sanction. Krigel at 295; Belz at 39.

## RESPONDENT'S MITIGATING CIRCUMSTANCES

In the instant case, there was no probable cause for an investigation after Informant provided proof that Respondent was the victim of a crime in which a fraudulent check was submitted to her trust account. See Point 1.

OCDC Counsel, OCDC Auditor Ms. Dillon and DHP all concluded that Respondent lacked dishonest or selfish motive in this case. ROA 187-188; 472.

There was no actual client harm in that all parties were paid in full, and no complaints were filed by any party. ROA 96 In Re Scott Gardner, 565 S.W.3d. 670, (2109) this court found that while the attorney's conduct would merit suspension, as there was actual harm to any client, no selfish or dishonest motive, the attorney was remorseful and of good character the sanction was stayed suspension with one year probation. Gardner at 672.

In the Coleman case the attorney had been previously admonished and publicly reprimanded with a total of 8 violations and 5 new violations that resulted in client harm. Coleman at 857. Attorney Coleman received one year probation as the court found that he was unlikely to harm the public in the further and could be adequately supervised.

In Re Wiles, 107 S.W.3d 228, (Mo banc. 2003), the attorney had been admonished at least 11 times over a three-year period for violations. In addition, the attorney had two prior admonitions in the State of Kansas. Wiles at 228.

It is also uncontroverted that Respondent, immediately upon recognizing her mistakes corrected them independently and not as a result of any complaint or requirement by anyone. Respondent not only expressed remorse, but again, it is uncontroverted that she cooperated fully with the investigation and admitted her mistakes. ROA 473.

Respondent is known to be of excellent character in the community and outside of these transgressions had been found to be of excellent character and reputation. ROA 414-415.

In addition, during the period in question, Respondent was facing numerous personal challenges, including working six jobs, actively participating in professional and civic matters, taking care of two family members one with early-stage Alzheimer's and the other mental health issues all while living in constant and often debilitating pain as a result of two undiagnosed medical conditions. ROA 154-155 and 165. Respondent's medical conditions resulted in sleep deprivation, debilitating headaches and pain and several visits to a trauma center before she finally received a diagnosis and appropriate treatment. ROA 161-162 also see Medical Records Exhibit M).

Finally, this is clearly a case where, if the court deems it necessary, Respondent's behavior can be modified with probation and monitoring as recommended by the DHP. In Re Nathan J. Forck, 418 S.W.3d 438, (2014), the attorney was on probation when he committed numerous other violations. Forck at 439. Within two years of his probation, four more client complaints were filed against him against him for a total of 5 new violations. His probation was extended for an additional two years. Forck at 442. This court found that it must take into account the nature and circumstances of the attorney's misconduct, his or her history, character and health status when placing them on probation. Forck at 443. Certainly, in the instant case, probation is the most appropriate sanction.

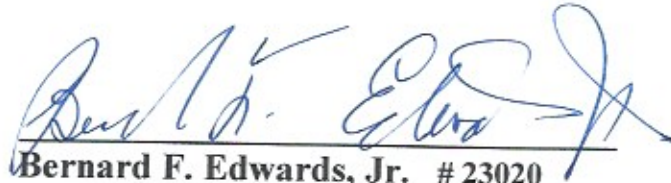
## CONCLUSION

This case should have been closed immediately upon the production of evidence to show that the reason for Respondent's overdraft of her trust account was the result of her being a victim of fraud. There was no probable cause to proceed with an audit. It is clear that this is not the first time Respondent has been treated differently from her colleagues when it comes to a review by OCDC. Respondent cooperated fully with the investigation in spite of her concern that she was receiving disparate treatment by the OCDC. As a result, this case should be dismissed without any attorney discipline.

Informant alleges the integrity of the profession has been impugned by Respondent's conduct. While we do not seek to diminish the seriousness of the offenses, taken in light of all factors, this is a case where the integrity of the profession can be maintained by placing Respondent on probation with monitoring to ensure that the conduct does in fact does not occur in the future.

## CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April 2021, a copy of Respondent's Brief is being served upon Informants' Counsel through the electronic filing system pursuant to Rule 103.08: Ms. Cheryl D. Walker, Attorney for Informant, 3933 Blaine, St. Louis, Missouri 63110.

  
**Bernard F. Edwards, Jr. # 23020**  
**Attorney for Respondent**

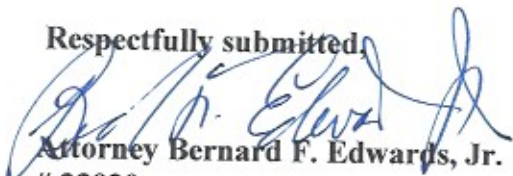


## CERTIFICATION

1. This appellate brief includes all information required by Rule 55.03.
2. This brief was served on Informant pursuant S. Ct. Rule 103.08 on this 12th day of April 2021.
3. This brief complies with the limitations contained in Rule 84.06.
4. That this brief complies with the word limitations contained in Rule 84.0 in that it contains a total of 2,889 words.

I, Bernard F. Edwards, Jr. hereby state that the above information is true, correct and complete, under the pain and penalty of perjury.

Respectfully submitted,



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