Supreme Court of Missouri

en banc

SC101626

In re: Kimberly M. Gardner,

Respondent.

Opinion issued November 24, 2026

Original Disciplinary Proceeding

Introduction

In 2022, the former circuit attorney for the city of St. Louis, Kimberly Gardner, received a public reprimand and was assessed costs and disciplinary fees by this Court. After paying the costs and fees, she reimbursed herself from a public fund. The Office of Chief Disciplinary Counsel ("OCDC") now seeks to discipline her law license for violating the rules of professional conduct. Gardner's misappropriation of public funds and misrepresentations to this Court violated Rules 4-8.4(b), 4-8.4(c), and 4-8.4(d).[1] Considering the rule violations, her position as a public official, and her disciplinary history, Gardner is disbarred.

Background

This Court previously issued a public reprimand against Gardner for violating the rules of professional conduct in her capacity as elected circuit attorney. Order, *In re: Kimberly M. Gardner*, No. SC99645 (Mo. banc Aug. 30, 2022). She incurred disciplinary fees and court costs

[1] Unless otherwise noted, all rule references are to Missouri Court Rules (2026).

totaling $5,004.33. At Gardner's direction, her disciplinary attorney wrote to OCDC to request an installment plan as follows: "Ms. Gardner is not going to contest any of the costs, but she is going to need time to pay. She is hoping to pay $750 within 30 days, and then make monthly payments of about $500 each until paid in full. Is that acceptable to OCDC?" OCDC approved this request. At the same time, Gardner asked her attorney whether it would be appropriate for the circuit attorney's office to reimburse her for the fee from the office's contingent fund. The fund, authorized by section 56.530, provides payment for

> incidental expenses in bringing parties and witnesses from other states or countries and in properly preparing causes for trial, attending trial on changes of venue, attending at the taking of depositions, in printing briefs, and appearing before the appellate courts of the state, and generally such expenses as he may be put to in the proper and vigorous prosecution of the duties of his office.[2]

The day after requesting a payment plan, the attorney replied to Gardner with a draft, unsigned letter indicating it was his experience that law firms would often pay attorney discipline fees directly with a law firm check. In forming his opinion, the attorney did not review any law applicable to the use of public funds for a similar kind of reimbursement. The letter stated reimbursement would be proper "as long as your Office deems it appropriate under its own policies and procedures."

There was no further communication between Gardner and the attorney about the propriety of reimbursement. After receiving his letter, she directed her chief clerk to issue her four checks reflecting the payments she made to this Court to satisfy the disciplinary fee. Gardner co-signed each of the reimbursement checks made payable to herself from the office's contingent fund. According to evidence presented at the disciplinary hearing, the fund had been

[2] Unless otherwise noted, all statutory references are to RSMo 2016. Note also statutory references used in this opinion often include only the masculine pronoun, but that use is construed to include the feminine as well. Sec. 1.030.2.

used to reimburse employees for miscellaneous office expenses or to pay vendors directly, but it had never been used to pay attorney discipline fees.[3]

After discovering the reimbursements, the United States Attorney's Office for the Eastern District of Missouri initiated an investigation for violations of 18 U.S.C. section 666 under belief Gardner had misappropriated public funds. She signed a pre-charge diversion agreement "accepting responsibility" for her conduct supporting the investigation, although, as part of the agreement, she was never charged.[4] The agreement required Gardner to pay restitution to the contingent fund. The United States Attorney's Office publicly released this agreement and notified OCDC by letter. In response, OCDC filed a disciplinary information alleging violations of Rules 4-8.4(b) (criminal act), 4-8.4(c) (deceit, fraud, dishonesty, or misrepresentation), and 4-8.4(d) (conduct prejudicial to the administration of justice). In its criminal act allegation, OCDC alleged violations of both federal and state law. 18 U.S.C. sec 666; sec. 575.320, RSMo Supp. 2017 (misconduct in the administration of justice).

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[3] The fund previously paid for conference expenses, trial expenses, attorney bar dues, CLE programs, and a leadership program. The fund also paid more personal expenses: retirement gifts, bereavement flowers, a happy hour, holiday luncheons, soda and candy, subscriptions to the St. Louis Business Journal, and a contribution to the St. Louis University School of Law Black Law Student Association casino night. Whether these uses of the fund were proper is not a question before the Court.

[4] The diversion agreement provided, "It appearing that you are reported to have committed a violation of Title 18, United States Code, Section 666 …" and subsequently stated facts pertinent to the allegation to which Gardner agreed:

> Kimberly Gardner, in her position as Circuit Attorney, directed employees of the St. Louis Circuit Attorney's Office to issue checks to her from public funds held in a Circuit Attorney's Office Contingent Fund Account as reimbursement for payments she made to the Supreme Court of Missouri of her personally assessed fee and costs …. Kimberly Gardner was not entitled under the law to that additional compensation.

The agreement required Gardner's signature and acceptance of responsibility for her behavior.

At the disciplinary hearing, Gardner did not testify. She instead asserted an advice of counsel defense, arguing she relied on the attorney's opinion in seeking reimbursement from the public fund. OCDC presented evidence the attorney reviewed no law in drafting his informal legal opinion but based his opinion on years of experience as a disciplinary attorney. Specifically, he did not review section 56.530. The disciplinary hearing panel ("DHP") found Gardner committed a criminal act reflecting adversely on her honesty, trustworthiness, or fitness as a lawyer in other respects, in violation of Rule 4-8.4(b), and recommended a reprimand. Both OCDC and Gardner rejected the decision, with OCDC seeking harsher discipline and Gardner maintaining her conduct was proper. Because both parties rejected the decision, the case was briefed and argued before this Court pursuant to Rule 5.19(b).

Standard of Review

Professional misconduct is established by a preponderance of the evidence. Rule 5.15(g). "This Court reviews the evidence *de novo*, independently determines all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law." *In re McCarty*, 716 S.W.3d 245, 251 (Mo. banc 2025) (internal quotations omitted). The DHP's decision is advisory, and this Court "may reject any or all of the DHP's recommendations." *Id.* (internal quotations omitted).

Ethical Violations

The issue before the Court is whether Gardner violated the rules of professional conduct and, if so, what discipline is proper.

The DHP found Gardner violated Rule 4-8.4(b), which states, "It is professional misconduct for a lawyer to … commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." This Court has found a

violation of Rule 4-8.4(b) not only reflects poorly on the attorney, but it also "tarnishes the public image of the profession as a whole." *In re Stewart*, 342 S.W.3d 307, 310 (Mo. banc 2011).

> In our society, lawyers hold a place of special responsibility as advisors and counselors in the law. A judicial admission that a lawyer [committed a crime] is a matter of grave consequence. Such conduct not only brings the lawyer's judgment and honesty into question but erodes public confidence in lawyers and the courts in general.

In re Shunk, 847 S.W.2d 789, 791 (Mo. banc 1993).

Gardner's violation of Rule 4-8.4(b) is predicated on her misuse of public monies in the circuit attorney's contingent fund. Proper use of the fund is set out in section 56.530, which authorizes payments from the fund in a limited set of circumstances, at broadest for "such expenses as he may be put to in the proper and vigorous prosecution of the duties of his office." Gardner argues the disciplinary fees fall within the fund's scope because the fees were incurred during the performance of her official duties. This argument obliquely omits the word "proper" from the statute. Clearly, payment of a circuit attorney's disciplinary fees incurred for violating the rules of professional conduct is not related to the "proper and vigorous prosecution of the duties" of the office.

Gardner's unauthorized reimbursement was a criminal act under federal law. Pursuant to 18 U.S.C. section 666, an agent of a local government receiving more than $10,000 in federal benefits must not "knowingly convert" property valued at $5,000 or more in that local government agency's control. The record supports the conclusion Gardner committed a criminal act, as she signed an agreement "accept[ing] responsibility" for her conduct amounting to a violation of 18 U.S.C. section 666. Her denial of her admission of criminal liability is inconsistent with the agreement she executed with the United States Attorney's Office.[5]

[5] OCDC also alleged Gardner violated section 575.320, RSMo Supp. 2017, which makes it a crime for a public servant to knowingly seize any property "without due and legal process, or

In addition to a criminal act, to violate Rule 4-8.4(b), the act must "reflect[] adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." The misappropriation of client funds has been held to satisfy this requirement because it "necessarily involves deceit and misrepresentation." *In re McMillin*, 521 S.W.3d 604, 608 (Mo. banc 2017) (internal quotation omitted). Gardner's misappropriation of public funds similarly reflects adversely on her honesty, trustworthiness, and fitness to practice law.

Gardner argues she did not violate Rule 4-8.4(b) because she lacked the intent to be guilty of the federal crime in that she was unaware of the limited uses of the public monies in the contingent fund. Specifically, she argues no one in the circuit attorney's office, including the chief clerk who administered the fund, was aware of the limitations in section 56.530. Gardner relies on this "universal ignorance" to contend the office established a uniform practice of using the funds for broader purposes than the statute permits. Because a criminal violation under 18 U.S.C. section 666 requires intentional or knowing conduct, she argues she could not have had the requisite *mens rea* while unaware of the fund's authorizing statute.

The flaw in Gardner's argument is that she signed a diversion agreement in which she acknowledged she was not entitled to reimbursement from the fund and accepted responsibility for her behavior. Regardless of any defenses she may have had to a federal prosecution under 18 U.S.C. section 666, she effectively waived those defenses by signing the diversion agreement to avoid prosecution. The DHP found the diversion agreement's language "could only mean acknowledging that Respondent's actions rose to the level required by the statute the alleged violation of which prosecution was being deferred. That includes scienter." This Court agrees

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other lawful authority." Given the diversion agreement and her admission of the federal violation, this Court focuses its analysis only on the violation of federal law.

that, by signing the diversion agreement, Gardner acknowledged she had the requisite *mens rea* to commit the federal crime.

Section 56.530 is a specific fund of public monies appropriated to support the circuit attorney's office in carrying out its duties. Gardner could not use public monies to pay disciplinary fees, and misusing the fund for such purpose violated 18 U.S.C. section 666, which reflected adversely on Gardner's character for trustworthiness and fitness to practice law. This Court finds Gardner violated Rule 4-8.4(b).

Further, Gardner's action in directing her clerk to issue reimbursement checks from public monies, which Gardner herself signed, also violated Rules 4-8.4(c) and 4-8.4(d). Those rules respectively prohibit "conduct involving dishonesty, fraud, deceit, or misrepresentation" and "conduct that is prejudicial to the administration of justice." In asking for permission to pay the fine and costs in installments, she represented to this Court and OCDC that she was personally paying the assessed disciplinary fees and court costs from her own funds. By sending this Court checks from her personal funds while reimbursing herself with public monies from the contingent fund, she plainly intended to deceive this Court as to the source of the funds. This misrepresentation, along with her directing her employees to make payments from the contingent fund, was conduct prejudicial to the administration of justice. Gardner provides no defense to these violations other than the advice of counsel defense.

Advice of Counsel Defense

Gardner also argues she did not violate Rules 4-8.4(b), 4-8.4(c), or 4-8.4(d) because she relied on the advice of counsel in her use of the contingent fund. This Court has never addressed this defense in a disciplinary proceeding. Because she sought the advice of her disciplinary counsel and believed she acted in good faith reliance on that advice, Gardner argues this

provided a valid defense to the underlying crime and should correspondingly absolve her of professional misconduct.

The advice of counsel defense has been raised to establish an excuse for unlawful conduct in criminal and civil cases. *See United States v. Rice*, 449 F.3d 887, 896-97 (8th Cir. 2006) (allowing the defense in a criminal case); *Lemon v. Hopkins*, 682 S.W.3d 772, 779 n.12 (Mo. App. 2023) (discussing the defense in a malicious prosecution case). To successfully assert an advice of counsel defense, the defendant must have "made a full and truthful disclosure of all material facts to his [or her] attorney" before taking action, including facts the defendant actually knows "and those [she] might have learned by reasonable diligence." *Diehl v. Fred Weber, Inc.*, 309 S.W.3d 309, 318 (Mo. App. 2010); *see also Lemon*, 682 S.W.3d at 779 n.12. In addition to a complete disclosure of facts, the advice of counsel defense requires actual reliance "in the good faith belief that [the defendant's] conduct was legal." *United States v. Naushad*, 68 F.4th 380, 387 (8th Cir. 2023).

This defense is unavailing here for two reasons. First, the advice Gardner received did not clearly authorize reimbursement such that she could have relied on that advice in good faith. She received a draft, unsigned, and informal opinion written by an attorney who neither had nor claimed to have expertise regarding the proper use of public monies, such as those in the contingent fund. His opinion was equivocal about the ultimate question of whether Gardner could be reimbursed from public monies in the contingent fund. The attorney's limited opinion stated (1) *private* attorneys had been reimbursed for disciplinary fees by *private* firms and (2) Gardner's reimbursement would be proper *only* so long as the policies and procedures of the circuit attorney's office allowed for the reimbursement. She could not reasonably rely upon this opinion to seek reimbursement from public funds.

Second, Gardner should have done more to receive clear guidance about whether it was ethical to seek reimbursement from the contingent fund. When her chief clerk asked whether reimbursement was proper, Gardner summarily responded that it was proper because the attorney had said so. After receiving his equivocal opinion, she should have sought further guidance, or she should have investigated her own office's policies and procedures as to whether reimbursement was allowed. Gardner never contacted the Office of Legal Ethics Counsel to request an informal or formal advisory opinion. While there is no guarantee that guidance would protect an attorney from discipline, *per se*, an advisory opinion would have given Gardner more insight into the ethical implications of reimbursement from the fund. To rely solely on the attorney's equivocal opinion was tantamount to willful ignorance because it was clear on the face of the letter that it did not represent a thorough dissection of the issue. Further research would have discovered section 56.530 and its limitations on the uses of the fund.

The advice of counsel defense also conflicts with the policies supporting the rules of professional conduct. The obligation to comply with the rules is personal in nature. Every lawyer takes a solemn oath to comport themselves with the rules of professional conduct. *See McCarty*, 716 S.W.3d at 257. Further, the preamble to the rules states, "Every lawyer is responsible for observance of the Rules of Professional Conduct." Rule 4, pmbl. ¶ 12. Other jurisdictions do not allow attorneys to avoid personal liability for their misconduct by an advice of counsel defense for these very reasons. *See, e.g.*, *Att'y Grievance Comm'n of Md. v. Pennington*, 876 A.2d 642, 656 (Md. 2005) ("[A]n attorney may not delegate the responsibility to another under the umbrella of advice of counsel and thereby create a defense to a violation of the Rules of Professional Conduct."); *People v. Katz*, 58 P.3d 1176, 1187 (Colo. 2002) ("It is the individual attorney's duty and obligation to comply with the Rules of Professional Conduct.").

Under the facts of this case, the advice of counsel defense is not available to Gardner. The advice she received was limited, informal, and incomplete, and she sought no other guidance about the propriety of her conduct.

Disbarment

OCDC seeks disbarment. Gardner argues this case warrants no discipline or, at most, a reprimand. The baseline sanction for misappropriation of client funds is disbarment. *McMillin*, 521 S.W.3d at 610-11; *In re Farris*, 472 S.W.3d 549, 562 (Mo. banc 2015) ("To be clear, disbarment is not automatic. However, disbarment constitutes the 'baseline sanction' for misappropriation." (internal citations omitted)). More broadly, disbarment is a proper sanction when an attorney appropriates funds they hold in a fiduciary capacity to their own use. *In re Haggerty*, 661 S.W.2d 8, 10 (Mo. banc 1983). Though *McMillin*, *Haggerty*, and *Farris* involved misappropriation of client funds, this Court's commitment to enforcing the profession's fiduciary obligations favor applying these rules to public funds as well. Indeed, the circuit attorney's office represents the people of St. Louis and the interests of the state in enforcing the law. *See In re Schuessler*, 578 S.W.3d 762, 775 (Mo. banc 2019) (noting circuit attorneys "act in the best interest of … the citizens of the city of St. Louis" and are not representing clients "only when performing a specific act in a case"). Misappropriation of public funds in that context is akin to taking from one's clients.

This Court also considers the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1992) ("ABA Standards") when determining the appropriate sanction in disciplinary cases. *McCarty*, 716 S.W.3d at 258; *see also* Rule 5.17(b)(4). ABA Standard 5.11 provides disbarment is an appropriate discipline for misappropriation of funds. In relevant part, ABA Standard 5.11 provides disbarment is generally appropriate in the following circumstances:

> (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, *misappropriation*, or theft ….

(Emphasis added). Because Gardner improperly used public funds to reimburse herself for fees she incurred for her own misconduct, disbarment is the presumptively appropriate sanction.

"Though disbarment is the presumptive discipline, the Court must consider mitigating and aggravating circumstances before determining whether to depart from this discipline in a particular case." *Farris*, 472 S.W.3d at 563. Mitigating evidence "must be weighed against the seriousness of the offense[] and the evidence in aggravation." *In re Kayira*, 614 S.W.3d 530, 539 (Mo. banc 2021).

Mitigating Factors

Gardner argues her misconduct is mitigated because she has paid restitution for the reimbursement, relied on the advice of counsel, and accepted accountability for her actions by signing the diversion agreement. The DHP also found Gardner cooperated with the disciplinary investigation and with the formal hearing process.

Gardner's cooperation with the disciplinary proceedings is a mitigating factor this Court considers. Rule 5.17(b)(4); ABA Standard 9.32(e) ("Mitigating factors include … full and free disclosure to [the] disciplinary board or cooperative attitude toward proceedings."). This Court accepts the DHP's finding on this factor.

Gardner's other arguments for mitigation do not warrant consideration. Advice of counsel is not an enumerated mitigator in the ABA Standards, and, as discussed above, her reliance on the attorney's informal and limited opinion does not mitigate against discipline. While this Court may consider the imposition of other penalties or sanctions under ABA Standard 9.32(k), Gardner's diversion agreement cannot be used in mitigation because it is not itself a penalty or sanction; to the contrary, it is the avoidance of penalty or sanction. Similarly, though ABA

Standard 9.32(e) would allow the consideration of "timely good faith effort to make restitution or to rectify consequences of misconduct," Gardner's payment of restitution in this case was obligatory under the diversion agreement.[6] The ABA Standards also provide "forced or compelled restitution" is neither aggravating nor mitigating. ABA Standard 9.4(a). A required payment of restitution under an agreement in which Gardner avoided criminal liability cannot mitigate against discipline.

Gardner also contends she lacked a dishonest or selfish motive and showed remorse. *See* ABA Standard 9.32(b), (l). The Court finds these arguments to be unfounded. The very nature of her misappropriation of funds indicates a selfish motive: Gardner wished to avoid personal liability for the sanctions this Court imposed on her. Additionally, the assertion that Gardner has remorse is disingenuous when she argued before the DHP and this Court that she believes she has not violated the rules of professional conduct. She cannot claim remorse for wrongdoing she denies having committed.

Aggravating Factors

Prior disciplinary offenses are an aggravating factor. ABA Standard 9.22(a). Gardner received the reprimand in 2022. This Court agrees with the DHP's finding that there is no evidence indicating a pattern of misconduct. The commission of another ethical violation shortly after receiving a reprimand, however, is an aggravating factor. The connection between the prior discipline and this case also evinces a financially selfish motive and a refusal to take accountability for her actions. ABA Standard 9.22(b), (g). Gardner continues to deny any impropriety in her conduct. She relied heavily on the advice of counsel defense to claim she

[6] Gardner paid restitution before signing the diversion agreement; however, the repayment was made after the misappropriation was discovered and during the process of negotiating the diversion agreement.

should not be held liable for her wrongdoing and further contends, because other circuit attorneys had used the contingent fund for purposes beyond those authorized in section 56.530, her use of the fund was acceptable. Furthermore, her deceit as to the source of her payments to this Court aggravates toward disbarment.

Other aggravating factors are Gardner's experience and her position as a public official. ABA Standard 9.22(i) provides "substantial experience in the practice of law" is a factor to be considered in aggravation. Gardner was licensed in 2004, giving her 18 years of experience before her reprimand and the conduct underlying this proceeding. Also, she was elected circuit attorney in 2017, giving her five years of experience in that office. As to her status as a public official, this Court has previously held assistant circuit attorneys to a higher standard of professional conduct in disciplinary cases:

> The prosecutor is an officer of the state who should have no private interest in the prosecution and who is charged with seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain. A prosecutor is under a duty to consider the public interest in the fair administration of criminal justice. … [S]uch attorneys are held to a higher standard given the nature of their work to protect the public.

Schuessler, 578 S.W.3d at 773-74 (internal quotation and citation omitted). As Gardner was the elected circuit attorney, she was a public official and certainly held to a higher standard of professional conduct. The comments to the rules of professional conduct also support a heightened standard for public officials: "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers." Rule 4-8.4, cmt. 6.

As the DHP stated in its decision, Gardner was *the* circuit attorney. She was presumed to know the law, given her position as chief prosecuting officer for the city of St. Louis. Her unfamiliarity with the statutes that applied to her office undermines her fitness for the practice of

law. Gardner was charged with ensuring her staff acted within the office's statutory authority and had an affirmative duty not to misuse any public monies, including from the contingent fund. That her chief clerk issued the checks provides no defense because the clerk did so at Gardner's request, and Gardner co-signed each of the checks. The rules contemplate such indirect misconduct: "Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf." Rule 4-8.4, cmt. 1. Regardless of what her clerk knew about the fund, Gardner, and no one else, had an obligation to ensure public monies were not misused.

Conclusion

Weighing the aggravating and mitigating factors, disbarment is the proper discipline. Although Gardner's rule violations alone do not automatically warrant disbarment, the combination of her misappropriation of public funds and misrepresentations to this Court, along with her status as a public official and her disciplinary history, clearly warrant her disbarment. Her reliance on the advice of counsel does not absolve her of her personal obligation to comport herself with the rules of professional conduct. Gardner is disbarred.



Mary R. Russell, Judge

Powell, C.J., Fischer, Wilson, Broniec, Gooch, and Hensley, Sp.J., concur. Ransom, J., not participating.