IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
DAVID BEN MANDELBAUM	)	**Supreme Court #SC93964**
	)	
Respondent.	)	

INFORMANT'S BRIEF

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ATTORNEYS FOR INFORMANT

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STATEMENT OF JURISDICTION

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 2000.

STATEMENT OF FACTS

Background

Respondent was licensed to practice law in Missouri in 1986. He is in private practice in the Kansas City area. He is also licensed in Kansas; both licenses are in good standing.

Respondent office shares with another attorney in an office located in Leawood, Kansas. **App. 49 (T. 23), 54 (T. 43)**. Currently he practices in the areas of criminal defense and traffic law, but also does some workers compensation, personal injury, and some domestic relations. **App. 63 (T. 79)**.

Disciplinary History

Respondent accepted two admonitions in 2000. One was for diligence (4-1.3) and communication (4-1.4) violations in Respondent's representation of a client in a slip and fall case. The other was for violation of the conflicts rule (4-1.7(b)). **App. 115-119.**

In an order dated January 4, 2008, the Missouri Supreme Court reprimanded Respondent for violation of the conflicts rules (4-1.7(a) and 4-1.8(b)). **App. 120.**

Disciplinary Case

In late June of 2012, the Office of Chief Disciplinary Counsel (OCDC) received an overdraft notice from Commerce Bank advising that Respondent's lawyer trust account had been overdrawn by three checks. **App. 69-70**. Disciplinary authorities thereafter performed an audit of Respondent's Commerce Bank trust account covering the period from August 1, 2011 to July 31, 2012. **App. 76.**

Overdraft

In the late 1990s, Respondent set up a lawyer trust account (IOLTA) at Commerce Bank. **App. 50 (T. 25)**. Commerce Bank closed the account on July 25 or 26, 2012. **App. 50 (T. 26)**. Respondent had several checks outstanding at the time Commerce Bank closed the trust account. **App. 50 (T. 26-27).** The bank sent Respondent a check for the funds that were in the account at the time the bank closed it, so the outstanding checks Respondent had written on the account did not clear the bank. **App. 61 (T. 69)**. The bank's closure of the account caused those checks to be returned by the bank, generating the overdraft notice to OCDC. **App. 50 (T. 26-27).**

Respondent believes that Commerce Bank closed his trust account because the Internal Revenue Service (IRS) had levied on his personal operating account. **App. 50 (T. 26)**. At the time, Respondent was negotiating with the IRS and the Kansas Department of Revenue regarding tax debt issues. **App. 19 (T. 9-10), 60 (T. 67).** The amount of tax debt involved was approximately $128,000.00. **App. 19 (T. 10)**. There were multiple levies by taxing authorities on Respondent's personal and business operating accounts between August of 2011 and August of 2012. **App. 79**. To his knowledge, there was never an attempt to levy on his trust account. **App. 19 (T. 10).**

Commingling

When the taxing authorities started levying on Respondent's operating account, he started leaving earned fees in his trust account. **App. 60 (T. 68)**. He left fees in his trust account because he was afraid that if he moved his money into the operating account it

would be taken by the IRS or the State of Kansas. **App. 33 (T. 63), 53 (T. 37)**. Respondent knew he was required to remove earned fees from the trust account. **App. 60 (T. 68), 63 (T. 80)**. It had not occurred to him that by leaving his personal funds in the trust account he was putting the trust account at risk of a levy. **App. 33 (T. 63)**.

Specific Transactions in Violation of the Rules

Respondent admits that he violated Rule 4-1.15(c) (2011) by failing to hold his property separate from his clients, i.e., leaving his earned fees in the trust account. **App. 57 (T. 56), 79**. Respondent also violated Rule 4-1.15(c) (2011) by using the trust account for transactions not related to a legal representation.

The transactions that Respondent has admitted violated the rule are found in the Joint Stipulation and are set forth below:

> In August 2011, Respondent deposited approximately $91,400.00 settlement proceeds into the Trust Account on behalf of a client, Josef Washington. From those proceeds, Respondent retained $1,500.00 in earned attorney fees in the Trust Account. Respondent utilized the trust account to hold his own personal property instead of promptly transferring the $1,500.00 in earned attorney fees out of the trust account into another account. **App. 77**.
>
> In or about May of 2011, Respondent disbursed a $500.00 payment from the Trust Account to a physician with

a notation indicating a report for client Chris Shell. However, Shell's proceeds were not deposited into the Trust Account until approximately ten months later. Accordingly, the physician received a payment of $500.00 derived from fees earned in connection with another client's matter that were improperly allowed to remain in the trust account. **App. 77**.

On September 8, 2011, Respondent made a $6,260.00 cash deposit into the Trust Account to facilitate the purchase of a motorcycle by a third party, a transaction unrelated to any bona fide professional service performed by Respondent. **App. 77-78**.

Respondent has made numerous payments into the Trust Account from William Mixson. Likewise, Respondent has made numerous disbursements from the Trust Account to Mr. Mixson. Mr. Mixson is a friend of Respondent. Respondent has utilized the Trust Account to facilitate personal transactions for Mr. Mixson unrelated to bona fide legal services performed by Respondent. **App. 78**.

Respondent has utilized the Trust Account to pay for non-trust items, such as personal expenses, business operating expenses and advances to clients for living expenses. Checks

written from the Trust Account to: Dr. Poppa (Check No. 3328 and Check No. 3405); Benson Schwark (Check No. 3411); Eric Dober (Check No. 3369); Respondent's landlord (Check No. 3281); Wes McCullough (Check No. 3439); McCullough Aviation (Check No. 3574); The Copier Man (Check No. 3425); Aire Care Inc. (Check No. 3464); Candace Houchen (Check No. 3284); and Capital One Credit Card (numerous checks) were not for trust purposes. **App. 78**.

Respondent has acknowledged violating Rule 4-1.15 by depositing $11,706.15, a fee he had already fully earned, into the trust account. **App. 62 (T. 73), 79**.

Respondent has acknowledged violating Rule 4-1.8(e) by advancing funds to clients for living expenses and to pay a fine for a client. The transactions are described in the Joint Stipulation and are set forth below.

> Respondent represented Candace Houchen in connection with a workers compensation claim. On or about September 16, 2011, Respondent advanced $1,000.00 to Candace Houchen for living expenses prior to the settlement of her claim. Such payment to Houchen was paid from Respondent's own funds. However, the advance to Houchen was paid from funds in the Trust Account drawn from a Trust Account check. **App. 79.**

> Respondent represented Lori Demanche in connection with an injury case. On or about September 27, 2011, Respondent advanced $186.50 for the client's benefit to pay for a municipal court fine. On November 24, 2011, and again on February 10, 2012, Respondent advanced a total of $600.00 to Ms. Demanche for living expenses. Such funds were paid from Respondent's own funds prior to the settlement of her claims. However, the advances to Demanche were paid in part from funds in the Trust Account drawn from a Trust Account check and also in part from cash funds on hand. **App. 80**.

Respondent violated Rule 4-1.8(a) by borrowing money from a client. The client's money was deposited in Respondent's trust account, and Respondent thereafter withdrew money totaling approximately $10,000.00 as he needed it for purposes not related to the client. **App**. **54 (T. 44)**. Respondent complied with none of the safeguards mandated by Rule 4-1.8(a) before borrowing the client's money. The client, Gail Fuller, had no objection to Respondent's use of her money and all of the money was turned over to Ms. Fuller when she requested it.

Specifically, in March of 2011, Respondent deposited $25,000.00 in his trust account. The funds had been paid to Ms. Fuller as part of a dissolution case in which he was representing her. Respondent had represented Ms. Fuller in various matters for

twenty-five years. She has full confidence in him and his legal abilities. **App. 64-65 (T. 84-85)**. Ms. Fuller did not want the $25,000.00 paid to her right away due to a pending legal matter. She asked Respondent to keep it for her with the understanding that he could use it for whatever purpose he wanted so long as he paid it to her whenever she asked for it. **App. 65 (T. 86-87)**. There was no paperwork involved in the transaction and no discussion about getting advice from another attorney. **App. 65 (T. 88), 66 (T. 91)**. Respondent maintained no written records regarding his use of Ms. Fuller's funds. Ms. Fuller received all of the $25,000.00 from Respondent in late August of 2011 and has no qualms about the way the money was handled. **App. 65 (T. 87-88).** Respondent has acknowledged that he violated Rules 4-1.15(d) (2011) and 4-1.8(a) in his handling of Ms. Fuller's funds.

Respondent's Status with Taxing Authorities

At the time of his disciplinary hearing, Respondent had two attorneys and an accountant working on his tax situation with the IRS and Kansas Department of Revenue. There are still issues in dispute. He does not anticipate any future levies. **App. 53 (T. 37)**.

Mitigating Evidence

Respondent is in a stable, office sharing practice that has been in existence since 2004. **App. 54 (T. 43)**. He and the lawyer with whom he office shares have malpractice insurance. **App. 53 (T. 39), 63 (T. 80)**. He is financially stable except for the outstanding tax issue. **App. 54 (T. 44)**. He has no addiction problems. **App. 54 (T. 42)**.

The misconduct represented by his disciplinary history occurred in the late 1990s. **App. 58 (T. 58)**.

Respondent has learned from the current disciplinary case. He has learned his lesson about conflicts of interest. **App. 59 (T. 62)**. He now runs his trust account appropriately. **App. 61 (T. 70-72)**.

There is no allegation that he misappropriated client funds, and he has never misappropriated client funds. **App. 52 (T. 34-35), 60 (T. 65).**

POINT RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED MULTIPLE RULES OF PROFESSIONAL CONDUCT IN THAT HE PROVIDED FINANCIAL ASSISTANCE TO CLIENTS IN VIOLATION OF RULE 4-1.8(e), HE FAILED TO HOLD PROPERTY OF CLIENTS SEPARATE FROM HIS OWN IN VIOLATION OF RULE 4-1.15(c), HE FAILED TO MAINTAIN COMPLETE TRUST ACCOUNT RECORDS IN VIOLATION OF RULE 4-1.15(d), AND HE BORROWED CLIENT MONEY, i.e., ENTERED INTO A BUSINESS TRANSACTION WITH A CLIENT WITHOUT COMPLYING WITH THE SAFEGUARDS AS SET FORTH IN RULE 4-1.8(a).

Supreme Court Rule 4-1.8(a) (e)

Supreme Court Rule 4-1.15(c) (d) (2011)

POINT RELIED ON

II.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR ONE YEAR, STAY THE SUSPENSION, AND PLACE RESPONDENT ON PROBATION FOR TWO YEARS BECAUSE RESPONDENT KNOWINGLY DEALT IMPROPERLY WITH CLIENT FUNDS (COMMINGLED) IN THAT HE KNOWINGLY LEFT AND DEPOSITED EARNED FEES IN HIS TRUST ACCOUNT.

In re Reid, 122 N.M. 517, 927 P.2d 1055 (1996)

In re Mathewson, 113 Ohio St. 365, 865 N.E.2d 891 (2007) (per curiam)

ABA Standard 4.12, Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED MULTIPLE RULES OF PROFESSIONAL CONDUCT IN THAT HE PROVIDED FINANCIAL ASSISTANCE TO CLIENTS IN VIOLATION OF RULE 4-1.8(e), HE FAILED TO HOLD PROPERTY OF CLIENTS SEPARATE FROM HIS OWN IN VIOLATION OF RULE 4-1.15(c), HE FAILED TO MAINTAIN COMPLETE TRUST ACCOUNT RECORDS IN VIOLATION OF RULE 4-1.15(d), AND HE BORROWED CLIENT MONEY, i.e., ENTERED INTO A BUSINESS TRANSACTION WITH A CLIENT WITHOUT COMPLYING WITH THE SAFEGUARDS AS SET FORTH IN RULE 4-1.8(a).

In this Rule 5 original disciplinary proceeding, the Court reviews the evidence de novo. The disciplinary hearing panel's findings of fact, legal conclusions, and sanction recommendation are advisory to the Court. *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005) (per curiam). Rule violations must be proven by a preponderance of the evidence. Supreme Court Rule 5.15(c).

This case was initiated when Commerce Bank sent the Office of Chief Disciplinary Counsel, in late June of 2012, a notice of an overdraft in Respondent's Commerce Bank trust account. An audit of the trust account, covering the period August

1, 2011, to July 31, 2012, in conjunction with Respondent's deposition testimony and evidence offered at his disciplinary hearing, substantiated numerous Rule violations arising out of Respondent's handling of his trust account in that time frame.

The violations and the facts underlying them have been readily acknowledged by Respondent. The facts and transactions are diverse, however, and often transactions that violated the rules are unrelated to other transactions. Further, the rule violations ascribed to a particular transaction by the First Amended Information and the Joint Stipulation do not always follow through and appear in the Disciplinary Hearing Panel (DHP) decision. An effort will be made to succinctly summarize, by the counts set forth in the First Amended Information, the transactions and the rule violations ascribed to them.

It is noted at the outset that there is no evidence that Respondent misappropriated client or third party funds. Nor did Respondent's mismanagement of his trust account, in violation of several rules, result in any disciplinary complaints. As noted above, this case was opened upon OCDC's receipt of an overdraft notice.

By way of background, Respondent testified that he did not start leaving earned fees in his trust account until taxing authorities began levying on his personal and operating accounts. The record is silent as to when the levies began, but Respondent stipulated that multiple levies occurred throughout the period covered by OCDC's audit of his trust account (August 1, 2011 through July 31, 2012). Respondent testified that he now follows and complies with all recordkeeping and ethical rules concerning attorney trust accounts.

Count I

Respondent was charged with violating Rule 4-1.8(e) by providing financial assistance to two clients. Respondent admitted and the records established that in 2011 and 2012 Respondent "advanced" two different clients money for living expenses. Respondent stipulated and the DHP concluded Respondent violated Rule 4-1.8(e), which prohibits providing financial assistance to a client except in certain circumstances not applicable here.

Count II

Respondent was charged with violating Rule 4-1.15(c) in that he left or deposited earned fees in his trust account, and used the account for transactions unrelated to a legal representation. As an example of the latter rule violation, an individual for whom Respondent had done legal work off and on for some time gave Respondent something close to $12,000.00 in cash and asked Respondent to purchase a motorcycle that the individual wanted to give a friend. Respondent deposited part of the money in his trust account ($6,259.00) and kept approximately $5,000.00 cash. He wrote a check for $11,259.00 out of the trust account to pay for the motorcycle. The $11,259.00 was paid from the cash he had deposited on the individual's behalf and from fees he had left in the account from another case. Respondent admitted the transaction was not a proper use of an attorney's trust account. **App. 57 (T. 54).**

In another instance of his violation of Rule 4-1.15(c), in late 2011 Respondent deposited into his trust account an annual fee ($11,706.15) he had been paid for serving

as the donor advisor trustee of a charitable remainder trust. **App**. **62-63 (T. 73-79).** The fee had been completely earned at the time of its deposit. Another example of Respondent's commingling was his admission that he left his fee from settling a client's case in the trust account, after paying the client the client's share of the funds. **App**. **63 (T. 78)**.

Respondent wrote checks out of the trust account on numerous occasions to pay for personal items (rent, office expenses) or litigation expenses for clients. These items were paid from Respondent's fees that he had left in the trust account; not from client's money. **App**. **78**. His clients always got their money first. **App**. **60-61 (T. 68-69)**. He has always deposited settlement proceeds in his trust account; he only started leaving his fee or depositing fees in the trust account in 2011 and 2012. **App**.**52 (T. 33-34)**.

Respondent started holding his fees in the trust account to keep his funds from taxing authorities. **App**. **53 (T. 37)**. He started leaving earned fees in the trust account in 2011 after the IRS levied on his operating account. **App**. **60 (T. 67-68)**. Respondent knew better than to leave his fees in the trust account; he understood the rules. **App**. **63 (T. 80)**.

Respondent stipulated that he violated Rule 4-1.15(c). The DHP concluded Respondent violated Rule 4-1.15(c).

The DHP also concluded Respondent violated Rule 4-1.15(b)[1] "by depositing his own funds in the trust account, for purposes other than paying bank service charges on that account." **App**. **101**. Respondent was not charged, however, with violating Rule 4-1.15(b), and that subdivision of the rule is not mentioned in the Joint Stipulation. Informant does not, therefore, contend here that Respondent violated that rule.

Count III

Respondent was charged with violating Rule 4-1.15(d),[2] which requires that "complete records" of client trust accounts be maintained for at least five years. The First Amended Information alleged numerous instances in which "complete records" were not maintained. Respondent stipulated that he violated this provision of the rule with respect to withdrawals he made from the trust account from funds held there for a client named Fuller (those transactions are described under Count IV). **App**. **81-82**. The DHP concluded Respondent violated Rule 4-1.15(d) by failing to maintain required records regarding the Fuller, i.e., loan, transactions and his personal use of client funds.

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[1] The relevant subsection of Rule 4-1.15 appears as (b) in the 2013 (the year the hearing occurred) version of the rules. In 2011 and 2012, when Respondent engaged in the misconduct at issue, the relevant subsection appeared as Rule 4-1.15(e).

[2] The relevant subsection of Rule 4-1.15 appears as (d) in the 2011 and 2012 versions of the rule. It is noted that the subsection appears as subsection (f) in the 2013 and 2014 versions of the rule.

Count IV

The First Amended Information charged Respondent in the alternative with violating either Rule 4-1.8(a) (prohibited transactions with a client) or Rules 4-1.5 and 4-8.4(c). The Joint Stipulation and evidence offered at the disciplinary hearing substantiate the Rule 4-1.8(a) charge. Disciplinary counsel does not allege that Respondent misappropriated Ms. Fuller's funds.

The evidence showed that in March of 2011 Respondent deposited $25,000.00, paid to his client Ms. Fuller at the conclusion of her dissolution case, in his trust account. Ms. Fuller testified that she had known Respondent for many years and had used him as her attorney in several matters. She continues to use Respondent and considers him her lawyer. She testified that she asked Respondent to keep the $25,000.00 for her as she was being sued as the title owner of a car that her son was in at the time of an accident. **App**. **65 (T. 86), 66-67 (T. 92-93)**. Ms. Fuller told Respondent he could do whatever he wanted with the money so long as it was there when she needed it. **App**. **66 (T. 89)**. He was holding the money for her so she would not spend it if she needed it for the case. **App**. **66 (T. 90, 92)**. When she asked Respondent for the money, he promptly paid it to her. **App**. **65-66 (T. 87, 89).**

Respondent withdrew $9,649.75 from his trust account between May 5, 2011 and June 17, 2011. **App**. **80-81.** Respondent had a large case that he anticipated would settle in the near future, but in the meantime he used Ms. Fuller's funds. **App**. **55 (T. 46)**. Respondent replaced the money he had withdrawn on or about August 25, 2011, which

was the same date he delivered the $25,000.00 to Ms. Fuller as she had requested. **App. 55 (T. 46-47), 80-81**.

There was no paperwork documenting the $25,000.00 Fuller transaction. There were no written or oral waivers of conflicts of interest. Ms. Fuller was not given an adequate opportunity to seek the independent advice of counsel. **App. 54 (T. 44), 65 (T. 88), 66 (T. 91), 81**.

The DHP concluded, and Respondent stipulated, that he violated Rule 4-1.15(d) by failing to maintain required records relating to the "loans" and "his personal use of client funds."

The DHP decision makes no finding regarding the charged Rule 4-1.8(a) violation. The evidence overwhelmingly substantiates that Respondent violated Rule 4-1.8(a) by entering into a business transaction, i.e., borrowing approximately $10,000.00 of Ms. Fuller's money without complying with any of the safeguards mandated by that rule before entering into such an inherently conflicted transaction. Informant urges the Court to conclude that Respondent violated Rule 4-1.8(a), as charged in the Amended Information.

ARGUMENT

II.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR ONE YEAR, STAY THE SUSPENSION, AND PLACE RESPONDENT ON PROBATION FOR TWO YEARS BECAUSE RESPONDENT KNOWINGLY DEALT IMPROPERLY WITH CLIENT FUNDS (COMMINGLED) IN THAT HE KNOWINGLY LEFT AND DEPOSITED EARNED FEES IN HIS TRUST ACCOUNT.

Sanction analysis starts with identification of the most serious instance of misconduct where more than one rule violation is present in the case. The most serious of Respondent's transgressions was leaving or depositing fees he knew he had already earned in the trust account in violation of Rule 4-1.15(c). Respondent acknowledged several times in his testimony that he knew that his fees were to be removed from the trust account when he earned them. He stated he "knew better" than to hold his money in the trust account; he candidly acknowledged that he did so to safeguard his money from taxing authorities that had repeatedly levied on his personal and operating accounts.[3]

[3] Informant found no criminal cases pending against Respondent on PACER or Case.net.

Commingling his funds with clients' in the trust account put client funds at risk of being levied on by taxing authorities. Respondent testified that it had not occurred to him that taxing authorities could levy on his trust account if they had reason to believe he was secreting his money there, but his professed lack of actual knowledge of that possibility should not obviate the very real risk of loss to which he subjected client money.

"Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." ABA Standard 4.12, Standards for Imposing Lawyer Sanctions (1991 ed.). Commingling that does not degenerate to misappropriation of funds is generally sanctionable by suspension. See the Commentary to Standard 4.12, citing cases from Washington, Kansas, Tennessee, and Illinois.

The Missouri Supreme Court generally disbars lawyers who commingle personal funds in the client trust account, when the commingling is accompanied by misappropriation of client or third party funds. In *In re Ehler*, 319 S.W.3d 442 (Mo. banc 2010), the attorney deposited multiple checks into her trust account representing money owed to herself for fees, third party creditors, and her client and the opposing party. Some money was withdrawn and properly paid to the appropriate individuals and entities. Before the lawyer's client and the client's ex-husband received all they were due, however, the trust account fell below the amounts owed because the lawyer paid personal and office bills out of the trust account.

In *In re Williams*, 711 S.W.2d 518 (Mo. banc 1986), the attorney properly deposited client funds in a trust account, but failed to deliver the funds promptly to the client because the trust account held insufficient funds to do so, i.e., the trust account was overdrawn at the time of the deposit. In *In re Staab*, 785 S.W.2d 551 (Mo. banc 1990), the attorney deposited funds he was to pay a third party in a trust account, then failed to pay the third party the funds for more than two years. The lawyer acknowledged using trust account funds during the interim to pay personal and office expenses.

Ms. Ehler, Mr. Williams, and Mr. Staab were all disbarred.

The instant case is distinguishable from the foregoing disbarment cases because while Mr. Mandelbaum knowingly commingled client funds with his own in the trust account, there is no evidence that he used client or third party funds to his own benefit, with the exception of Ms. Fuller's funds as is discussed below. Mr. Mandelbaum's case is one of commingling, without misappropriation, in an effort by the attorney to safeguard his property from tax levy. No Missouri discipline cases presenting this set of facts were discovered. Because of the high degree of risk to which Respondent subjected client property, even without misappropriation, Informant suggests that suspension is the appropriate baseline sanction.

Respondent offered persuasive evidence at the hearing that he did not misappropriate Ms. Fuller's funds. Ms. Fuller testified that it was at her insistence that her $25,000.00 was left in Respondent's trust account and that she orally gave Respondent permission to use the funds any way he wished, so long as he could deliver

the funds to her at any time she asked for them. There are ethical problems with Respondent's acquiescence in his client's request, but misappropriation was not one of them.

While none of the following cases are on point with the case under consideration, an overview of other states' attorney discipline decisions involving an attorney's use of the trust account to avoid collection procedures is offered below.

Disciplinary authorities were alerted to possible trust account violations by a bankruptcy court in *In re Reid*, 122 N.M. 517, 927 P.2d 1055 (1996). The bankruptcy court's clerk reported to disciplinary authorities that two checks drawn on Reid's trust account had been returned for insufficient funds. A twelve-month audit of Reid's trust account records revealed multiple trust account violations, including failure to keep personal funds separate, paying personal expenses out of the account, and failing to maintain required records. Reid acknowledged that he began using the trust account for personal business when he became concerned the IRS was going to levy on his personal account.

In sanctioning Reid (who had prior unrelated discipline) to a two-year suspension, stayed for all but the initial sixty days, and ordering him to serve a probation during the stayed suspension, the New Mexico Supreme Court noted that the "fact that respondent was concerned about a potential IRS levy in no way excuses his misuse of his trust account."

The attorney in *In re Mathewson*, 113 Ohio St. 365, 865 N.E.2d 891 (2007) (per curiam), acknowledged using his client trust account as a personal checking account in an attempt to avoid federal tax and child support enforcement collection procedures. The case involved other misconduct as well. The Ohio Supreme Court suspended Mathewson's license indefinitely, which meant he was eligible for reinstatement in two years.

The attorney in *In re Blumberg*, 695 N.E.2d 114 (Ind. 1998) (per curiam), deposited $700-$800 of his own funds in his trust account, he said, to protect client funds because the IRS had previously levied on his trust account three times. The Indiana Supreme Court noted that it had recognized an exception to the "no commingling" rule by allowing an attorney to deposit a nominal sum in the trust account for the protection and integrity of the account. Cf. Rule 4-1.15(b) (2014). The court found, however, that $700-$800 was not nominal, and that Respondent's own fiscal mismanagement "set the stage for the perceived need to commingle." 695 N.E.2d at 116. The court also noted that the attorney's commingling likely further exposed the account to attachment by creditors. The court suspended the attorney's license for six months.

Finally, the New York Supreme Court, Appellate Division, suspended a lawyer's license for three years in *In re Wagshul*, 308 A.D.2d 248, 765 N.Y.S.2d 47 (2003) (per curiam), where the attorney established an attorney escrow account in an effort to prevent his creditors from locating his assets and executing on judgments obtained against him.

He failed to maintain required records. There apparently was no evidence of any client harm, and the lawyer had no prior disciplinary history.

Consideration of aggravating and mitigating factors is the final step in sanction analysis. The parties stipulated that the aggravating factors present in this case are Respondent's prior history of a reprimand and two admonitions, the pattern of misconduct demonstrated by the commingling that occurred over the course of a year, the fact that multiple rules were violated, and Respondent's experience in the practice of law.

The mitigating factors to be considered are Respondent's full and free disclosure and cooperation with the disciplinary investigation and proceeding, his expression of genuine remorse for his misconduct, and the testimony of two attorneys at the hearing that they know Respondent to be a trustworthy and dependable colleague.

Disciplinary counsel agreed to jointly recommend stayed suspension with probation because Respondent appears unlikely to harm the public during a two-year period of probation (his trust account will be monitored) and expressed willingness to have his practice closely supervised. No evidence suggested Respondent's legal skills risked causing disrepute to the courts or profession. And, as discussed above, Informant does not believe Respondent is guilty of disbarable offenses. See Rule 5.225(a)(2).

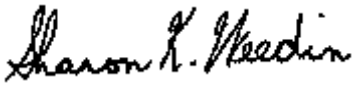
The term and conditions of probation proposed for use in this case directly address the misconduct identified by OCDC's audit of Respondent's trust account. Informant and Respondent jointly recommend that a stayed suspension with a lengthy probation be ordered.

CONCLUSION

Respondent has acknowledged knowingly commingling his funds in his client trust account. He has also admitted using the trust account for transactions unrelated to any representation, advancing living expenses to clients, and borrowing money from a client without complying with Rule 4-1.8(a). Respondent has readily admitted wrongdoing and expressed remorse. The parties jointly recommend that the Court suspend Respondent's license for one year, stay the suspension, and order Respondent placed on probation for two years.

Respectfully submitted,

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel



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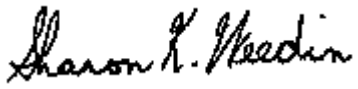
CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2014, the Informant's Brief was sent to Respondent and Respondent's counsel via the Missouri Supreme Court e-filing system:

David Ben Mandelbaum
Respondent

J. D. Williamson, Jr.
Attorney for Respondent

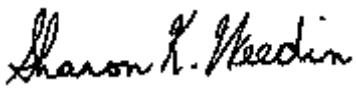


Sharon K. Weedin

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. Complies with the limitations contained in Rule 84.06(b);
3. Contains 5286 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



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