IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
DARREN EARNEST FULCHER	)	**Supreme Count No. SC99744**
104 W. 9th Street, Suite 402	)	
Kansas City, MO 64105	)	
	)	
Missouri Bar No. 49548	)	
	)	
Respondent.	)	

RESPONDENT'S BRIEF

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DARREN EARNEST FULCHER

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STATEMENT OF FACTS

The issues in this matter are reflected in the Information that Informant filed on April 9, 2021, and generally cover the period from December 4, 2017 to September 17, 2020. **App 138 (Vol 1)**. The Information contains twenty-four Counts against Respondent, **App. 1–34 (Vol 1)**. Informant has dismissed part of Count 1 (subparts B and D of Paragraph 24) and the entirely of Count 10. **App. 111, 121, 124–125 (Vol 1)**. The remaining twenty-three Counts contain alleged violations of Rule 4-1.8; Rule 4-1.5(a), (d), and (f); and Rule 4.8.4(c). **App. 1–34 (Vol 1)**.

Respondent admits to most, but not all, of the factual violations. ***E.g.*, App. 167–168 (Vol 1)**. As to the remaining Counts, twenty-one of them (Counts 1–9, 11, 13–15, 17–23, and 25) allege that Respondent violated Rule 4.15(d) by failing to promptly deliver funds to either a client or third party, but Respondent denies thirteen of those alleged rule violations (Counts 7, 9, 13–15, 17–23, and 25). **App. 55–69, 72, 75–87, 90 (Vol 1)**. Eight of the remaining Counts (Counts 2–6, 12, 13, and 15) allege Respondent violated "Rule 4-1.15(a) by misappropriating client funds" and violated "Rule 8.4(c) by engaging in dishonesty and deceit by misappropriating his client's funds." **App. 58, 59–61, 63, 65, 73, 75, 77–78 (Vol 1)**. Respondent denies every one of those allegations. **App. 58, 59–61, 63, 65, 73, 75, 77–78 (Vol 1)**.

A. Background Information Regarding Respondent and His Past Accounting Practices

Respondent was born and raised in Missouri. **App. 253 (Vol 1)**. He grew up near 76th and Paseo, and graduated from Southwest High School in 1986. **App 253 (Vol 1)**. After receiving his undergraduate degree, Respondent worked at Evangelical Children's Home. **App. 253–54 (Vol 1)**. He then went to law school the University of Missouri-Columbia, where he received his law degree in 1987. **App. 253–54 (Vol 1)**. On June 26, 1998, Respondent was licensed as an attorney in Missouri, assigned Missouri Bar No. 49548, and began his legal career clerking for Judge Gray at the Jackson County Circuit Court. **App. 254 (Vol 1)**; **App 3, 35 (Vol 1)**.

In 2006, Respondent joined practices with other Missouri attorneys and established a law firm in downtown Kansas City. **App. 255–256 (Vol 1)**. He had two overdraft situations with respect to his trust account while working at that firm. **App. 455–56; 458–59 (Vol 2)**. Both times Respondent's trust account was reviewed by Informant. **App. 455–56; 458–59 (Vol 2)**. In one matter, Respondent received an admonishment for a Rule 4-1.15 violation, but in the other matter, Informant closed the case without disciplinary action. **App. 455–56; 458–59 (Vol 2)**. Although he was provided information about a CLE on trust accounts, Respondent was not required to attend the CLE as part of Informant's determinations in these previous matters—both of which occurred over a decade

ago. **App. 455–56; 458–59 (Vol 2).** Respondent is currently in good standing with the Missouri Bar and has never lost that status. **App. 50 (Vol 1).**

In 2012, Respondent started his own solo practice comprised of criminal work, personal injury work, and general civil litigation. **App 256 (Vol 1); App. 468–69 (Vol 2).** Respondent had previously been handling ten to twelve personal injury cases per year, but towards the beginning of 2017, Respondent's personal injury practice grew exponentially, with the majority of his clients from the inner-city community. **App. 257–58 (Vol 1).**

Respondent has acknowledged that he has subpar accounting skills and his record keeping system was insufficient, which he testified was his fault. **App. 275–76 (Vol 1).** When Respondent started his solo practice, he used an accounting software called Abacus, which was created specifically for attorneys. **App. 276–77 (Vol 1).** He later changed his accounting software from Abacus to QuickBooks because he thought QuickBooks would be more cost efficient. Unfortunately, QuickBooks was not adequate software for helping him keep track of his trust account. **App. 277 (Vol 1).** This issue was compounded by the fact that Respondent's switch to QuickBooks occurred at about the same time as his personal injury practice began to grow exponentially. **App. 277–78 (Vol 1); App. 257–58 (Vol 1).**

It is undisputed that Respondent consistently deposited all settlement funds he received in the trust account "for the benefit of [each of his clients]." Informant's Brief, at p. 10–16, 18–21, 23–29, 31, 33–35). Kelly Dillon, who is a trust account examiner for Informant, audited Respondent's trust account from December 4, 2017 to September 17, 2020 in this matter. **App 138 (Vol 1)**. Ms. Dillon's audit discovered instances where clients and third parties were not promptly paid funds Respondent had received and deposited into his trust account[1] as well as times when trust balance fell below the total amount of funds owed to clients and third parties. **App. 132–134 (Vol 1), App. (Vol 4)**.

Informant's suggestion that the difference between undisbursed funds and Respondent's trust balance grew increasingly worse over time is arrived at by taking mere snapshots of Respondent's trust account at certain points in time. (Informant's Brief, at p. 39–40). However, the evidence shows that additional settlement funds continued to be deposited into his trust account, and that

[1] **App. 113-14 (Vol. 1), App. 475 (Vol. 3); App. 115-17 (Vol. 1), App. 478 (Vol. 3); App. 117 (Vol. 1), App. 492 (Vol. 3); App. 118 (Vol. 1), App. 502 (Vol. 3); App. 118-19 (Vol. 1), App. 509 (Vol. 3); App. 119 (Vol. 1), App. 522 (Vol. 3); App. 119-20 (Vol. 1), App. 535 (Vol. 3); App. 120 (Vol. 1), App. 544 (Vol. 3); App. 120-21 (Vol. 1), App. 560 (Vol. 3); App. 121-23 (Vol. 1), App. 570 (Vol. 4); App. 124-25 (Vol. 1), App. 592 (Vol. 4); App. 125 (Vol. 1), App. 600 (Vol. 4); App. 125-26 (Vol. 1), App. 606 (Vol. 4); App. 127 (Vol. 1), App. 627 (Vol. 4); App. 127-28 (Vol. 1), App. 637 (Vol. 4); App. 128-29 (Vol. 1), App. 646 (Vol. 4); App. 129 (Vol. 1), App. 653 (Vol. 4); App. 129-30 (Vol. 1), App. 661 (Vol. 4); App. 130 (Vol. 1), App. 671 (Vol. 4); App. 130-31 (Vol. 1), App. 678 (Vol. 4); App. 131-32 (Vol. 1), App. 707 (Vol. 4)**

Respondent's share of those funds brought his trust account balance above the amount needed to pay undisbursed funds.

For example, Informant points this Court to Respondent's trust accouut balance on May 9, 2018, to show in was approximately $4,000 short of the amount needed to undisbursed funds. (Informant's Brief, at p. 39). However, on May 14, 2018, Respondent received a total of $35,000.00 in settlement funds. **App. 930 (Vol 5).** Respondent's share of those funds was approximately 33% or $11,600.00. **App. 142–143 (Vol 1).** Thus, just five days after Informant's snapshot of Respondent's trust account, Respondent's account balance was $7,000.00 more than the amount needed to pay mistakenly undisbursed funds.

Despite the intermediate rises in Respondent's account balance, Informant argues the "difference between the balance in [Respondent's] trust account and the undisbursed . . . funds . . . continued to grow," and it points this Court to another snapshot of Respondent's trust account balance on February 26, 2020, to claim it was over $60,000.00 short of the amount needed to pay undisbursed funds. (Informant's Brief, at p. 39–40). However, the next day, Respondent received $100,000.00 in settlement proceeds, and less than a week later, an additional $37,800.00 in settlement proceeds were deposited in the trust account. **App. 948 (Vol 5).** Respondent then received three more settlements for $11,913.12, $13,851.94, and $45,000.00 before then end of March, which provided the trust

account with a sufficient balance to pay all undisbursed funds after accounting for Respondent's share of the settlement proceeds. **App. 948–949 (Vol 5); App. 142–143 (Vol 1)**.

Respondent did not consciously refuse to payout the undisbursed funds; he mistakenly failed to do so. Informant's fraud examiner, Ms. Dillon, testified that she does not believe Respondent is a dishonest person but instead a "horrible accountant." **App. 192 (Vol 1)**. She further testified that Respondent was cooperative during the reconciliation process, **App. 154–165 (Vol 1)**, and "was great in making sure that everyone got paid according to [her] reconciliation of the account," **App. 172 (Vol 1)**. During the reconciliation process, Ms. Dillon would ask Respondent for more information about certain transactions, and Respondent would see what information he could find, then make the necessary payments to reconcile the trust account. **App. 164–65 (Vol 1)**. With Ms. Dillon's help, Respondent has able to reconcile his account and make all payments that were due and owing to his clients and third parties. **App. 272–73 (Vol 1)**. All clients and third parties received the funds due and owing to them.

Respondent is remorseful about his previous trust accounting practices as he never wanted to risk hurting his clients. **App. 164–165, 310–311 (Vol 1)**. Even though his trust account was never overdrawn, Respondent realizes he should not have allowed the funds in his trust account to drop below the minimum level

necessary. **App. 289 (Vol 1)**. Respondent's previous accounting practices and the impact it could have had on his clients made Respondent visibly distraught, even catching the attention of Ms. Dillon while Respondent worked with her to reconcile his trust account. Respondent is now seeing a therapist to help him deal with his remorse. **App. 164–65, 314–315 (Vol 1)**.

B. Respondent's New and Improved Accounting Practices

In July 2020—roughly nine months before the Information in this matter was filed—Respondent made changes to his accounting practices. **App. 203–207 (Vol 1); App. 313–315 (Vol 1)**. He hired accounting firm DeFrain & Million with Certified Public Accounts, Timothy Eaton and Doug DeFrane, to make sure Respondent's trust account is reconciled each month. **App. 205–206 (Vol 1)**. Respondent remains personally involved in the reconciliation process, performing case recaps to make sure none of his clients are harmed. **App. 313 (Vol 1)**. Through these changes, Respondent will avoid the mistakes made in the past. **App. 203–207 (Vol 1); App. 313–315 (Vol 1)**.

C. Character Witnesses

Four individuals testified with respect to Respondent's character, and although none of them spoke to Respondent's accounting skills, all of them attested to Respondent's honesty, commitment to his clients and commitment to the community. **App. 213–252 (Vol 1).** Eight other individuals, both outside and within the legal community, submitted letters attesting to Respondent's character.

Appendix 801–815 (Vol 5). Attorney Phillip Brooks, who has known Respondent since 2000, has found Respondent to always be "professional, polite and concern[ed] about the needs of his clients." **Appendix 801**. Dr. Brian Schnitta, who works with Respondent on a weekly if not daily basis, found Respondent "to be candid, honest, and straight forward with everyone," and a "person of high integrity." **Appendix 802**. Attorney David Vogel, who has known Respondent for more than 35 years, has always perceived the "sole objective" of Respondent's practice as "serv[ing] his clients in an ethical and professional manner." Although he did not know the precise details of the issues in this matter, Attorney Vogel believes Respondent would never "do anything to intentionally violate a rule or harm a client to benefit himself" as that is not who "[Respondent] is or needs to be." **Appendix 803–804**.

Three Judges, Judge Larry Harman (ret.), Judge Ardie Bland, and Judge Charlie Atwell (ret.), also provided their opinions on Respondent. **Appendix 808–815**. Judge Harman, who knows the nature of the allegations in this matter, believes Respondent "is a worthy individual, a good and decent lawyer who may have made unfortunate mistakes," and "know[s] [Respondent] regrets being in his current situation." Judge Harman encourages a close look at Respondent's entire career before determining disciplinary action. **Appendix 808–809**. Judge Bland acknowledges the severity of the allegations against Respondent, but believes

Respondent is not only the kind of lawyer who "competently and zealously represent[s] his clients" but also "the type of attorney who deserves a chance at redemption." **Appendix 813**. Judge Atwell, who has known Respondent for over 20 years, knows Respondent is "well thought of by Judge Gray and other judges within Jackson County Circuit Court." It is Judge Atwell's "strong impression that [Respondent] cared very much for his clients and always worked hard for them." **Appendix 814**.

POINTS RELIED ON

I.

RESPONDENT NEITHER VIOLATED "RULE 4-1.15(A) BY MISAPPROPRIATING CLIENT FUNDS" NOR VIOLATED "RULE 4-8.4(C) BY ENGAGING IN DISHONESTY AND DECEIT BY MISAPPROPRIATING HIS CLIENT'S FUNDS," AS ALLEGED IN THE INFORMATION.

In re Schaeffer, 824 S.W.2d 1, 5 (Mo. banc 1992)

Missouri Supreme Court Rule 4-8.4(c)

POINTS RELIED ON

II.

REPRIMAND—OR, AT MOST, PROBATION—IS THE MOST APPROPRIATE DISCIPLINE TO IMPOSE UNDER THE FACTS OF THIS CASE AND MISSOURI LAW.

In re Stewart, 342 S.W.3d 307, 313 (Mo. banc 2011)

In re Zink, 278 S.W.3d 166, 169 (Mo. banc 2009)

In re Gardner, 565 S.W.3d 670, 678 (Mo. banc 2019)

ABA Standards for Imposing Attorney Discipline (2019).

ARGUMENT

I.

RESPONDENT NEITHER VIOLATED "RULE 4-1.15(A) BY MISAPPROPRIATING CLIENT FUNDS" NOR VIOLATED "RULE 4-8.4(C) BY ENGAGING IN DISHONESTY AND DECEIT BY MISAPPROPRIATING HIS CLIENT'S FUNDS," AS ALLEGED IN THE INFORMATION.

STANDARD OF REVIEW

"This Court has inherent authority to regulate the practice of law and administer attorney discipline." *In re Gardner*, 565 S.W.3d 670, 675 (Mo. banc 2019) (citing Rule 5). In a disciplinary proceeding, this Court "reviews the evidence de novo, independently determining all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law." *Id.* However, the Disciplinary Hearing Panel's "findings of fact, conclusions of law, and recommendations are advisory." *Id.*

Rule 4-8.4(c) provides that a lawyer commits professional misconduct when he or she "engage[s] in conduct involving dishonesty, fraud, deceit, or misrepresentation." Mo. S. Ct. R. 4-8.4(C). Informant argues that "Respondent engaged in misappropriation when he made disbursement from the client trust account that caused the balance of the trust account required to satisfy all trust obligations." (Informant's Brief, at p. 49). To support its argument, Informant

relies on an out-of-context quote from *In re Schaeffer*—a case that is factually different from the instant matter. (*Id.*).

In re Schaeffer, 824 S.W.2d 1, 5 (Mo. banc 1992), involved an attorney who intentionally deposited a client's settlement funds into the attorney's general business account rather that the client's trust account: "[T]he settlement check, deposited in respondent's business account at respondent's direction, was specifically marked by respondent with the following notation: 'Deposit in general account[.]'" In that context, this Court stated:

> When an attorney deposits the client's funds into an account used by the attorney for his own purposes, any disbursement from the account for purposes other than those of the client's interests has all the characteristics of misappropriation, particularly when the disbursement reduces the balance of the account to an amount less than the amount of the funds being held by the attorney for the client.

Id. (further explaining that the attorney's failure to preserve client funds in a trust account "constitutes a more serious violation of the disciplinary rules").

The context in which the *Schaeffer* made the above statement is significantly different when compared to the instant matter. Here, unlike the attorney in *Schaeffer*, Respondent received settlement funds and deposited the funds into the client's trust account for the benefit of the client. That fact is undisputed. Informant acknowledges that Respondent consistently deposited all settlement funds he received in the trust account "for the benefit of [the appropriate client]." (Informant's Brief, at p. 10–16, 18–21, 23–29, 31, 33–35). In other words, this is

not a case where "an attorney deposit[ed] the client's funds into an account used by the attorney for his own purposes," *Schaeffer*, 824 S.W.2d at 5. Thus, to describe Respondent's actions in this matter as misappropriation is inaccurate.

Nonetheless, Informant continues to argue that Respondent engaged in "dishonesty, fraud, deceit, or misrepresentation" in violation of Rule 4-8.4(c) when the trust funds for Ayers, Duisik, and Johnson "fell below the amount needed to pay combined undisbursed client funds," and Respondent benefited from the delayed payment of settlement funds to those clients. (Informant's Brief, at p. 49). Not so.

Dishonesty, fraud, deceit, and misrepresentation are conscious acts with intended results. *See Schaeffer*, 824 S.W.2d at 5 (finding the attorney's conduct to be willful and deliberate). It is notable that Informant's own fraud investigator, Ms. Dillon, and upon whose investigation the Informant's entire case rests, did not come to the conclusion that Respondent is dishonest but instead a "horrible accountant." **App. 192 (Vol 1)**. She also witnessed how distraught Respondent's prior accounting practices had made him feel when Respondent was helping her reconcile his trust account. **App. 164–65, 204–205 (Vol 1)**. As such, it appears that not only Respondent's twelve character witnesses, but also Informant's own investigator, who worked closely with Respondent during the investigation, all believe Respondent would not deliberately and dishonestly convert funds from his

clients, most of whom come from the same community in which Respondent was raised. **App. 192 (Vol 1); Appendix 801–815 (Vol 5); App. 253 (Vol 1); App. 257–258 (Vol 1)**. In addition, after a nearly seven-hour hearing, the Disciplinary Panel found insufficient evidence to conclude that Respondent violated Rule 4-8.4(c) by misappropriating funds with dishonesty, fraud, deceit, or misrepresentation, and instead held that "the preponderance of the evidence was that Respondent was negligent." **Appendix 864 (Vol 5)**. The conclusion of the panel makes sense in light of the evidence and the conclusion of Informant's own investigator that Respondent was not and is not dishonest and, as a result, she could not conclude that his poor accounting practices had their genesis in deceitful intentions. **App. 192 (Vol 1)**.

II.

REPRIMAND—OR, AT MOST, PROBATION—IS THE MOST APPROPRIATE DISCIPLINE TO IMPOSE UNDER THE FACTS OF THIS CASE AND MISSOURI LAW.

STANDARD OF REVIEW

"This Court has inherent authority to regulate the practice of law and administer attorney discipline." *In re Gardner*, 565 S.W.3d 670, 675 (Mo. banc 2019) (citing Rule 5). In a disciplinary proceeding, this Court "reviews the evidence de novo, independently determining all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law." *Id.* However, the Disciplinary Hearing Panel's "findings of fact, conclusions of law, and recommendations are advisory." *Id.*

Informant argues Respondent should be suspended instead of being placed on probation, yet the crux of Informant's argument hinges on this Court finding Respondent misappropriated client funds as contemplated under ABA Standard 4.11. Informant then contends that such a finding makes Respondent ineligible for probation even before this Court gives any consideration to aggravating or mitigating factors.

However, the presumptive discipline under ABA Standard 4.13, not the presumptive discipline under ABA Standard 4.11, applies to Respondent's conduct because no evidence to suggest Respondent's conscious objective was to

mishandle funds. Regardless, Respondent remains eligible for probation because Respondent's conduct does not warrant suspension or disbarment after a consideration of the aggravating and mitigating factors in this case.

A. Purpose of Attorney Discipline

"This Court has inherent authority to regulate the practice of law." *In re Zink*, 278 S.W.3d 166, 169 (Mo. banc 2009). This Court had held that suspension or "disbarment is reserved for cases in which it is clear that respondent should not be allowed to practice law," after considering aggravating and mitigating factors. *Id.* at 908–09. It has also been recognized that "[d]isbarment and lengthy suspensions generally should be reserved for those circumstances in which clients are harmed." *In re Stewart*, 342 S.W.3d 307, 313 (Mo. banc 2011) (Teitelman, J., concurring). The well-establish purpose of attorney discipline "is not to punish the lawyer but to protect the public and to maintain the integrity of the profession and the courts." *In re McBride*, 938 S.W.2d 905, 907 (Mo. banc 1997).

B. ABA Standards for Imposing Discipline

"This Court relies on the ABA Standards when imposing sanctions to achieve the goals of attorney discipline." *In re Coleman*, 295 S.W.3d 857, 869 (Mo. banc 2009). Generally, when imposing a sanction, the Court considers four factors: (1) "the ethical duty and to whom it is owed," (2) "the attorney's mental state," (3) "the amount of injury caused by the attorney's misconduct," and (4) the existence of "any aggravating or mitigating circumstances." *Id.*

i. Ethical Duty

The ethical duties Respondent breached were owed to his clients and third parties. ABA Standard 4.0 is therefore the starting point for the analysis in this case. *See* ABA Standard 4.0; *In re Coleman*, 295 S.W.3d 857, 870 (Mo. banc 2009). ABA Standard 4.1 states that "[a]bsent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:" disbarment when a lawyer "knowingly" converts client property (ABA Standard 4.11); suspension when a lawyer "knows or should know" that he is dealing improperly with client property" (ABA Standard 4.12); and reprimand when a lawyer is "negligent" in dealing with client property (ABA Standard 4.13). *E.g.*, ABA Standard 4.1.

ii. Mental State

Respondent's mental state determines whether ABA Standard 4.11, 4.12 or 4.13 applies. Informant contends that Respondent "knowingly" converted client funds and therefore the presumptive discipline is disbarment under ABA Standard 4.11. (Informant Brief, p. 52). Not so.

As stated above, both ABA Standard 4.11 and 4.12 share the same root word: *know* as in ***know***ingly under 4.11 and ***know***s under 4.12. The Annotation to ABA Standard 4.11 clarifies when it should apply as opposed to ABA Standard 4.12. The Annotation to Standard 4.11 provides:

> Although Standard 4.11 should be applied when courts find a "knowing" conversion, some courts use the terms "intentional" and "knowingly" interchangeably. *Regardless of the terminology used, the focus is on deliberate conduct.*

(ABA Standard 4.11, Annotation for Knowing Conversion) (emphasis added). The deliberate conduct contemplated under ABA Standard 4.11 is the equivalent of "intentional" conduct for which disbarment is the baseline discipline under the ABA Standards as this Court recently acknowledged: "Generally, the baseline discipline for intentional misconduct is disbarment, for knowing conduct is suspension, and for isolated instances of negligent misconduct is a reprimand." *In re Gardner*, 565 S.W.3d 670, 678 (Mo. banc 2019). Thus, the baseline discipline for intentional, knowing, and negligent misconduct matches the presumptive discipline under ABA Standard 4.11 (disbarment), 4.12 (probation), and 4.13 (reprimand), respectively.

Informant does not contend that Respondent intentionally converted client funds (Informant's Brief, at p. 51), nor does the evidence support such a finding. As this Court has explained:

> Intention is defined as the conscious objective or purpose to accomplish a particular result. . . . Knowledge is defined as a conscious awareness of the nature or attendant circumstance of the conduct but without the conscious or purpose to accomplish a result. . . . Negligence is defined as a failure of a lawyer to heed 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 that situation.

In re Gardner, 565 S.W.3d at 678 (internal quotations and citations omitted). Nobody—not the Disciplinary Panel nor Informant's own trust account examiner—indicates a belief or conclusion that Respondent acted dishonestly or deliberately in handling his trust account. **App. 192 (Vol 1); Appendix 801–815 (Vol 5); Appendix 864 (Vol 5); App 253 (Vol 1)**. As such, the presumptive discipline under ABA Standard 4.11 does not apply.

Instead, ABA Standard 4.13 should be the starting point for guiding this Court's disciplinary determination. Reprimands are appropriate when a lawyer is "negligent in dealing with clients' property but still may have caused injury or potential injury to a client. Reprimand is appropriate, for example, for lawyers who negligently fail to follow established trust account procedures or fail to return client property." (Annotation to ABA Standard 4.13). At most, ABA Standard 4.12 applies should this Court infer that Respondent knew or should have known that he was dealing with client funds improperly. (ABA Standard 4.12).

iii. Amount of Injury

Both the actual and the potential injury are to be evaluated when considering the amount of injury. However, while actual injury and potential injury are both considered, the ABA and this Court distinguish actual injury from potential injury. *E.g.*, *In re Gardner*, 565 S.W.3d at 679; *In re Weier*, 994 S.W.2d 554, 558 (Mo. banc 1999); *In re Cupples*, 979 S.W.2d 932, 937 (Mo. banc 1998). Respondent

testified that "looking back on it now, the system [he] had set up was not sufficient," and that he "wasn't reconciling the account like [he] should have[.]" **App. 276 (Vol 1)**. Respondent admits that his trust account dropped below the amount necessary to pay liens and settlements, and that he shouldn't have let that happen even though his account was never overdrawn. **App. 289 (Vol 1)**. Respondent became distraught after realizing that he could have harmed his clients. **App. 314–315 (Vol 1)**. He has taken efforts to prevent his past mistakes and avoid potential harm to his client by hiring accounting professionals and remaining personally involved in the account reconciliation process. **App. 203–205 (Vol 1); App. 289 (Vol 1); App. 313–315 (Vol 1)**. Moreover, by cooperating with Ms. Dillon, Respondent was actively engaged in reconciling his account and making all payments that were due and owing to his clients and third parties. **App. 164–165 (Vol 1); App. 272–273 (Vol 1).**

iv. Aggravating and Mitigating Factors

Informant asks this Court to find that the following facts support four aggravating factors: (1) prior disciplinary offenses under ABA Standard 9.22(a) due to Respondent's 2011 admonishment; (2) a pattern of misconduct under ABA 9.22(c) for Respondent's prior accounting practices; (3) Respondent's multiple offenses in this matter under ABA Standard 9.22(d); and (4) Respondent's

substantial experience in the practice of law under 9.22(i) because he was been practicing (albeit in good standing) since 1998.. (Informant's Brief, at p. 54–55).

The mitigating factors in this case are significant. There are at least six mitigating factors: (1) absence of a dishonest or selfish motive under ABA Standard 9.32(b); (2) timely good faith effort to make restitution or to rectify the consequences of misconduct under ABA Standard 9.32(d); (3) disclosure to the disciplinary board and cooperative attitude under ABA Standard 9.32(e); (4) character and reputation under ABA Standard 9.32(g); (5) remorse under ABA Standard 9.32(l); and (6) remoteness of prior offenses under ABA Standard 9.32(m).

The evidence shows Respondent did not have a dishonest or selfish motive. Ms. Dillon, testified that she does not believe Respondent is dishonest. **App. 192 (Vol 1)**. Respondent's witnesses described him as an attorney who is dedicated to and cares for his clients. These witnesses include Judges, attorneys and also members of the Kansas City community. In other words, people who know him the best. **App. 213–251 (Vol 1); App. 801–815 (Vol 5)**.

Informant's investigator testified that Respondent was cooperative during the investigation in this matter. **App. 164–165 (Vol 1)**. Respondent worked with Ms. Dillon to reconcile his trust account and promptly made payments to all clients and third parties upon notice of his accounting mistakes. **App. 164-165, 272–273**

(Vol 1); *see* ABA Standard 9.32(e) ("full and free disclosure to the disciplinary board or cooperative attitude" is a mitigating factor); ABA Standard 9.32(d). He has since changed his accounting practices by hiring accounting professionals to reconcile his trust account each month while remaining personally involved in the reconciliation process to help ensure none of his clients will be at risk of being harmed. **App. 203–205 (Vol 1)**; ABA Standard 9.32(d) ("good faith effort to make restitution or to rectify the consequences of misconduct" is also a mitigating factor). This Court should find Respondent's cooperative attitude and corrective action both serve as mitigating factors. *See In re Gardner*, 565 S.W.3d at 680.

In addition, twelve individuals attested to Respondent's character and reputation. **App. 213–251 (Vol 1); App. 801–815 (Vol 5)**. Their testimony establishes that Respondent is not only respected within the legal community, but also held in a high regard within the greater Kansas City area. **App. 213–251 (Vol 1); App. 801–815 (Vol 5)**; ABA Standard 9.32(g) (evidence of good moral character is a mitigating factor). Furthermore, "[e]vidence of good character is more likely to be a mitigator when the attorney has also admitted to the misdeeds and shows some remorse." *In re Gardner*, 565 S.W.3d at 680. In that regard, Respondent openly admitted that his past accounting practices were mistakes for which he takes full responsibility. **App. 268 (Vol 1)**. Also, there is no dispute that Respondent is remorseful about his past accounting practices. Informant

acknowledges that fact in its Brief. (Informant's Brief, at p. 54). Respondent testified to his regrets over his past mistakes and is now seeing a therapist to address his remorse. **App. 314–315 (Vol 1)**. Judge Harman "know[s] [Respondent] regrets being in his current situation." **Appendix 808–809 (Vol 5)**. Informant's investigator, Ms. Dillon, also witnessed and testified to Respondent's remorse. **App. 164 (Vol 1)**. This Court should also find Respondent's character, reputation, and remorse all serve as mitigating factors in this matter. *In re Gardner*, 565 S.W.3d at 680; ABA Standards 9.32(g), (l).

Weighing both the aggravating and mitigating factors should lead this Court to determine that reprimand—or, at most, probation, as determined by the advisory panel—is the most appropriate discipline to impose under the facts of this case and Missouri law.

C. Missouri's Reprimand and Probation Rule

Informant contends that Respondent is not eligible for either reprimand or probation. Informant's argument is that the baseline discipline is disbarment and therefore, without any consideration of aggravating or mitigating factors, Respondent is ineligible for reprimand or probation under Missouri Supreme Court Rule 5.225.

Informant's argument is flawed because, as discussed above, the presumptive discipline under ABA Standard 4.11 does not apply. Respondent

neither violated Rule 4-8.4(c) nor misappropriated client funds much less engaged in conduct relating to such violations with a conscious objective to take from his clients. *See In re Gardner*, 565 S.W.3d at 678 (explaining the applicable mental state as it relates to the baseline disciplinary action). For that reason, alone, Respondent is eligible for both reprimand and probation.

Even if this Court were to conclude that the presumptive discipline is disbarment (which it is not), Informant's argument is still flawed because mitigating factors must be considered before the Court determines whether a lawyer's acts "warrant" disbarment under Rule 5.225.

Under Rule 5.225(a), a lawyer is eligible for reprimand and probation if (among other requirements) the lawyer has "not committed acts warranting disbarment." Mo. S. Ct. R. 5.225(a)(1)(E), (a)(2)(C). Rule 5.225 has recently been amended, and Rule 5.175 which takes effect on January 1, 2023, states that a lawyer is eligible for probation if (among other requirements) he or she has "not committed acts that, absent mitigating factors, would warrant disbarment." *See* 2022 Mo. Lexis 166, at *46 (Rule 5.175 Probation). Although Rule 5.175 is not yet in effect, it clarifies the meaning of current Rule 5.225 in that mitigating factors must be considered before determining whether the lawyer's acts warrant disbarment. *See In re Charron,* 918 S.W.2d 257, 262 (Mo. banc 1996) (considering mitigating circumstances before holding that disbarment is not warranted).

Therefore, because the mitigating factors in this matter demonstrate that disbarment is not warranted, Respondent is eligible for reprimand or probation under Rule 5.225.

In sum, the presumptive discipline does not control the eligibility determination under Rule 5.225. A consideration of the mitigating factors must be made before making that determination. Respondent is eligible for reprimand or probation because the presumptive discipline is not disbarment, and even if it were, Respondent remains eligible under Rule 5.225 because the mitigating factors in this matter further establish disbarment is not warranted.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Court to find that he:

a) did not violate "Rule 4-1.15(a) by misappropriating client funds" and did not violate "Rule 4-8.4(c) by engaging in dishonesty and deceit by misappropriating his client's funds," as alleged in the Information;

b) should be reprimanded or placed on probation in accordance with the ABA Standards and Missouri law as applied to the facts of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was sent via the Missouri e-filing system on this 11th day of October, 2022, to:

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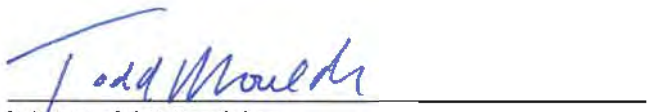
CERTIFICATION: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;
2. The Brief was served on Informant through the Missouri electronic filing system, pursuant to Rule 103.08;
3. Complies with the limitations contained in Rule 84.06(b);
4. Contains 5,702 words, according to Microsoft Word, which is the word processing system used to prepare this Brief.



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