Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
KIMBERLY TYLER	)	**Supreme Court No. SC99622**
1 Pointview Drive	)	
Bonne Terre, MO 63628-1355	)	
	)	
Missouri Bar No. 38603	)	
	)	
Respondent.	)	

INFORMANT'S BRIEF

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel

Carolyn Gail Vasterling #38172
Staff Counsel
3327 American Avenue
Jefferson City, MO 65109
(573) 635-7400 - Telephone
(573) 635-2240 - Fax
Email: carolyn.vasterling@courts.mo.gov

ATTORNEY FOR INFORMANT
CHIEF DISCIPLINARY COUNSEL

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

TABLE OF CONTENTS

COVER PAGE 1

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

STATEMENT OF JURISDICTION 5

STATEMENT OF FACTS 6

PROCEDURAL HISTORY 6

BACKGROUND AND DISCIPLINARY HEARING 6

COUNT I (JASON WILLIAMS) 8

COUNT II (AUDIT OF RESPONDENT'S TRUST AND OPERATING ACCOUNT) 9

DISCIPLINARY HEARING PANEL'S DECISION 15

THE DISCIPLINARY HEARING PANEL'S RECOMMENDATION 16

POINTS RELIED ON

I. 18

II. 19

ARGUMENT

I. 20

II. 24

CONCLUSION 31

CERTIFICATE OF SERVICE 32

CERTIFICATION: RULE 84.06(c) 32

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

TABLE OF AUTHORITIES

CASES

In re Crews, 159 S.W. 3d 355 (Mo. banc 2005) 20

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010) 19, 24, 25, 26, 30

In re Farris, 472 S.W.3d 549 (Mo. banc 2015) 18, 19, 20, 25, 26, 30

In re Kayira, No. SC 98531, 2021 WL 97636, at 8 ..... 19, 25, 29

In re Shelhorse, 147 S.W.3d 79 (Mo. banc 2004) 18, 20

In re Storment, 873 S.W.2d 227 (Mo. banc 1994) 24

In re Wiles, 107 S.W.3d 228 (Mo. banc 2003) 24

In the Disciplinary Proceedings Against Hicks, 214 P.3d 897 (Wash. 2009) 27

In the Disciplinary Matter Involving Stepovich. 386 P.3d 1205, 1212 (Alaska 2016) 29

In the Matter of McBride, 865 N.E. 2d 1110 (Mass. 2007) 28

OTHER AUTHORITIES

ABA Standards for Imposing Lawyer Sanctions (1992) 19, 24, 25, 26, 30

ABA Standard 3.0 ..... 24, 26

ABA Standard 4.11 26

ABA Standard 4.12 26

ABA Standard 9.22(a) 29

ABA Standard 9.22(b) 29

ABA Standard 9.22(c) 30

ABA Standard 9.22(d) 30

ABA Standard 9.22(i) 30

ABA Standard 9.32(b) 28

ABA Standard 9.32(c) 27

ABA Standard 9.32(e) 27

ABA Standard 9.32(i) 28

ABA Standard 9.32(l) 27

ABA Standard 9.32(m) 28

Advisory Committee Formal Opinion 128 (Amended October 24, 2018)..... 21

RULES

RULE 4-1.9 ..... 18, 20, 21, 30, 31

RULE 4-1.15 ..... 18, 29, 30

RULE 4-1.15(a) 18, 20, 21, 30, 31

RULE 4-1.15(b) 18, 20, 22, 30, 31

RULE 4-1.15(c) 18, 20, 22, 30, 31

RULE 4-1.15(f) 18, 20, 22, 23, 30, 31

RULE 4-1.15(a)(7) 21, 22

RULE 4-1.16 18

RULE 4-1.16(d) 18, 20, 21, 30, 31

RULE 4-8.4 18

RULE 4-8.4(c) 18, 20, 23, 30, 31

RULE 5.225 ..... 26, 27

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

STATEMENT OF JURISDICTION

This action is one in which Informant, the Chief Disciplinary Counsel, is seeking to discipline an attorney licensed in the State of Missouri for violation of the Missouri Rules of Professional Conduct. Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2016.

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

STATEMENT OF FACTS

PROCEDURAL HISTORY

June 3, 2019	Eckhoff Complaint against Respondent filed
July 31, 2019	Williams Complaint against Respondent filed
September 7, 2021	Information
October 7, 2021	Respondent's Answer
October 14, 2021	Appointment of Disciplinary Hearing Panel ("DHP")
January 19, 2022	Disciplinary Hearing
March 22, 2022	DHP Decision
March 31, 2022	Informant's Rejection of DHP Decision
April 13, 2022	Respondent's Acceptance of DHP Decision

BACKGROUND AND DISCIPLINARY HEARING

Respondent was licensed as an attorney on or about October 14, 1988 and is currently in good standing. Respondent's bar number is 38603. **App. 4, 25.** Other than working for the Public Defender for five years when she first left law school and serving as an appointed Associate Circuit Judge for about two years starting in 1994, she has been in private practice. **App. 96-97.**

Respondent has her own law firm in Bonne Terre, Missouri, with four office staff. **App. 99.** She primarily practices family law and testified she has between 175-200 open files in any six-month period. **App. 98, 100.** She also is appointed in Iron, Washington, and St. Francois counties to represent the parents of children taken into the juvenile

system. She testified she probably has approximately 40 of those cases open at a time. **App. 100, 124.** She also takes on one or two free cases per year. **App. 101.**

During the relevant time herein, Respondent maintained her law firm trust account and operating account at First State Community Bank. The client trust account, Account No. XXXX-6930, is in the name of Kimberly Tyler Trust ("Trust Account") and the law firm operating account, Account No. XXXX-5398, is in the account name of Kimberly Tyler General Account ("Operating Account"). **App. 7, 27.** Respondent had the sole responsibility the for handling of client funds that were given to her in advance of representing a client. **App. 133.**

Respondent has a prior disciplinary history. Specifically, Respondent accepted the following five Letters of Admonition pursuant to Rule 5.11: October 16, 2007 for violation of Rule 4-1.4 (Communication in Case No. 07-50); October 16, 2007 for violation of Rule 4-1.4 (Communication in Case No. 07-545); October 12, 2011 for violation of Rule 4-1.4 (Communication in Case No. 11-45); October 12, 2011 for violation of Rule 4-1.16(d) (Failure to Provide Client File in Case No. 11-0142); and January 12, 2016 for violation of Rule 4-1.3 (Diligence in Case No. 15-10). **App. 162-176.**

Informant filed a two count Information on September 7, 2021. In Count I, Respondent was charged with violating Rule 4-1.9 (Duties to Former Clients). Count II charged Respondent with a Rule 4-1.16(d) violation for using a fee agreement with a non-refundable fee provision, multiple Rule 4-1.15 trust account violations, and a Rule 4-8.4(c) violation for depositing unearned client funds into her Operating Account for her

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

own personal use. **App. 4-13.** Respondent filed her Answer on October 7, 2021. **App. 25-29.**

The disciplinary hearing was heard by a virtual proceeding before a Disciplinary Hearing Panel on January 19, 2022. Informant called Kelly Dillon (Office of Chief Disciplinary Counsel Investigator) as a witness. Respondent was represented by counsel, Martin Buckley, and testified on her own behalf. During the course of the disciplinary hearing, Informant's Exhibits 1-15 were admitted without objection. Respondent introduced no exhibits. **App. 36-110.**

The Disciplinary Hearing Panel issued its decision on March 22, 2022 and recommended that Respondent be placed on stand-alone probation for three years with specified conditions. **App. 317-326.** Informant filed its letter of rejection of the decision with the Advisory Committee on March 31, 2022. **App. 327.** Respondent filed her letter of acceptance with the Advisory Committee on April 13, 2022. **App. 328.**

COUNT I (Jason Williams)

Respondent represented Jason Williams in a 2014 divorce case, 14SF-DR00426, *Jason Williams v. Grace Fey*, that requested sole physical custody of the couple's son, Julius, be awarded to Jason Williams. Jason Williams lived with Respondent's daughter, Katherine Anne Tyler, at the time. Respondent withdrew at the conclusion of the case on January 24, 2017. **App. 227-244.**

On April 15, 2019, Katherine Anne Tyler, as intervenor, filed a Motion to Modify Judgment and Decree of Dissolution of Marriage in case 14SF-DR00426-01, *Jason Williams v. Grace Fey*, claiming that both the father (Jason Williams) and mother were

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

unfit, and requesting the court award her sole legal and physical custody of Julius. The Motion specifically alleged Jason Williams was abusive and neglectful and had undiagnosed mental health issues. **App. 283-292.**

Cira Duffe filed the Motion, as Attorney for Intervenor. **App. 292.** Respondent also entered her appearance as attorney of record for Katherine Anne Tyler, Intervenor, on April 15, 2019. **App. 263.** Respondent testified that she entered so that she could look at the filings that the public could not see and tell her daughter what was going on in the case. She did not prepare any pleadings or argue any motions in the matter. **App. 106.** She testified that she realized what a stupid thing she had done and she withdrew on April 24, 2019. **App. 107, 131-32, 252-53.**

Respondent acknowledged that she had a conflict, that the subsequent litigation in which she entered was substantially related to the dissolution action in which she had represented Mr. Williams, and that he was in a materially adverse position in the subsequent litigation. **App. 131-32.**

COUNT II (Audit of Respondent's Trust and Operating Account)

On February 21, 2019, Linda Eckhoff signed Respondent's Domestic Relations Contract. The Contract required payment of a retainer fee of $2,900 and contained the following language: "THE RETAINER IS NON-REFUNDABLE. Client acknowledges that attorney has foregone representation of the Petitioner/Respondent in this matter in order to represent client. Further, client is guaranteed future access to attorney's representation in this matter." **App. 293-296.** Respondent testified that it was a contract "that we had used, we in this area had used for a long time." **App. 108.** She

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

acknowledged that the language is not proper and is not permissible. **App. 137.** Respondent stated that she did refund the Complainant's, Ms. Eckhoff's, fees and that it was her practice to refund fees even though the non-refundable language was in her contracts. **App. 109-110.** She testified that all of her contracts have been revised since the filing of the Information and they no longer contain this language. **App. 109.**

As part of the investigation, and because of the Respondent's disciplinary history and the non-refundable fee language in Respondent's contract, the Office of Chief Disciplinary Counsel (OCDC) examined Respondent's Trust Account. **App. 51-52.** Kelly Dillon, Investigative Examiner for the OCDC, testified that Respondent produced requested bank records. She also produced a general ledger which Ms. Dillon was not able to reconcile to the account. The reason why the general ledger would not reconcile was because Respondent created the journal for Ms. Dillon's benefit in order to answer her request. **App. 56.** Ms. Dillon described Respondent as generally cooperative in terms of her responses to OCDC requests and stated that Respondent appeared to be remorseful. **App. 57, 84.**

During the audit of Respondent's Trust Account, Ms. Dillon was able to discern the following from Respondent's bank records:

a. Respondent was depositing all flat fees (minimum fees) to her Operating Account, considering them earned upon receipt, thereby commingling. **App. 61.**

b. Respondent admitted that she maintained "roughly" $1,000 of her own funds in trust, thereby commingling. The bank where Respondent

maintains her IOLTA account confirmed that there is no monthly bank service charge, so she would be allowed per the Rule to maintain zero of her own funds in the Trust Account. **App. 61, 83.**

c. Respondent had no process for reconciliation and did not maintain a general ledger or individual client ledgers. **App. 62.**

Due to the deposit of client funds to her Operating Account, Respondent's Operating Account was also reviewed, and records for large deposits were requested. Records for large deposits to the Operating Account for the listed clients revealed the following:

a. Darrin McIntyre/Angela Webb: Respondent's billing statement shows that she received a "minimum flat fee" (also referenced as "initial retainer") on 4/10/19 of $5,000, which was deposited to her Operating Account. **App. 196, 295-296.** Her billing statement indicates work did not begin until 6/16/19. **App. 297-298.** Respondent's Operating Account fell to a balance of $133.80 on 4/17/19, two months before Respondent began work on the McIntyre representation. **App. 7, 27, 198.** Ms. Dillon testified that the funds should have been deposited into trust and disbursed from trust once earned but, even given that they were deposited into operating, they should not have been spent until such time as they were earned. **App. 72.** Respondent's expenditures of this money prior to earning it were for personal expenses, such as dining, ATM withdrawals, taxes, insurance, utilities, and groceries. **App. 72.** In

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

addition, the McIntyre payment of $5,000 was reduced to a deposit of $4,299.85 because Square, a credit card processing company, captured a portion of it for payment on a loan that Respondent received from Square. **App. 73.**

b. Abby Smith: Respondent's billing statement shows that she began work for the client on 1/1/19. Three payments totaling $6,200 were received from the client on 1/31/19 (prior to the beginning date of the audit which was 4/5/19). Respondent's billing records reflect that by the date of the payment, Respondent had earned only $1,215 of that fee. **App. 299-309.** Therefore, the rest of the funds should have been deposited to trust and drawn down as they were earned. **App. 8, 27, 82, 133-135.**

c. Colby Emily: Respondent's billing statement shows that she began work on this case on 7/31/19. **App. 74-75, 310-312.** Respondent received a "flat fee" of $2,900 from the client on 7/17/19, prior to working on the case, which was deposited into her Operating Account. **App. 73-74, 219.** Respondent's Operating Account fell to a balance of $118.50 on 7/26/19. **App. 8, 27, 75, 222.** Respondent's expenditures from the Operating Account for living expenses almost completely depleted the $2,900 within 12 days, predating when Respondent began work on Colby's legal matter. **App. 75.**

d. Gary and Tamtha Sutton: Respondent's billing statement reflects a "minimum flat fee" (aka "initial retainer") of $2,500 received on 6/7/19,

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

which Respondent deposited into her Operating Account. **App. 210, 313-314.** Respondent's billing statement also shows she did not begin work on the matter until 9/16/19. **App. 313-314.** In the meantime, before beginning work on the matter and within 11 days, Respondent had spent down her Operating Account to a balance of $662.83. **App. 8, 27, 39, 213.**

e. Alyssa Bley: Respondent deposited $2,900 from client Alyssa Bley on 5/29/19 into her Operating Account. **App. 208.** On 6/3/19, Respondent's Operating Account balance fell to $119.96. **App. 209.** On 6/25/19, Respondent paid Alyssa Bley $2,500 by check (no. 8091) with a memo "fee refund." **App. 8, 27, 215, 315.** The source of the refund was not Bley's original payment. **App. 78-79, 136.**

Respondent did not dispute the audit findings. She agreed that she commingled funds by placing client fee payments into her Operating Account. **App. 136.** She acknowledged that she misappropriated fees by spending down the fees prior to beginning work. **App. 136.** She offered that the listed clients did not complain about her work or her billing. **App. 118-121.** She testified that none of her clients lost money, although she recognized that this could have happened and "somebody could have really been hurt" and "some people could have lost money." **App. 122-123.**

Respondent testified that she did not understand the correct usage of her Trust Account. **App. 27.** She used it for money coming in, such as filing fees, which would never become her money. **App. 110.** She put client payments, whether paid in advance or

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

after the work was done, in her Operating Account. **App. 111.** With regard to her own funds in the Trust Account, Respondent testified she did not deposit that money into the Trust Account, but left money in the Trust Account if a filing fee ended up being less than what the client paid and the client owed her money. **App. 112.** She stated that she just did not sweep the money from the Trust Account and described these amounts as "dribs and drabs over a decade." **App. 138.**

Respondent testified with regard to remedial steps taken that she had closed her commingled Trust Account immediately after Ms. Dillon advised her to do so. **App. 113.** She now uses LawPay, which allows her to take credit and debit card payments into the new trust account but fees come out of the Operating Account. **App. 113-114.** She still uses Square for monies she has already earned. **App. 114.** She stated that she and her office manager now reconcile the trust account each month and that she now keeps a ledger page on each client. **App. 115.** She did not provide documentation of these statements.

Respondent testified that the last time she produced any documents to Ms. Dillon was in May 2020. **App. 129.** She next heard from the OCDC in September 2021, when she received the Information. **App. 129-130.** She stated that she received no complaints in the interim. **App. 130.**

Respondent described personal issues that she experienced between 2018 through 2020. She stated that her father had a stroke and moved in with her in January 2018. He died in April 2018. **App. 125.** Her daughter gave birth to twins on March 3, 2018 and nearly died. Her daughter had issues with the twins' father, and her daughter and the twins

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

moved in with Respondent in April 2019. **App. 126-127.** She said that these issues took her away from her office and her work. **App. 128-129.** She continues to provide financial support for her daughter and her youngest son, who is a freshman in high school. **App. 128.**

DISCIPLINARY HEARING PANEL'S DECISION

On March 22, 2022, the Hearing Panel issued its decision and concluded that:

- Respondent violated Rule 4-1.9 (Duties to Former Clients) in that she entered her appearance for her daughter in the same or substantially related matter in which her daughter's interests were materially adverse to the interests of Respondent's former client, Jason Williams. **App. 322.**
- Respondent violated Rule 4-1.16(d) (Declining or Terminating Representation) in that she used a fee agreement with a non-refundable fee provision. **App. 322.**
- Respondent violated Rule 4-1.15(a) (Trust Accounts) in that she failed to keep appropriate trust account records, deposited unearned client funds into her Operating Account, and did not regularly reconcile her Trust Account. **App. 322.**
- Respondent violated Rule 4-1.15(b) in that she deposited her own funds into the Trust Account in amounts in excess of that necessary for paying financial institution service charges. **App. 322.**

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

- Respondent violated Rule 4-1.15(c) in that she failed to deposit into the Trust Account legal fees paid in advance, to be withdrawn only as fees are earned. **App. 322.**
- Respondent violated Rule 4-1.15(f) in that she failed to keep or maintain a general ledger and client ledgers sufficient to meet recordkeeping requirements. **App. 323.**
- Respondent engaged in commingling when she deposited unearned client funds into her Operating Account and kept personal funds in her Trust Account. **App. 323.**
- Respondent engaged in misappropriation when she deposited unearned client funds into her Operating Account and made disbursements for personal and operating expenses that caused the balance of the Operating Account to drop below the sum required to satisfy all client trust obligations. **App. 323.**
- Respondent violated Rule 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation) when she deposited unearned client funds into her Operating Account for her own personal use. **App. 323.**

THE DISCIPLINARY HEARING PANEL'S RECOMMENDATION

The Disciplinary Hearing Panel recommended that Respondent be placed on stand-alone probation for three years with conditions. **App. 323.** The recommendation was based upon "consideration of the facts, ABA Standards for Imposing Lawyer Discipline, and mitigating factors." **App. 323.** The recommendation set forth the

following factors that led to the Panel's decision to recommend probation in lieu of a harsher penalty:

a. Respondent's actions which produced the improprieties caused no harm to clients;

b. Respondent took full responsibility for these actions and behaviors; and

c. Respondent's demeanor at the hearing was respectful and she did not seek to justify her actions or avoid any of the implications. **App. 325.**

On March 31, 2022, Informant rejected the decision. **App. 327.** On April 13, 2022, Respondent accepted the decision. **App. 328.**

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

POINTS RELIED ON

I.

RESPONDENT VIOLATED RULES 4-1.9, 4-1.16(d), 4-1.15(a), (b), (c) and (f), and 4-8.4(c) AS ALLEGED IN THE TWO COUNTS OF THE INFORMATION.

In re Shelhorse, 147 S.W.3d 79 (Mo. banc 2004)

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

Rule 4-1.9

Rule 4-1.15

Rule 4-1.16

Rule 4-8.4

POINTS RELIED ON

II.

UPON CONSIDERATION OF THIS COURT'S DECISIONS IN PREVIOUS ATTORNEY DISCIPLINE CASES AND THE ABA SANCTION GUIDELINES, RESPONDENT SHOULD BE SUSPENDED.

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

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

In Re Kayira, 614 S.W.3d 530 (Mo. banc 2021)

ABA Standards for Imposing Lawyer Sanctions (1992)

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

ARGUMENT

I.

RESPONDENT VIOLATED RULES 4-1.9, 4-1.16(d), 4-1.15(a), (b), (c) and (f), and 4-8.4(c) AS ALLEGED IN THE TWO COUNTS OF THE INFORMATION.

Standard of Review

Professional misconduct is established by a preponderance of the evidence. *In re Crews*, 159 S.W. 3d 355, 358 (Mo. banc 2005). This Court reviews the evidence *de novo*, independently determining all issues pertaining to the credibility of witnesses and the weight of the evidence and reaches its own conclusion of law. *Id.* In matters of attorney discipline, the disciplinary panel's decision is advisory. *In re Farris*, 472 S.W.3d 549, 557 (Mo. banc 2015).

An attorney must comply with the Rules of Professional Conduct as set forth in Supreme Court Rule 4 as a condition of retaining his license. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004). Violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *Id.*

A. Violation of Rule 4-1.9

Rule 4-1.9 prohibits a lawyer who has formerly represented a client in a matter to thereafter represent another person in the same or substantially related matter in which the person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. Respondent entered her appearance for her daughter in a case in which her daughter was attempting to obtain

custody of a child whose custodial father Respondent had represented in his original divorce and custody proceeding. Even though she offered that she did not prepare any motions or file any pleadings in the case, Respondent admitted that she violated Rule 4-1.9 in that she had a conflict, the subsequent litigation in which she entered her appearance for her daughter was substantially related to the dissolution action in which she had represented Mr. Williams, and Mr. Williams was in a materially adverse position in the subsequent litigation.

Violation of Rule 4-1.16(d)

Rule 4-1.16(d) explicitly requires any fee that has not been earned to be refunded at the end of the representation. *See Advisory Committee Formal Opinion 128 (Amended October 24, 2018).* The language of the fee agreement that Respondent had used "for a long time" contained the language, "THE RETAINER IS NON-REFUNDABLE." By using this fee agreement, Respondent violated Rule 4-1.16(d).

B. Violation of Rule 4-1.15 (a)

Rule 4-1.15(a) provides, in relevant part, that a lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Respondent violated Rule 4-1.15(a) when she deposited unearned client fees into her Operating Account and when she did not sweep roughly $1,000 of her own money from her Trust Account, thereby commingling both accounts.

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

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

institution is provided or available. Respondent violated Rule 4-1.15(a)(7) because she had no process for a periodic reconciliation of her Trust Account. Such a periodic reconciliation would require Respondent to maintain a general ledger and client ledgers, which she admitted she did not.

Violation of Rule 4-1.15(b)

Rule 4-1.15(b) provides that a lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying financial institution service charges on that account, but only in an amount necessary for that purpose. Respondent violated Rule 4-1.15(b) when she kept $1,000 of her own money as a buffer in her Trust Account.

C. Violation of Rule 4-1.15(c)

Rule 4-1.15(c) provides that a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, except that an advanced flat fee which does not exceed $2,000 is exempted from this requirement and may be deposited into another account. Respondent violated Rule 4-1.15(c) when she consistently deposited unearned fees in excess of $2,000 into her Operating Account, instead of depositing these client funds into her Trust Account and withdrawing them as earned.

D. Violation of Rule 4-1.15(f)

Rule 4-1.15(f) requires a lawyer to maintain and preserve complete trust account records for at least six years to include receipt and disbursement journals and ledger records for each client. Respondent produced a general ledger which Ms. Dillon was not able to reconcile to the account because Respondent created it in order to answer Ms.

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

Dillon's request. Respondent's admitted failure to maintain the required trust accounting records set forth above is a violation of Rule 4-1.15(f).

E. Misappropriation and Violation of Rule 4-8.4(c)

Respondent engaged in misappropriation when she deposited unearned client funds into her Operating Account and made disbursements for personal and operating expenses that caused the balance of the Operating Account to drop below the sum required to satisfy all client trust obligations. She violated Rule 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation) when she deposited unearned client funds into her Operating Account for her own personal use.

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

ARGUMENT

II.

UPON CONSIDERATION OF THIS COURT'S DECISIONS IN PREVIOUS ATTORNEY DISCIPLINE CASES AND THE ABA SANCTION GUIDELINES, RESPONDENT SHOULD BE SUSPENDED.

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

This Court has consistently turned to ABA Standards for Imposing Lawyer Sanctions (ABA Standards) for guidance in deciding what discipline to impose. *In re Storment,* 873 S.W.2d 227 (Mo. banc 1994). Per ABA Standard 3.0, when imposing a sanction, a court should consider the: (1) duty violated, (2) lawyer's mental state, (3) potential or actual injury caused by the lawyer's misconduct, and (4) the existence of aggravating and mitigating factors. When an attorney has committed multiple acts of misconduct, the ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct. *In re Ehler,* 319 S.W.3d at 451.

This Court also looks at mitigating and aggravating circumstances to see if any of these factors might suggest either increasing or decreasing the level of discipline.

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

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

ABA Sanction Analysis for Cases Involving Misappropriation and Dishonesty

As noted above, the ABA Standards first consider the duty violated. Here, the duty violated was Respondent's duty to protect her clients' money. It is among the highest duties the rules address. *In re Ehler*, 319 S.W.3d at 451.

Respondent's mental state with regard to her failure to preserve client property was knowing. "Knowledge" as defined by the ABA Standards, is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Although Respondent claims that she did not understand the correct usage of her Trust Account, which is explained in the Rules of Professional Conduct that she is required to know and follow, she certainly knew that she put client money into her Operating Account and that she spent the money on personal expenses before it was earned (and in some cases before she had even started work for her client). *See In Re Kayira,* 614 S.W.3d 530, 538 (Mo. banc 2021) (Respondent knowingly converted client funds when he used funds he knew to be client funds to pay for personal and firm expenses).

As to the third consideration, injury, it is undisputed that Respondent converted funds that were to be preserved for the listed clients for her own benefit. Respondent offers that the clients did not complain about her billing or her work. But the ABA Standards address both injury and potential injury, or "harm to the client that is

reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." ABA Standards (Definitions). That potential injury was recognized by Respondent when she testified "somebody could have really been hurt" and "some people could have lost money." Those people would have been her clients.

In Missouri, the standard for the most serious violation is the starting place for analysis. *In re Ehler,* 319 S.W.3d 442, 451 (Mo. banc 2010). Standard. 4.11 serves as the baseline this Court routinely applies in misappropriation cases: "Absent aggravating or mitigating circumstances, upon application of the factors set out in [Standard] 3.0, … disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client." *In re Farris,* 472 S.W.3d at 563. Standard 4.12, suggests suspension is appropriate "when a lawyer knows or should know that [s]he is dealing improperly with client property and causes injury or potential injury to a client." Respondent either knew or should have known she was dealing improperly with client money.

Although the Panel recommended stand-alone probation, it did not appear to consider the minimum standards for the use of probation in Missouri discipline cases. A lawyer is eligible for probation if (a) the lawyer is unlikely to harm the public and can be supervised, (b) continued practice by the lawyer would not harm the profession's reputation, and (c) the misconduct doesn't warrant disbarment, Rule 5.225(a)(2). Under Rule 5.225, probation is never available where the baseline sanction would be disbarment. To read the rule otherwise would defeat the whole meaning of Section

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

(a)(2)(c). Because the baseline sanction for Respondent's conduct is disbarment, Respondent should not be eligible for probation.

Applicable Mitigating Factors

Upon finding the applicable baseline standard, aggravators and mitigators are considered. The following mitigating factors might apply:

ABA Standard 9.32(c) (personal or emotional problems). Respondent testified about her father's stroke and subsequent death and her daughter's serious medical issues. She said that these issues took her away from her office and her work. She did not, however, explain how these issues or her time away from the office between 2018 and 2020 caused her disregard of the trust accounting rules or her long-term improper treatment of unearned client funds. There must be a connection between the asserted emotional or personal problem and the conduct in order for such to be considered a mitigating factor. *In the Disciplinary Proceedings Against Hicks,* 214 P.3d 897, 904 (Wash. 2009). Respondent has not shown such connection.

ABA Standard 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings). Respondent was cooperative with the Trust Account and Operating Account audits and provided requested information to the OCDC.

ABA Standards 9.32(l) (remorse). Responded recognized that the way she was handling client funds was incorrect and could have caused clients to lose their money. She said she felt fortunate that the investigation occurred and made her recognize this risk.

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

Non-applicable Mitigating Factors

Respondent asked the Panel to consider the following mitigating factors. For the reasons stated, these factors are not applicable:

ABA Standard 9.32(b) (absence of a dishonest or selfish motive). This mitigating factor should not apply because it is inconsistent with Respondent's conduct of misappropriating client funds by placing unearned fees in her Operating Account and spending them on personal expenses, sometimes before even beginning work for the client.

ABA Standard 9.32(i) (delay in disciplinary proceedings). It was just over 2 ½ years from the time the initial complaint was filed until the disciplinary hearing in this matter. During this time, the OCDC conducted audits of both Respondent's Trust and Operating Accounts, investigated two open complaints, reviewed the findings of the audits and investigations, and prepared an Information. Respondent's argument appears to be based on the fact that she had no contact from the OCDC between May of 2020 until September 2021, when she received the Information. This Court should decline to find the modest passage of time involved in this matter to be a mitigating factor, particularly when Respondent did not claim she was prejudiced by any delay. *See In the Matter of McBride,* 865 N.E. 2d 1110, 1119 (Mass. 2007) (effect of a delay in disciplinary proceedings is considered mitigating factor only if attorney is prejudiced by delay).

ABA Standard 9.32(m) (remoteness of prior offenses). Respondent's prior offenses, five admonitions from 2007, 2011, and 2016, are not so remote in time to

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

qualify for this mitigator. They do not date back decades and, while they do not involve trust account violations, they do involve violations of duties owed to clients.

Applicable Aggravating Factors

When the court finds mitigators, "they must be weighed against the seriousness of the offenses and the evidence in aggravation." *In re Kayira,* 614 S.W.3d 530, 539 (Mo. banc 2021). The Panel recommendation does not mention any aggravating factors and it does not indicate it considered any aggravating factors. However, the following aggravating factors apply:

ABA Standard 9.22(a) (prior disciplinary offenses). Respondent accepted five Letters of Admonition, the latest one in 2016. Although the prior discipline did not involve trust account issues, it did involve violations of duties owed to clients, including communication and diligence. Based on her prior discipline, this Court should expect Respondent to have a heightened awareness of the necessity to conform to all the requirements of the Rules of Professional Conduct. Instead, she flagrantly violated Rule 1.15. *See In the Disciplinary Matter Involving Stepovich.* 386 P.3d 1205, 1212 (Alaska 2016) ("a lawyer with a history of professional discipline should be familiar with the Rules of Professional Responsibility and particularly apt to tread carefully in circumstances that are ethically uncertain"). Despite receiving five admonitions, Respondent did nothing to improve her knowledge of the Rules of Professional Conduct.

ABA Standard 9.22(b) (dishonest or selfish motive). Respondent spent unearned client fees that she had deposited into her Operating Account on personal expenses. In some cases, she spent the money before she had ever started working on the

cases. *See In re Ehler,* 319 S.W.3d at 452 (selfish motive when attorney converted client funds for her own personal use).

ABA Standards 9.22(c) (a pattern of misconduct). Respondent's failure to protect client funds occurred at least throughout the time period of the audit and, based on Respondent's testimony regarding her lack of understanding about the purpose of a client trust account, had undoubtedly been going on during her years of private practice.

ABA Standards 9.22(d) (multiple offenses). As the Panel found, Respondent violated Rules 4-1.9, 4-1.16(d), 4-1.15(a),(b),(c) and (f), and 4-8.4(c)

ABA Standards 9.22(i) (substantial experience in the practice of law). Respondent has been licensed to practice law since 1988. During the majority of that time, she engaged in private practice, and should have been familiar with the requirements of Rule 4-1.15.

Based on previous rulings from this Court and the ABA Sanction Standards, an actual suspension is the minimum appropriate sanction. Discipline is intended to protect the public and preserve the integrity of the legal profession. In regards to safeguarding property, this Court has recognized that its "obligation to protect the public and the profession from attorneys who violate this trust is as important today as ever. There simply is no room in this profession for attorneys who take property held in trust for others and use it as their own." *In re Farris*, 472 S.W.3d 549, 562 (Mo. banc 2015).

If the Court decides to impose a stayed suspension with probation, Informant would welcome the opportunity to recommend probation terms and conditions.

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

CONCLUSION

For the reasons set forth above, Informant respectfully requests this Court:

(a) to find that Respondent is guilty of professional misconduct and to find that Respondent has violated Missouri Supreme Court Rules 4-1.9, 4-1.16(d), 4-1.15(a), (b), (c) and (f), and 4-8.4(c).

(b) to suspend Respondent's law license for an indefinite period of time with no leave to apply for reinstatement until after the expiration of two (2) years; and,

(c) to tax all costs in this matter to Respondent, including the $1,000.00 fee pursuant to Rule 5.19(h).

Respectfully submitted,

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel

By: Gail Vasterling

Carolyn Gail Vasterling #38172
Staff Counsel
3327 American Avenue
Jefferson City, MO 65109
(573) 635-7400 - Telephone
(573) 635-2240 - Fax
Email: Carolyn.Vasterling@courts.mo.gov

ATTORNEYS FOR INFORMANT

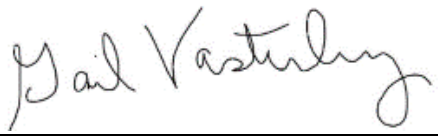
Electronically Filed - SUPREME COURT OF MISSOURI - June 21, 2022 - 09:59 AM

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2022, a copy of Informant's Brief is being served upon Respondent's counsel through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08.

Martin John Buckley
800 Market Street, Suite 2900
St. Louis, MO 63101

Attorney for Respondent



Carolyn Gail Vasterling

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. The brief was served on Respondent through the Missouri electronic filing system pursuant to Rule 103.08;
3. Complies with the limitations contained in Rule 84.06(b);
4. Contains 6,183 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Carolyn Gail Vasterling