IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
LARRY D. COLEMAN,	**)**	**Supreme Court #SC89849**
	)	
Respondent.	**)**	

INFORMANT'S BRIEF

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ATTORNEYS FOR INFORMANT

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters exists in the Missouri Supreme Court and 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 and Disciplinary History

On or about April 30, 1977, Respondent, Larry D. Coleman ("Respondent") was licensed to practice law in the State of Missouri. Respondent's bar number is 27575. By order of this Court, Respondent received a public reprimand on April 15, 2008 for violations of Rules 4-1.3 (diligence), 4-1.5 (unreasonable fees) and 4-8.4(d) (conduct prejudicial to the administration of justice). **App. 202**. Respondent also received two prior admonitions, the first being in 1990 for failure to communicate with his client and for unreasonable fees. **App. 199-200**. Respondent's second admonition was received in 1999 for failure to act with reasonable diligence, failure to expedite litigation and failure to communicate with his client. **App. 201**.

Conduct Underlying the Amended Information[1]

Vera Davis, Count I of the Amended Information

Respondent represented Ms. Vera Davis ("Ms. Davis") in three civil actions that were separate, but pending simultaneously. **App. 8 (T. 16)**. In or around July 18, 2001,

[1] Informant's Amended Information contained three counts, with Count II pertaining to Respondent's representation of Myrtle Canady. **App. 68-78**. The Disciplinary Hearing Panel found the evidence insufficient to establish violations pertaining to Respondent's representation of Myrtle Canady and while acknowledging that this Court conducts a *de novo* review, Informant does not contest the Disciplinary Hearing Panel's findings or recommendation, here. **App. 207-211**.

Respondent entered into an agreement with Ms. Davis to represent her in an action against St. Luke's Hospital for the wrongful death of Ms. Davis' sister ("St. Luke's case"). **App. 6 (T. 8-9); 119**. Ms. Davis paid Respondent a "non-refundable" retainer of $5000 and Respondent charged Ms. Davis $200 per hour. **App. 6-7 (T. 9-10); 119**. The second case involved a claim by Ms. Davis that she was unlawfully terminated by her employer, Two Rivers Psychiatric Hospital ("Two Rivers case"). **App. 7 (T. 11)**. Ms. Davis paid Respondent a "non-refundable" retainer of $2000 and Respondent charged Ms. Davis $200 per hour. **App. 7-8 (T. 13-14)**. Finally, in or around March, 2004, Respondent entered into an agreement to represent Ms. Davis in a discrimination claim against Western Missouri Mental Heath Center ("Western Missouri Mental Health case"). **App. 8 (T. 15); 120**. Ms. Davis paid Respondent a retainer of $1000 and Respondent charged Ms. Davis $200 per hour for the representation. **App. 120**.

From June, 2001 to September, 2006, Respondent sent bills to Ms. Davis on a periodic basis. **App. 8 (T. 17)**. As the bills arrived, Ms. Davis paid by cashier's check, personal check or money order. **App. 9 (T. 18); 121-139**. Ms. Davis did not keep a ledger of all monies paid to Respondent nor did she otherwise keep track of each receipt for monies paid to Respondent. **App. 9 (T. 18-19)**. Ms. Davis was, however, able to produce some receipts indicating that she paid Respondent over $38,000 in fees. **App. 9 (T. 18-19); 121-139**. Ms. Davis estimates that she paid Respondent between $30,000 and $50,000 in fees and Respondent does not disagree with her estimation. **App. 9 (T. 18); 23 (T. 77)**. Respondent did not maintain copies of any bills or other documentation

indicating receipt of money by Ms. Davis and contends that all bills and statements were delivered to Ms. Davis when he returned her files to her possession. **App. 23 (T. 77)**.

Between June, 2001 and 2006, Ms. Davis did not feel that her cases were sufficiently progressing. **App. 10 (T. 23)**. It appeared to Ms. Davis that no action was being taken on her cases, though she continued to pay Respondent when he sent a billing statement. **App. 10 (T. 23)**. In or around July, 2006, the State of Missouri, on behalf of Western Missouri Mental Health Center, made an offer to settle Ms. Davis' discrimination case for $20,000. **App. 10 (T. 23); 140**. Ms. Davis informed Respondent that she did not find the settlement offer to be acceptable and instructed Respondent to reject the State's offer. **App. 10 (T. 24)**.

In or around September 8, 2006, Ms. Davis informed Respondent that she could no longer afford to continue paying him the large sums of money that she had paid over the previous five years. **App. 10 (T. 24-25); 141**. Ms. Davis offered to pay Respondent $50 per month towards any fee that might accrue, but Respondent informed Ms. Davis that $50 per month was too insignificant an amount to be useful. **App. 10 (T. 25)**. Instead, Respondent proposed that he and Ms. Davis convert their fee agreement in each case to a contingency agreement. **App. 10 (T. 24-25)**. In the St. Luke's case, Respondent executed a written agreement whereby Respondent states that he is willing to forgive any currently-owed balance of fees in exchange for receipt of one-third of any recovery in the St. Luke's case. **App. 141**. Similarly, Respondent executed separate agreements in the Two Rivers and Western Missouri Mental Health cases, whereby Respondent agreed to forego collection of currently-owed balances of fees in exchange

for receipt of one-third of any recovery in the cases. **App. 142; 143**. Under the terms of the new contingency agreements, Ms. Davis was to receive no credit for the $38,000 (or more) that she had previously paid to Respondent and the one-third recovery was to be calculated and paid in addition to the fees previously paid by Ms. Davis. **App. 26 (T. 87)**.

In each of the new contingency agreements drafted and executed by Respondent, Respondent inserted the following paragraph:

> In consideration of one-third (1/3) of any recovery, I agree to forego my hourly rate, and instead, agree to accept one-third of any recovery. However, because I am taking a risk with you on this case, and because I am more familiar with the legal trends relative to judgments, settlements, and summary disposition, you agree I shall have the exclusive right to determine when and for how much to settle this case. That way, I am not held hostage to an agreement I disagree with.

App. 141; 142; 143. Upon receipt in the mail of the new contingency agreements, Ms. Davis looked at each in a cursory manner to determine that the contingent recovery contained in the letters was "one-third," as previously discussed with Respondent. **App. 11 (T. 27)**. Ms. Davis did not read the portion of the letter that purported to give Respondent the exclusive right to settle her cases without her consent and contends that Respondent did not explain or otherwise discuss this clause in the agreements with Ms. Davis prior to the execution of the agreements. **App. 11 (T. 27-28)**. Respondent maintains that he believed and still believes that he has the right to enter into this type of

agreement with his client, that the agreement is fair and ethical and that he adequately explained the terms of the agreements to Ms. Davis. **App. 24 (T. 79-80)**. Ms. Davis signed each of the new agreements and returned them to Respondent. **App. 11 (T. 27)**.

In or around October 11, 2006, the State of Missouri, on behalf of Western Missouri Mental Health, once again directed a letter to Respondent with an offer to settle Ms. Davis' case for the sum of $20,000. **App. 144**. After receiving a copy of the State's letter in the mail, Ms. Davis contacted Respondent and informed him that the offer was unacceptable. **App. 11 (T. 28)**. On or about October 12, 2006, Respondent accepted the State's settlement offer for $20,000 without Ms. Davis' express consent. **App. 145; 146**. On or about October 12, 2006, Respondent directed a letter to Ms. Davis in which he informed her that he settled her case against Western Missouri Mental Health for $20,000. **App. 146**. In his October 12, 2006 letter to Ms. Davis, Respondent states, "I hope you are pleased with this result. If not all I can say is I did what my professional judgment indicates that I need to do. And I will be vindicated by history." **App. 146**.

Following Respondent's verbal acceptance of the State's settlement offer for $20,000, Respondent repeatedly requested that Ms. Davis sign the settlement papers in the Western Missouri Mental Health case. **App. 12 (T. 30); 147**. Ms. Davis refused to sign the settlement documents. **App. 12 (T. 30)**. Ms. Davis directed a letter to Respondent in which she again states that she is declining the $20,000 settlement offer and requests that she be allowed to proceed to trial. **App. 148**. On or about November 6, 2006, Respondent directed a letter to Ms. Davis wherein Respondent states that if Ms. Davis continues to refuse to sign the settlement agreement Respondent will be forced to

withdraw in all three cases or move the Court to enforce the settlement against Ms. Davis. **App. 149-150**. Following Respondent's repeated attempts to persuade Ms. Davis to sign the settlement agreement, Ms. Davis directed a letter to Respondent wherein she set forth her belief that Respondent had acted against her interest in accepting the settlement offer without her consent, as well as her belief that Respondent had violated the Rules of Professional Conduct. **App. 151-152**.

Respondent filed a motion in the Western Missouri Mental Health case to enforce the settlement agreement against his client. **App. 13 (T. 36); App. 164-165**. Respondent rationalized that because defendants regularly file motions to enforce settlement agreements, due process should allow plaintiffs, or counsel for plaintiffs, to file motions to enforce settlement agreements, as well. **App. 25 (T. 82)**. In or around February 12, 2007, the judge in the Western Missouri Mental Health case ruled against Respondent and declined to enforce the settlement agreement against Ms. Davis. **App. 153; 164-165; 13 (T. 36-37)**. The Court subsequently placed the case back on the trial docket for April, 2007. **App. 13 (T. 37)**. On or about February 16, 2007, Respondent sent a letter to Ms. Davis informing her of the Court's denial of his request to enforce the settlement agreement and stating that unless Respondent heard from Ms. Davis in writing within one week of the date of his letter he would withdraw as her attorney. **App. 153**. On or about February 28, 2007, Respondent filed a motion to withdraw as Ms. Davis' attorney in the Western Missouri Mental Heath case, citing Ms. Davis' failure to respond to his February 16, 2007 deadline as his reason for withdrawal. **App. 158-159**. Respondent did not send Ms. Davis a copy of his Motion to Withdraw. **App. 161**.

Ms. Davis sought to review her client files for the purpose of ascertaining their status and on or about March 2, 2007, sent a letter to Respondent requesting her files. **App. 14 (T. 39-40); 154**. Ms. Davis had not previously terminated Respondent or otherwise indicated to him that she wished for him to withdraw as her attorney. **App. 14 (T. 40)**. On or about April 5, 2007, Respondent sent an acknowledgment to Ms. Davis that her files had been picked up from his office and signed the letter "[i]t was a pleasure to serve you." **App. 157**. Thereafter, Ms. Davis directed a letter to Respondent, which stated as follows:

> As you know, I picked up my file from you regarding the case set for trial for April 1st. You indicated in your letter of March 5, 2007, "it was a pleasure to serve you." If you meant that to mean that you were no longer my attorney, you are mistaken. I did not discharge you when I asked to see my file. I simply wanted to look at the file so I could help you prepare for trial. Especially, since you tried to force a settlement of $20,000 on me and even took me to court to get the judge to make me take that settlement. I wanted the file to see what work you had done. I'm no lawyer, but it doesn't look to me like this case is ready for trial.
>
> . . .
>
> So I ask that you immediately seek a continuance from the trial setting. And, if you withdraw, I ask that you file something with the court to let the court know what you are doing.

App. 166. At the beginning of April, 2007, Ms. Davis received a copy of Respondent's Motion to Withdraw from the Court, as well as a directive by the Court that she must respond on or before April 12, 2007 if she wished to respond to Respondent's Motion to Withdraw. **App. 155-156; 161**. Ms. Davis was uncertain as to how to proceed and on or about April 3, 2007, directed a letter to Respondent in which she asked Respondent to answer a number of questions, including whether she needed to obtain another lawyer, what Respondent's fees or liens were in her cases, what the status of each of her cases was, and whether he anticipated that she would have any problems in her cases. **App. 155; 161**. Respondent did not reply to Ms. Davis' letter or otherwise provide her the information requested. **App. 161**.

On or about May 1, 2007, Ms. Davis filed a response to Respondent's Motion to Withdraw in the Western Missouri Mental Health case, opposing the withdrawal of Respondent unless and until Respondent provided the information sought by Ms. Davis. **App. 161-163**. On or about May 23, 2007, the Court in Western Missouri Mental Health issued and Order stating, "[t]he Court is not in a position to mediate disputes between attorneys and their clients, that is a function which is best served by the Missouri Bar. Therefore, the Court GRANTS Mr. Coleman's Motion to Withdraw." **App. 164-165**. The case was thereafter placed on the Fall 2007 Accelerated Trial Docket beginning October 1, 2007. **App. 165**. Ms. Davis attempted to obtain new counsel, however, she received several letters from attorneys that declined to accept the cases based on their age and the potential liens to be taken from the cases. **App. 14 (T. 38; 40-41)**. Ms. Davis'

case against Western Missouri Mental Health was ultimately dismissed following her failure to obtain new counsel. **App. 16 (T. 48); 169**.

During the relevant time periods described above, summary judgment had been issued against Ms. Davis in the wrongful death action pending against St. Luke's. **App. 17 (T. 53); 167**. In or around March, 2007, Respondent filed an appeal of the summary judgment and Ms. Davis' action against St. Luke's was pending in the early stages of appeal before the Court of Appeals Western District. **App. 18 (T. 54); 167**. On or about March 30, 2007, Respondent filed a Motion to Withdraw as Ms. Davis' counsel in the St. Luke's case and was granted permission to withdraw by the Court of Appeals. **App. 168**. Respondent did not inform Ms. Davis of her obligations with respect to the St. Luke's case nor did he explain to Ms. Davis what she must do to preserve her rights in the action. **App. 18 (T. 56)**. Similarly, in or around June, 2007, Respondent requested and was granted permission to withdraw as Ms. Davis' attorney in the discrimination action pending against Two Rivers. **App. 18 (T. 55); 170**. Respondent did not inform Ms. Davis of her rights or obligations with respect to the Two Rivers case. **App. 18 (T. 56)**. On or about July 19, 2007, Ms. Davis filed a complaint against Respondent with the Office of Chief Disciplinary Counsel. **App. 171-180**.

Trust Account Violations, Count III of the Amended Information

Per the Missouri Supreme Court's Order of April 15, 2008, which resulted in Respondent's public reprimand, Respondent was ordered to submit payment of $750 plus costs to the Clerk of the Missouri Supreme Court. **App. 202**. On or about June 11, 2008, Respondent wrote a check payable to the Clerk of the Missouri Supreme Court in the

amount of $1457.25 and designated in the memo portion of the check that the check was for "fee & costs." **App. 181-182**. The check, numbered 1019, was written from account number 9871231291, which was designated an IOLTA account. **App. 181-182**. On or about June 16, 2008, the Missouri Supreme Court deposited the check in the Advisory Committee Fund. **App. 181**. Upon receipt of Respondent's check and realization that Respondent had paid his fees and costs from an IOLTA designated account, the Office of Chief Disciplinary Counsel opened a complaint and initiated an investigation against Respondent. **App. 183-184**.

From at least December, 2007 to June, 2008, Respondent maintained an IOLTA trust account at United Missouri Bank, Account No. 9871231291. **App. 39 (T. 141)**. Respondent, by his own admission, regularly deposited personal funds, as well as client funds, into his IOLTA account, though Respondent maintains that the two were never in his account at the same time. **App. 41 (T. 146-147; 148-149)**. Respondent did not keep records or ledgers identifying payments into the account. **App. 41 (T. 148)**. On or about May 31, 2008, Respondent had a current balance of $1133.35 in his IOLTA Account, which Respondent admits were his personal funds. **App. 194; 41 (T. 149)**. The bank records of Respondent reflect that the following transactions took place during the time period in question:

DATE	TRANSACTION	REMAINING ACCT. BALANCE
5/31/07	Previous month's balance of $1,133.35	$1,133.35

	belonging to Respondent	
6/5/07	Deposit of $10,000 settlement proceeds in the case of Patricia Johnson Rushing	$11,133.35
6/12/07	Check written by Respondent to himself for cash in the amount of $1500	$9633.35
6/17/07	Check written by Respondent to the Missouri Supreme Court for fees and costs in the amount of $1457.25	$8,176.10
6/23/07	Check written by Respondent to Patricia Johnson Rushing for settlement proceeds in the amount of $6,666.66	$1509.44

App. 194-195. Respondent's bank records further reflect that he wrote personal checks to Apple Market, Farmer's Insurance, and Wildwood Lake Home Associations from his IOLTA Account in the month of May, 2007. **App. 195; 40 (T. 145)**. Respondent admits that he regularly deposits client funds into his IOLTA account when the account contains personal funds, but insists that this practice does not constitute the commingling of funds because he immediately issues a check to the client for their portion of the proceeds. **App. 41; (T. 146-147)**. Of his trust account practices, Respondent stated the following:

> So that having been said, I didn't do anything that I was aware of that was improper. I got no notice from the Supreme Court saying don't send us an IOLTA check. I got no notice they were communicating with the Chief

> Disciplinary Counsel about we got one, here's a guy that wrote us a check from an IOLTA account. And it's hard enough just to make a living other than to be tripped up on stuff that nobody is saying you can't write a check out of your IOLTA account to the court. So I frankly don't feel that I am being fairly treated by this process, not this panel, this hearing committee, but by the process that brings this to bear today for these cases. That's all I have to say about that.

App. 42 (T. 151).

Disciplinary Proceeding

An Information was served on Respondent in April, 2008, setting forth Informant's belief that probable cause existed to establish that Respondent violated multiple Rules of Professional Conduct in two counts pertaining to Respondent's representation of Vera Davis and Myrtle Canady. **App. 44-52; 53**. On or about May 7, 2008, Respondent filed an Answer to the Information. **App. 54-55**. A hearing panel was appointed on or about May 20, 2008. **App. 56-58**. Respondent subsequently filed an objection to Ms. Lajuana Counts participation in the hearing as a Disciplinary Hearing Panel member, a First Request for Production of Documents, and a First Request for Admissions. **App. 59; 60-62; 63-65**. Ms. Lajuana Counts was replaced as presiding officer on the Disciplinary Hearing Panel by Mr. David Macoubrie, at Ms. Counts' request. **App. 66-67**. On or about July 8, 2008, Respondent filed a Motion to Enforce Discovery and for Sanctions. **App. 91-114**.

On or about August 29, 2008, Informant filed an Amended Information which added a third count pertaining to Respondent's trust account violations. **App. 68-78**. Informant also provided Respondent notice of its intent to submit business records at hearing. **App. 117-118**. Respondent subsequently filed a Motion to Dismiss Amended Information and Informant filed Suggestions in Opposition to Motion to Dismiss Amended Information. **App. 79-81; 88-90**. On or about September 11, 2008 and prior to receiving a ruling on his Motion to Dismiss Amended Information, Respondent filed an Amended Answer to the Amended Information. **App. 82-87**. On or about October 3, 2008, the Presiding Officer of the Disciplinary Hearing Panel issued a decision in which he overruled the Respondent's Motion to Dismiss the Amended Information, ordered Informant to respond to one request for production of documents, and overruled Respondent's motion for sanctions. **App. 115-116**.

The disciplinary hearing took place on October 15, 2008. **App. 4**. In the case of Vera Davis, the Informant pled in its Amended Information that Respondent violated Rule 4-1.2 (failing to abide by the client's decision) in that Respondent accepted the settlement offer in Western Missouri Mental Health against the wishes of Ms. Davis and then moved the Court to enforce the settlement agreement against Ms. Davis; Rule 4-1.7 (conflict of interest) in that Respondent entered into a contingent fee contract with his client that purported to give him the exclusive right to settle his client's cases and moved the Court to enforce a settlement agreement against his own client; Rule 4-1.16(d) (failing to take steps necessary to protect the client upon termination of representation) in that Respondent failed to inform Ms. Davis that he had withdrawn in the Western

Missouri Mental Health case and further failed to provide her any information requested pertaining to her rights and obligations; Rule 4-1.5 (unreasonable fee) in that Respondent charged Ms. Davis between $30,000-$50,000 in fees and then entered into a contingency agreement for one-third of any recovery while giving Ms. Davis no credit for the monies paid; and Rule 4-8.4(d) (conduct prejudicial to the administration of justice).[2] **App. 68-78**.

With respect to Informant's charge that Respondent violated Rule 4-1.5 (unreasonable or excessive fees), the panel had differing views. **App. 205-206**. The presiding officer wrote that the fee was unreasonable and that the conversion of the fee from an hourly basis to a contingent basis after the client ran out of money was "wrong." **App. 206**. However, the majority of the Panel and, therefore, the finding of the Panel was that there was insufficient proof to establish a violation of the Rule. **App. 205**. The Panel further determined that there was insufficient proof to establish that the clause in the contingency contract, purporting to give Respondent the exclusive right to settle the client's cases, created a conflict of interest in violation of Rule 4-1.7. **App. 206**. The Panel determined that there was insufficient proof to establish that Respondent failed to protect the client's interests upon termination of the representation in violation of Rule 4-

[2] Informant also pled that Respondent violated Rule 4-1.3 in failing to act with diligence and promptness in connection with all of Ms. Davis' legal matters. **App. 72**. The Disciplinary Hearing Panel found insufficient evidence to establish a diligence violation and the Informant does not dispute the finding or recommendation, here. **App. 205**.

1.16(d). **App. 206-207**. The Panel did determine that Respondent failed to abide by the decision of his client in violation of Rule 4-1.2(a) in that Respondent accepted the settlement agreement in the Western Mental Health case against the express wishes of his client, which also resulted in a violation of Rule 4-8.4(d) pertaining to conduct prejudicial to the administration of justice. **App. 204-205**. As a result of this finding the Panel recommended that Respondent be publicly reprimanded. **App. 207**.

Informant pled in the third count of its Amended Information that Respondent violated Rule 4-1.15 (failure to hold client property separate from the property of counsel) in that Respondent commingled client funds with his own funds. **App. 75-77**. The Disciplinary Hearing Panel found that there was no evidence that Respondent violated Rule 4-1.15 and, therefore, made no recommendation for sanction. **App. 211**. The Panel did not appear to consider aggravating or mitigating factors in connection with its recommendation that Respondent be publicly reprimanded. **App. 203-212**. On or about November 18, 2008, Informant filed its rejection of the Disciplinary Hearing Panels recommendation, which brings this matter before the Court. **App. 213**.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULES OF PROFESSIONAL CONDUCT:

a. 4-1.2 (FAILURE TO ABIDE BY CLIENT'S DECISION) IN THAT RESPONDENT ACCEPTED A SETTLEMENT AGREEMENT WITHOUT CONSENT OF HIS CLIENT AND THEN MOVED THE COURT TO ENFORCE THE AGREEMENT AGAINST HIS CLIENT;

b. 4-1.5 (EXCESSIVE FEE) IN THAT RESPONDENT CONVERTED AN HOURLY FEE AGREEMENT TO A CONTINGENT AGREEMENT AFTER MS. DAVIS PAID HIM OVER $30,000 IN FEES WITHOUT GIVING MS. DAVIS CREDIT FOR THE FEES PAID;

c. 4-1.7 (CONFLICT OF INTEREST) IN THAT RESPONDENT ENTERED INTO A CONTINGENCY AGREEMENT WITH MS. DAVIS THAT PURPORTED TO GIVE HIM THE EXCLUSIVE RIGHT TO SETTLE ALL OF HER CASES AND SUBSEQUENTLY TOOK

ADVERSE ACTION AGAINST HIS CLIENT IN COURT;

d. 4-1.16 (FAILURE TO PROTECT CLIENT'S INTERESTS AT TERMINATION) IN THAT RESPONDENT FAILED TO NOTIFY MS. DAVIS THAT HE HAD WITHDRAWN FROM HER CASE AND FURTHER FAILED TO PROVIDE HER ANY INFORMATION AS TO HER RIGHTS AND OBLIGATIONS;

e. 4-1.15 (SAFEKEEPING PROPERTY) IN THAT RESPONDENT REGULARLY COMMINGLED PERSONAL AND CLIENT FUNDS; AND

f. 4-8.4(d) (CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE) IN THAT RESPONDENT CAUSED HARM TO THE SYSTEM AND HIS CLIENTS BY VIOLATING MULTIPLE RULES OF PROFESSIONAL CONDUCT

Compton v. Kittleson, 171 P.3d 172 (Al. 2007)

Cincinnati Bar Assn. v. Lawson, 891 N.E.2d 749 (Ohio 2008)

People v. Schmad, 793 P.2d 1162 (Co. 1990)

In re Eckert, 867 N.E.2d 141 (Ind. 2007)

Preamble [2] to the Rules of Professional Conduct

Rule 4-1.2

Rule 4-1.5

Rule 4-1.7

Rule 4-1.15

Rule 4-1.16

Rule 4-8.4(d)

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO REAPPLY FOR A PERIOD OF ONE YEAR BECAUSE SUSPENSION IS APPROPRIATE WHEN A LAWYER KNOWINGLY TAKES ACTION AGAINST THE INTERESTS OF HIS CLIENT, SHOULD KNOW THAT HE IS IMPROPERLY HANDLING CLIENT FUNDS AND ENGAGES IN CONDUCT THAT VIOLATES DUTIES OWED TO CLIENTS AND THE PROFESSION

Matter of Belding, 589 S.E.2d 197 (S.C. 2003)

Matter of Corrin, 184 P.3d 923 (Kan. 2008)

In the Matter of Indeglia, 765 A.2d 444 (R.I. 2001)

In re Cupples, 979 S.W.2d 932 (Mo. banc 1998)

Standards for Imposing Lawyer Sanctions, American Bar Association, 1991

Rule 4-1.2

Rule 4-1.15

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULES OF PROFESSIONAL CONDUCT:

a. **4-1.2 (FAILURE TO ABIDE BY CLIENT'S DECISION) IN THAT RESPONDENT ACCEPTED A SETTLEMENT AGREEMENT WITHOUT CONSENT OF HIS CLIENT AND THEN MOVED THE COURT TO ENFORCE THE AGREEMENT AGAINST HIS CLIENT;**

b. **4-1.5 (EXCESSIVE FEE) IN THAT RESPONDENT CONVERTED AN HOURLY FEE AGREEMENT TO A CONTINGENT AGREEMENT AFTER MS. DAVIS PAID HIM OVER $30,000 IN FEES WITHOUT GIVING MS. DAVIS CREDIT FOR THE FEES PAID;**

c. **4-1.7 (CONFLICT OF INTEREST) IN THAT RESPONDENT ENTERED INTO A CONTINGENCY AGREEMENT WITH MS. DAVIS THAT PURPORTED TO GIVE HIM THE EXCLUSIVE RIGHT TO SETTLE ALL OF HER CASES AND SUBSEQUENTLY TOOK ADVERSE ACTION AGAINST HIS CLIENT IN COURT;**

d. 4-1.16 (FAILURE TO PROTECT CLIENT'S INTERESTS AT TERMINATION) IN THAT RESPONDENT FAILED TO NOTIFY MS. DAVIS THAT HE HAD WITHDRAWN FROM HER CASE AND FURTHER FAILED TO PROVIDE HER ANY INFORMATION AS TO HER RIGHTS AND OBLIGATIONS;

e. 4-1.15 (SAFEKEEPING PROPERTY) IN THAT RESPONDENT REGULARLY COMMINGLED PERSONAL AND CLIENT FUNDS; AND

f. 4-8.4(d) (CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE) IN THAT RESPONDENT CAUSED HARM TO THE SYSTEM AND HIS CLIENTS BY VIOLATING MULTIPLE RULES OF PROFESSIONAL CONDUCT

A disciplinary hearing panel's recommendation is advisory in nature. *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). This Court conducts a *de novo* review of the evidence and reaches its own conclusions of law. *Id.* Discipline will not be imposed unless professional misconduct is proven by a preponderance of the evidence. *Id.* Where misconduct is proven by a preponderance of the evidence, violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004).

In 1986, Missouri adopted the American Bar Association's Model Rules of Professional Conduct and though the Rules in Missouri now exist with variation, the Model Rules are used by a majority of other states, making other state disciplinary cases relevant to Missouri disciplinary matters. *State ex rel. Horn v. Ray*, 138 S.W.3d 729 (Mo.App. E.D. 2002) and www.abanet.org/cpr/mrpc/model_rules.html (last visited October 24, 2008) (indicating that California, New York and Maine are the only states that have not adopted professional conduct rules that follow the format of the ABA Model Rules). See also *In re Cupples*, 952 S.W.2d 226 (Mo. banc 1997) and *In re Belz*, 258 S.W.3d 38 (Mo. banc 2008) (where this Court analyzed other state disciplinary law in reaching a conclusion in Missouri).

a. Violation of Rule 4-1.2 Regarding Failure to Abide Client Directives

Rule 4-1.2(a) (2006) stated, in relevant part, that "[a] lawyer shall abide by a client's decisions whether to accept an offer of settlement of a matter." That the client, alone, retains the exclusive right to settle a case is a well-established principle articulated in The American Bar Association's *Annotated Model Rules of Professional Conduct*, where it is stated that '"[a] lawyer has no inherent power, by virtue of the fact that he or she represents a client, to settle the client's claim."' *Compton v. Kittleson*, 171 P.3d 172, 177 (Al. 2007) (quoting Ann. Model rules of Prof'l conduct R. 1.2 legal background at 16 (4th ed.1999)). Even when an attorney's fee is contingent on the resolution or settlement of a case, the client's refusal of a settlement offer is binding on an attorney. *Culpepper & Carroll, PLLC v. Cole*, 929 So.2d 1224, 1227 (La. 2006).

In the present action, it is undisputed among the Respondent and Ms. Davis that Ms. Davis directed Respondent to reject Western Missouri Mental Health's settlement offer of $20,000. Nevertheless, Respondent verbally accepted the settlement agreement on behalf of his client. Respondent's actions were in direct contravention of Rule 4-1.2. Compounding the violation of Rule 4-1.2 was Respondent's attempt to enforce the settlement agreement against his client in court. Following Ms. Davis' refusal to accept and sign the settlement agreement, Respondent moved the Court to enforce his acceptance of the settlement agreement against his own client. In attempting to force a settlement on Ms. Davis against her wishes, and for the sole purpose of ensuring additional payment for himself, Respondent's actions grossly offend the precept that an attorney must be loyal and act in the best interest of his client. *In re Donaho*, 98 S.W.3d 871, 876 (Mo. banc 2003).

Respondent has maintained that in signing the written contingency agreement, which purported to give Respondent the exclusive right to settle Ms. Davis' cases, Ms. Davis consented to the settlement agreement with Western Missouri Mental Health. However, courts have consistently declined to enforce fee agreements that give an attorney control over settlement. *Compton v. Kittleson*, 171 P.3d 172 at 177 (Al. 2007) (citing *Mattioni, Mattioni & Mattioni, Ltd. v. Ecological Shipping Corp.*, 530 F.Supp. 910, 913 (E.D.Pa.1982); *In re Lansky*, 678 N.E.2d 1114, 1116 (Ind.1997); *Parents Against Drunk Drivers v. Graystone Pines Homeowners' Ass'n*, 789 P.2d 52, 55 (Utah App.1990); *Butler v. Young*, 121 W.Va. 176, 2 S.E.2d 250 (1939)). In the *Matter of Lansky*, the attorney included in his fee agreement a provision that stated, "[w]e hereby

authorize our attorney to settle this matter for any amount he determines is reasonable without further oral or written authorization." 678 N.E.2d 1114, 1115 (Ind. 1997). The Supreme Court of Indiana determined that the lawyer violated Rule 1.2(a) in that the fee agreement included a provision requiring the client to give up her right to decide whether to accept an offer of settlement. *Id*. Similarly, in *Parents Against Drunk Drivers v. Graystone Pines Homeowners' Ass'n*, the Utah Court of Appeals declared a provision in a fee agreement giving an attorney control over the settlement of the case to be contrary to the Utah Code of Professional Responsibility, contrary to public policy, and ultimately void. 789 P.2d 52, 55 (Utah.App.1990). The Utah Court of Appeals went on to state that the voiding of fee agreements that give control over settlement to attorneys is consistent with the view of a majority of jurisdictions. *Id*. (citing *Mattioni, Mattioni & Mattioni, Ltd. v. Ecological Shipping Corp.*, 530 F.Supp. 910, 913 (E.D.Pa.1982) (federal court found under Pennsylvania law that provision in fee agreement giving control over settlement to attorney void as against public policy); *Giles v. Russell*, 222 Kan. 629, 567 P.2d 845, 850 (1977) ("employment contract which prevents the client from settling without the consent of the attorney is void as against public policy"); *Cummings v. Patterson*, 59 Tenn.App. 536, 442 S.W.2d 640, 642 (1968) (counsel for appellant conceded that provision in contract requiring approval by counsel before securing settlement void and unenforceable as against public policy)).

In the present action, the provision of Respondent's fee agreement with Ms. Davis that purported to give Respondent the right to settle Ms. Davis' case with or without her consent is contrary to public policy and did not constitute "consent" on the part of Ms.

Davis. As such, Respondent accepted a settlement agreement without the consent of his client and failed to follow her directive to reject the $20,000 settlement offer. Respondent violated Rule 4-1.2 and Informant respectfully requests that he be appropriately sanctioned.

b. Violation of Rule 4-1.5 Regarding Reasonableness of Fees

Rule 4-1.5 (2006) provided that a lawyer's fee shall be reasonable.[3] Pursuant to the hourly fee agreement that Ms. Davis entered into with Respondent, Ms. Davis estimates that she paid Respondent between $30,000-$50,000 and Respondent does not disagree with Ms. Davis' estimation. Ms. Davis was able to produce receipts indicating that she paid Respondent at least $38,000 in fees. While Respondent was unable to produce any written records or accountings demonstrating the work performed in association with this fee, Informant does not contend that the $38,000 (or more) was unreasonable for the work performed by Respondent.

When Ms. Davis was no longer able to pay Respondent thousands of dollars on demand, Respondent suggested that Ms. Davis enter into a contingency contract for one-third of any recovery in each of her three pending cases. Respondent testified at hearing that Ms. Davis was to be given no credit for the $38,000 (or more) that she previously paid Respondent under the terms of the new contingency agreement and that the one-

[3] Rule 4-1.5(a), as amended in July, 2007, states, in relevant part, that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."

third recovery was to be paid in addition to the money already tendered by Ms. Davis. In making such an agreement Respondent contracted for an unreasonable fee.

The relationship between an attorney and client is fiduciary and binds the attorney to a "scrupulous fidelity" to the cause of the client. *Shaffer v. Terrydale Management Corp.*, 648 S.W.2d 595, 605 (Mo.App. W.D. 1983) (citing *Demmel v. Hammett*, 230 S.W.2d 686, 689 (Mo. banc 1950)). Because of the highly fiduciary nature of the attorney-client relationship, courts hold attorneys to a high standard and do not condone behavior that evidences a greater interest in the attorney's personal, financial welfare than in the interests of the client. *McInerney v. Massasoit Greyhound Association, Inc.*, 269 N.E.2d 211 (Mass.Super. 1971) (quoting *State ex rel. Nebraska State Bar Assn. v. Richards*, 84 N.W.2d 136 (1957)). Once an attorney-client relationship is established and the attorney has gained the client's trust, a change in the terms of the attorney-client relationship should be viewed with special scrutiny. *Redlich v. Lanell*, 2006 WL 1000353 [23] (Mass.Super). In *Redlich v. Lanell*, an attorney attempted to convert an hourly fee agreement to a contingent agreement in the midst of the litigation and after a substantial settlement had been offered. *Id*. The Massachusetts Superior Court stated:

> Accordingly, courts take a dim view of changes in fee agreements between lawyers and clients, particularly changes that have the effect of benefiting the lawyer (citation omitted). Some jurisdictions have held that such agreements are void. (citation omitted). Other states invalidate such fee agreement contracts on the grounds of fraud and shift the burden to the attorney to show the fairness of the transaction in that the compensation

> does not exceed a reasonable compensation for services rendered. (citation omitted). Other jurisdictions have concluded that these types of changes are attended by a presumption of invalidity. (citation omitted). The skepticism is rooted in the public policy of protecting a client against the strong influence of an attorney. (citation omitted). The public policy concern 'operates independently of any ingredient of actual fraud or of the age or capacity of the client, being intended as a protection against the strong influence to which the confidential relation naturally gives rise.' (emphasis added). Though the Massachusetts courts have not adopted an explicit position regarding when changes are permitted in an attorney/client fee agreement, a synthesis of common-law principles and the Massachusetts Rules of Professional Conduct indicate that at a minimum, an attorney must show the fairness of the transaction in 'all respects.' (citations omitted).

Id. at [24].

In the present action, Respondent's conversion of the fee agreement from a fixed, hourly agreement to a contingent agreement is suspect and casts a shadow of suspicion over Respondent's actions and intentions with respect to his fiduciary dealings with Ms. Davis. At the time that Respondent proposed the conversion from an hourly rate to a contingent rate, Respondent knew that Ms. Davis could no longer continue to pay his hourly rate. Rather than risk Ms. Davis' failure to pay or accept the "nominal" payment of $50 per month, Respondent converted the fee agreement to a contingency agreement

knowing that the State had offered to settle Ms. Davis' discrimination action with Western Missouri Mental Health for $20,000. Ms. Davis had invested five years in Respondent's representation, with no resolution in any of her actions. Ms. Davis was faced with the choice of attempting to find a new attorney or accepting the terms as proposed by Respondent. While Respondent contends that he forgave fees that Ms. Davis owed at the time of the conversion, Respondent was not able to produce any documentation that would indicate that the fees had actually been earned or that the fees were owed by Ms. Davis. The sum of the circumstances indicates that the conversion of the agreement operated to the distinct disadvantage of Respondent's client and that the fee agreement, by virtue of the fact that it was converted five years into the representation, was unreasonable.

Even should this Court fail to reach a determination as to whether such a conversion is patently unfair or unreasonable, the terms of Respondent's agreement in this case constitutes the making of an agreement for unreasonable fees. In *Cincinnati Bar Assn. v. Lawson*, the respondent entered into a contingent fee agreement with a client, but was terminated prior to disposition of the case. 891 N.E.2d 749 (Ohio 2008). The respondent's associate sent the respondent's client a letter demanding legal fees and threatening legal action if the client did not pay. *Id*. at 756. The Ohio Supreme Court found the respondent guilty of violating Ohio's rule prohibiting the charge of excessive fees in that the respondent's associate had attempted to convert the contingent fee agreement into an hourly fee. *Id*. at 757. Conversely, in the present action Respondent received significant compensation for the work that he had performed and rather than

continuing the representation and attempting to collect on a *quantum meruit* basis or withdrawing from representation once Ms. Davis' failure to pay became a material breach in their arrangement, Respondent chose to convert the fee agreement to a contingency agreement while giving Ms. Davis no credit for the $38,000 (or more) that she had already paid to Respondent.

A contingency fee is meant to encompass the entirety of the fee earned during a representation and must, in and of itself, be reasonable. Comment [3] to Rule 4-1.5. The one-third contingency fee contracted for with Ms. Davis would ordinarily constitute the entirety of the fee owed in a representation. To allow Respondent to contract for $30,000-$50,000 in additional fees constitutes the making of an agreement for an unreasonable fee, particularly when no resolution had been reached after five years of litigation in each case. As such, Informant requests this Court find that Respondent violated Rule 4-1.5 and that he be appropriately sanctioned.

c. Violation of Rule 4-1.7 Regarding Conflicts of Interest

Rule 4-1.7(a)(2) (2006 and 2007) provided that a lawyer shall not represent a client if the representation will be materially limited by a personal interest of the lawyer. In the present action, Respondent entered into a contingency fee agreement with Ms. Davis whereby Respondent would only receive a contingency fee if Ms. Davis settled her cases or received a favorable verdict. At the same time, Respondent contracted with Ms. Davis for the exclusive right to settle her cases with or without her consent. Respondent failed to disclose to Ms. Davis that the contract created a conflict of interest in that

Respondent's interest in getting paid was affected by his newly acquired right to settle Ms. Davis' cases without her consent. Such conduct violated Rule 4-1.7.

In a case very similar to the one at bar, a Colorado attorney entered into a contingency fee agreement with his client, who had suffered injuries in an automobile accident. *People v. Schmad*, 793 P.2d 1162, 1163 (Co. 1990). The attorney's client rejected a settlement offer from the insurer. *Id.* The respondent attorney proceeded to propose a counter-offer to the insurer, without the consent of his client and the counter-offer was subsequently accepted by the insurer. *Id.* When the respondent's client refused to sign the settlement agreement, the respondent threatened to enforce the unwritten contingency agreement by means of an attorney's lien. *Id.* at 1164. The Colorado Supreme Court determined that the respondent attorney violated the rule requiring full disclosure when a lawyer's professional judgment on behalf of his clients may be affected by the lawyer's own financial interest in that the respondent had a contingency agreement with his client and did not fully disclose that his attempts to settle the case may be affected by the attorney's interest in getting paid under the unwritten contract. *Id.*

In addition to the conflict created when Respondent entered into the contingency agreement Respondent created an additional conflict of interest when he moved to enforce the settlement agreement against Ms. Davis in court. In *Bronson v. Borst*, an attorney accepted a settlement offer on behalf of his client without the express consent of the client and then moved the Court for declaratory judgment determining that the settlement was enforceable as against the client. *Bronson v. Borst*, 404 A.2d 960 (D.Ct. Col.App. 1978). The Court of Appeals declined to issue declaratory judgment and

reiterated the principle that without specific authority an attorney cannot accept an offer of settlement on behalf of the client. *Id*. at 963. In the present action, Respondent was well aware that Ms. Davis did not want to accept the $20,000 settlement offer in Western Missouri Mental Health because she had declined to sign the settlement papers. Knowing that his client did not wish to accept the settlement offer, Respondent proceeded to move the Court to enforce the settlement agreement against his client without explaining to his client that his actions before the Court were affected by his own interest in getting paid under the contingency contract. Further, Respondent allowed his personal interest in the effectuation of the settlement to compel him to take action in court that was directly adverse to his client while still purporting to represent the interests of his client in the underlying litigation. Preamble [2] to the Rules of Professional Conduct provide that as a representative of clients, a lawyer provides a client with an informed understanding of the client's legal rights and obligations, zealously asserts the client's position and seeks a result advantageous to the client, but consistent with the requirement of honest dealings. In the present case, Respondent's conduct is a direct breach of the responsibilities of a lawyer as articulated in the Rules of Professional Conduct in that Respondent neither provided his client an informed understanding of her rights nor did Respondent assert the *client's* position. Respondent's actions are a violation of Rule 4-1.7 that deserve sanction by this Court.

d. Violation of Rule 4-1.16 Regarding Protection of Client Interests at Termination

Rule 4-1.16(d) (2007) provided that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests. .

[.]" Comment [9] to Rule 4-1.16 goes on to state that a lawyer must take all reasonable steps to mitigate the consequences to the client.

Following Respondent's attempt to enforce an unauthorized settlement agreement on Ms. Davis, Respondent filed a motion in February, 2007 to withdraw in the Western Missouri Mental Health case. Respondent did not notify Ms. Davis that he was filing a motion to withdraw, as evidenced by Ms. Davis' later correspondence with Respondent wherein she asks him to file something with the Court if he was to withdraw. Respondent failed to inform his client that he was filing a motion to withdraw and failed to provide his client a copy of the motion to withdraw. In the case of *In re Eckert*, the Indiana Supreme Court determined that an attorney's failure to provide his client a copy of his motion to withdraw and failure to provide the Court with an accurate address so that the client might receive a copy of the motion to withdraw constituted a failure to protect the client's interests at termination in violation of Rule 1.16. *In re Eckert*, 867 N.E.2d 141, 142-143 (Ind. 2007). Similarly, in *Office of Disciplinary Counsel v. Yoshino*, the Supreme Court of Hawaii determined that an attorney's failure to notify his clients of his withdrawal and failure to turn over papers constituted a violation of rule 1.16. 2005 WL 3170992, [3].

In addition to Respondent's failure to provide Ms. Davis a copy of his motion to withdraw, Respondent failed to provide Ms. Davis any of the information that she requested in seeking to make an informed decision about her rights and obligations. Ms. Davis sent a letter to Respondent requesting the status of each of her cases, the amount of liens, if any, that Respondent was asserting in her cases and a statement as to whether she

needed to obtain a new attorney. Respondent failed to provide Ms. Davis any of the information that she requested, thereby failing to mitigate the consequences of his withdrawal. The Presiding Disciplinary Judge of the Colorado Supreme Court determined in *People v. Doering* that upon request of the client, an attorney's failure to provide an accounting of funds at the termination of representation constituted a violation of Rule 1.16 requiring a lawyer to take reasonable steps to protect client interests. 35 P.3d 719, 722 (Colo.O.P.D.J. 2001).

In the case of Respondent, it appears that Respondent only withdrew from representation following Ms. Davis' refusal to sign the settlement agreement and the Court's refusal to enforce the settlement agreement against Ms. Davis. Ms. Davis had no reason to suspect that Respondent might withdraw from representation as she did not terminate Respondent and never received a copy of Respondent's February motion to withdraw until the Court sent her a copy in April. Further, when Ms. Davis attempted to obtain basic information from Respondent, such as the status of her case, Respondent was not responsive. In failing to provide the information requested, Respondent failed to protect Ms. Davis' interests upon withdrawal and Respondent's license should be sanctioned for violation of Rule 4-1.16.

e. Violation of Rule 4-1.15 Regarding Safekeeping of Client Property

Rule 4-1.15 provides, in relevant part, that "[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." Subsection (d) of Rule 4-1.15 goes on to state that "[a] lawyer may deposit the lawyer's own funds in a client trust

account for the sole purpose of paying a bank service charges on that account, but only in an amount necessary for that purpose." In the case of Respondent, Respondent admits that he regularly held personal funds in the same account in which he deposited client funds. However, Respondent contends that he immediately issues disbursement checks to his clients so that client funds are not held in the account at the same time as his personal funds. Though bank records refute Respondent's explanation of his conduct, Respondent's explanation nevertheless constitutes a violation of Rule 4-1.15.

In determining whether Rule 1.15 has been violated, courts look to the actual use of the account and not the designation appended to the account by the attorney. *In the Matter of Indeglia*, 765 A.2d 444, 447-448 (R.I. 2001). Respondent's account bears an IOLTA designation, indicating that Respondent may have intended for the account to be used as a client trust account. Respondent regularly deposited client funds into the account. When asked to provide records for his client trust account to the regional disciplinary committee that was investigating the violation, Respondent provided the records before this Court. Respondent's account was meant to be used a client trust account. Nevertheless, a large portion of the checks written by Respondent from this account were for personal expenses, including checks written to his wife, himself, the grocery store and the insurance company.

The mandates of Rule 1.15 are strict and failure to abide by their terms is cause for discipline. *In the Matter of St. Onge*, 958 A.2d 143, 144 (R.I. 2008). Respondent has admitted at hearing that he keeps personal funds in the account meant to act as a client trust account. Further, Respondent admitted that he deposits client funds on top of

personal funds being held in the account. Respondent contends, however, that the client funds are only in the account until such time as the client cashes the check that Respondent issues in disbursement. The problem with Respondent's contention is that he has no control over what a client does with the check once it is issued in disbursement and a client who fails to immediately cash his or her check unknowingly leaves his or her proceeds commingled with the funds of Respondent. In failing to appropriately move his own funds, Respondent ensures that his funds and the client funds are commingled for a period of time not allowed by the Rules of Professional Conduct.

There is no exception or provision in Rule 4-1.15 that allows an attorney to hold personal and client funds together if only for a short amount of time. Rule 4-1.15 strictly prohibits the commingling of funds, but for the small amount permitted to cover bank service charges. During the time period examined, Respondent had in his account over $1100 that he claimed were personal and which were not being used to cover service fees at the same time that he was holding over $6000 in client funds. Further, the bank records reveal that Respondent's personal funds and the proceeds from Patricia Rushing's settlement were held together for a period of 18 days, which belies Respondent's contention that his immediate disbursal of funds results in no commingling.

Though Respondent's practice of depositing client funds into an account holding personal funds contravenes the strict mandates of Rule 4-1.15, Respondent's violation of the Rule is compounded by the fact that Respondent does not keep ledgers or other accounting of the transactions that take place within this account. This Court has determined that failure to maintain adequate records regarding the disposition of client

funds is a violation of Rule 4-1.15. *In re Griffey*, 873 S.W.2d 600, 601 (Mo. banc 1994). Respondent testified at hearing that he does not maintain ledgers for this account. Further, when questioned regarding the origin of some of the deposits or when asked to identify the owner of certain money deposited into his account, Respondent was unable to say to whom the money belonged.

In the case of *In re Varriano*, the Minnesota Supreme Court considered the mandates of Rule 1.15 and stated the following:

> Attorneys licensed in Minnesota are charged with the knowledge that they must maintain trust accounts for client funds. (citation omitted). An attorneys' responsibility to maintain his or her trust account properly 'goes beyond a requirement to refrain from intentional wrongdoing.' (citation omitted).
>
> . . .
>
> Rule 1.15(a) explicitly requires that funds held in connection with a representation be deposited into a trust account. Implicitly these are the only types of funds that belong in a trust account. Lawyer's personal funds or fees to which they are entitled must not remain in the trust account.

In re Varriano, 755 N.W.2d 282, 289 (Minn. 2008). In the present action, Respondent commingles personal and client funds and keeps no records pertaining to the account. As an attorney in Missouri, Respondent is responsible for adherence to the Rules of Professional Conduct and Respondent's trust account practices have amounted to a mishandling of client funds and a violation of Rule 4-1.15.

f. Violation of Rule 4-8.4(d) Regarding Prejudicial Conduct

Rule 4-8.4(d) states that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice[4]. By virtue of the fact that Respondent has frustrated the judicial process in violating Rules 4-1.2, 4-1.7 and 4-1.16 Respondent has also violated Rule 4-8.4(d). See *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997) (wherein this Court determined that Caranchini had violated Rule 4-8.4(d) by violating other provisions Rules of Professional Conduct). In this case, Respondent failed to follow the directives of his client and in fact brought action in court to enforce a settlement agreement to which his client had not consented. Respondent wasted judicial resources and acted against the interests of his client. Further, Respondent failed to protect Ms. Davis' interests upon termination which hindered her ability to make an informed decision as to how to proceed in her cases. Respondent's conduct directly impacted the judicial process and as such, Informant respectfully suggests that Respondent's license be appropriately disciplined.

[4] Rule 4-8.4 was amended in July, 2007, however, the 2006 version of subsection (d), cited in this brief, is identical in language.

ARGUMENT

II.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO REAPPLY FOR A PERIOD OF ONE YEAR BECAUSE SUSPENSION IS APPROPRIATE WHEN A LAWYER KNOWINGLY TAKES ACTION AGAINST THE INTERESTS OF HIS CLIENT, SHOULD KNOW THAT HE IS IMPROPERLY HANDLING CLIENT FUNDS AND ENGAGES IN CONDUCT THAT VIOLATES DUTIES OWED TO CLIENTS AND THE PROFESSION

When considering the level of discipline to impose for violation of the Rules of Professional Conduct, this Court has considered the propriety of the sanctions under the American Bar Association model rules for attorney discipline ("ABA Standards"). *In re Crews*, 159 S.W.3d 355, 360 (Mo. banc 2005). The ABA Standards divide rule violations into four categories that include violations of duties owed to the clients, duties owed to the public, duties owed to the legal system and duties owed to the profession. See Standards for Imposing Lawyer Sanctions, American Bar Association, 1991. The Respondent's conduct in the present action has run afoul of his duties to his clients, the legal system and the profession. The notes to the ABA Standards further provide that when an attorney violates multiple Rules of Professional Responsibility, the ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct and often should be greater than the sanctions for the most serious

misconduct. See Section II-Theoretical Framework of the ABA Standards. In the case at bar, the most serious violations committed by Respondent pertain to his failure to follow the directions of his client, creation of a conflict of interest and his mishandling of client funds.

Respondent's failure to follow Ms. Davis' directives in violation of Rule 4-1.2 is governed by ABA Standard 4.4, which provides that a suspension is appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury, whereas a reprimand is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client. Standards for Imposing Lawyer Sanctions, American Bar Association, 1991. In Respondent's case, Respondent was very aware that Ms. Davis did not find the State's $20,000 settlement offer to be acceptable and Ms. Davis explicitly directed Respondent to reject the offer. Respondent knowingly failed to abide Ms. Davis' directive to reject the settlement offer and accepted the State's offer, again, knowing that his client had directed him to act otherwise. Respondent's actions were deliberate and motivated by his own self-interest, making his misconduct worthy of a one year suspension. A one-year suspension in Respondent's case is supported by instructive case law, as well. In the *Matter of Belding*, a South Carolina attorney missed a hearing date for a client and in an attempt to cover the mistake, accepted a settlement offer without the authorization of the client. 589 S.E.2d 197, 201 (S.C. 2003). When the client refused to sign the settlement papers, the attorney withdrew as counsel and failed to take appropriate measures to safeguard his client's interests. *Id*. The South Carolina Supreme Court found Respondent guilty of violating 1.2 (failure to

follow client directives), 1.4 (failure to communicate) and 1.16 (failure to protect client interests upon withdrawal) and ultimately ordered that the attorney be suspended for a period of one year. *Id.*

When Respondent contracted with Ms. Davis to receive a contingent fee and to simultaneously retain the exclusive right to settle her cases, Respondent created a conflict of interest. Further, when Respondent took direct, adverse action in court by attempting to enforce the acceptance of the settlement agreement on his client, Respondent created a conflict of interest. These violations of duties owed to his client are governed by ABA Standard 4.3, which provides that disbarment is appropriate when a lawyer, with the intent to benefit himself, engages in representation of a client knowing that the lawyer's interests are adverse to the client, whereas a suspension is appropriate when a lawyer knows of a conflict and does not fully disclose to the client the possible effect of that conflict. Standards for Imposing Lawyer Sanctions, American Bar Association, 1991. A reprimand is appropriate when a lawyer is negligent in determining whether the representation may be materially affected by the lawyer's own interests. *Id*. The Commentary to Standard 4.3 states that the courts generally disbar lawyers who intentionally exploit the lawyer-client relationship by acquiring a pecuniary interest adverse to the client. Arguably, the Respondent in the present action engaged in such conduct. However, the standard for suspension appears more appropriate in that Respondent created a conflict of interest and failed to fully explain to Ms. Davis that his interest in settling her cases would be motivated by his personal interest in getting paid. In *People v. Schmad,* discussed *supra*, the Supreme Court of Colorado found that an

attorney who contracted with his client for the exclusive right to settle the client's case, accepted a settlement agreement without consent of his client and then failed to explain to his client the potential conflict of interest created by the contingency agreement was guilty of failing to disclose to his client a conflict of interest. 793, P.2d 1162, 1164 (Colo. 1990). The Colorado Supreme Court analyzed the attorney's violations per the ABA Standards and specifically Standard 4.3 pertaining to conflicts of interest before concluding that the attorney should be suspended for a period of one year. *Id*.

Finally violations of Rule 4-1.15, pertaining to the commingling of client and attorney funds, is governed by ABA Standard 4.1 which provides that disbarment is appropriate when a lawyer knowingly converts client property, whereas suspension is appropriate when a lawyer should know that he is dealing improperly with client property and causes injury or potential injury. Respondent should have known and may have known that it was improper to keep personal funds in the same bank account as client funds while keeping no ledgers or other records to be able to ascertain which money belongs to each individual. Further, Respondent should have known and may have known that writing personal checks from these accounts created a significant risk of pecuniary loss to the client. ABA Standard 4.1 indicates that Respondent's license should be suspended. Instructive case law would also indicate that Respondent's license should be suspended. In the *Matter of Corrin*, the Kansas Supreme Court indefinitely suspended an attorney who commingled client funds and failed to keep appropriate records of the account. 184 P.3d 923 (Kan. 2008). Similarly, the Supreme Court of Rhode Island suspended an attorney who kept his personal funds in the same account as

client funds and unintentionally converted client property. *In the Matter of Indeglia*, 765 A.2d 444, 447 (R.I. 2001).

This Court has considered the gravity of the conduct, as well as aggravating and mitigating circumstances, when determining appropriate attorney sanctions. *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). Factors considered in aggravation and pertinent to this case include prior disciplinary offenses, dishonest or selfish motive, pattern of misconduct, multiple offenses, refusal to acknowledge the wrongfulness of the conduct and experience in the law. *In re Cupples*, 979 S.W.2d 932, 937 (Mo. banc 1998). There are no mitigating factors relevant to Respondent's case. The nature of Respondent's behavior and Rule violations makes clear that suspension is the appropriate sanction for his conduct. However, even if the Disciplinary Hearing Panel's recommendation of a public reprimand was the appropriate initial sanction, the fact that Respondent was previously reprimanded for similar conduct, engaged in multiple Rule violations, and was motivated purely by selfish interests to the detriment of his client is enough to advance the sanctioning recommendation to that of a suspension.

The record in this case indicates that it is critically necessary for Respondent to reevaluate his practice and familiarity with the Rules that govern his practice. At hearing, Respondent indicated that he believed the contract giving him the exclusive right to settle his client's cases was ethical, fair and permissible. Further, Respondent testified that he did not know he could not write a check for personal debts from a client account that holds both personal and client funds and stated that the Rules prohibiting such conduct were designed and implemented unfairly so as to "trip up" hardworking practitioners like

Respondent. Respondent has received two previous admonitions and a public reprimand and a substantial sanction of suspension is necessary to give Respondent the time and motivation necessary to correct these egregious defects if he is to continue the practice of law in Missouri.

CONCLUSION

For the reasons set forth above, the Chief Disciplinary Counsel respectfully prays the Court issue the following Order:

WHEREAS, in this Court the complete record of the hearing before the Disciplinary Hearing Panel having been filed and the parties having fully briefed and argued said cause, the Court finds that Respondent, Larry D. Coleman, Missouri Bar No. 27575, violated Rule 4-1.2 by accepting a settlement agreement on behalf of his client without the consent of his client and against her express directives; Rule 4-1.5 by collecting over $30,000 in hourly fees and then converting the fee agreement to a contingency agreement for one-third of the client's potential recovery without giving his client credit for the fees previously paid; Rule 4-1.7 by converting an hourly fee agreement to a contingency agreement and then purporting to contract with his client for the exclusive right to settle her cases without explaining that his representation may be affected by his personal interests; Rule 4-1.7 by moving the court to enforce a settlement agreement against his own client; Rule 4-1.16 by failing to notify his client that he had withdrawn from representation and failing to provide his client information pertaining to her rights and obligations upon his withdrawal from representation; and Rule 4-1.15 by commingling personal and client funds in the same account.

In accordance with previous disciplinary decisions by this Court, the Court hereby suspends the license of Respondent, Larry D. Coleman, with no leave to apply for reinstatement for a period of one year.

Fee pursuant to Rule 5.19(h) in the amount of $1,000 payable to the Clerk of this Court to the credit of the Advisory Committee Fund taxed to Respondent. Costs taxed to Respondent.

Respectfully submitted,

ALAN D. PRATZEL #29141
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ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2009, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

Larry D. Coleman
8801 E. 63rd St., Ste. 208
Raytown, MO 64133

_____
Shannon L. Briesacher

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 11,395 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That AVG 8.0 software was used to scan the disk for viruses and that it is virus free.

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Shannon L. Briesacher

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