**IN THE SUPREME COURT**
**STATE OF MISSOURI**

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

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# INFORMANT'S REPLY BRIEF

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- **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**

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## 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;**
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"The lawyer's efforts in a representation must be for the benefit of the client…a lawyer may hope to further the lawyer's professional reputation and income through a representation, but may do so only as a by-product of promoting the client's success." Restatement (Third) of the Law Governing Lawyers §16 Comment c (Vol. 1 2000). In the present action, the majority of the Rule violations committed by Respondent appear to have originated from Respondent's desire for money and from his lack of concern for promoting the success of his client. Respondent's behavior evidences his inability to appropriately carry out his duties as a client advocate and representative.

## Respondent Violated Rule 4-1.2 in Accepting a Settlement Agreement against the Direction of his Client

Respondent does not dispute that Ms. Davis repeatedly informed him that she did not wish to settle her case with Western Missouri Mental Health, nor does Respondent dispute that he accepted the $20,000 settlement offer on behalf of Ms. Davis, without her consent. Respondent does not dispute that he attempted to enforce the settlement agreement against Ms. Davis in court. Respondent only claims that because Ms. Davis failed to sign the settlement papers proffered by the State, and because the Court subsequently refused to enforce the settlement against Ms. Davis, the settlement was not perfected, resulting in no violation of Rule 4-1.2. **Resp. brief, p. 3**. Such contention by Respondent is without merit.

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." Rule 4-1.2, in its entirety, makes clear that the purpose of the Rule is to ensure that within the boundaries of the law and the rules of ethics, lawyers respect the right of a client to direct his or her own litigation. "In general, it is the client (and not the lawyer) who has the authority to make major decisions. . [.]" Legal Ethics*: The Lawyer's Deskbook on Professional Responsibility* §1.2-2, Dzienkowski & Rotunda, American Bar Association Center for Professional Responsibility (2008-2009). In the present action, Respondent violated Rule 4-1.2 when he first accepted the offer of the State against the wishes of Ms. Davis. Respondent compounded his violation of the Rule when he attempted to enforce the settlement agreement against Ms. Davis in court. That the settlement agreement was never perfected is immaterial. It was Respondent's disregard of his client's directives and decisions that resulted in the violation of Rule 4-1.2.

Respondent also appears to contend in his brief that §484.140, RSMo creates the right of an attorney to contract with a client for the exclusive right to settle the client's case. **Resp. brief, p. 15-16**. However, §484.140 simply provides that an attorney may contract for a contingency fee, thereby creating an attorney's lien. *Ganaway v. Department of Social Services*, 753 S.W.2d 12, 14 (Mo.App. W.D., 1988). Section 484.140 in no way creates a contract right permitting an attorney to settle a client's case without the consent of the client. To the contrary, it is a generally accepted principle of law that an attorney may not contract in a fee agreement to eliminate the client's right to accept or reject a settlement offer. See ABA/BNA Lawyers' Manual on Professional Conduct §31:307 p. 240 (2002) and Legal Ethics*: The Lawyer's Deskbook on Professional Responsibility* §1.2-2, Dzienkowski & Rotunda, American Bar Association Center for Professional Responsibility (2008-2009).

Respondent lacked authority to accept a settlement offer on behalf of his client, irrespective of whether that settlement was later perfected. Further, the provision in Respondent's contingency agreement purporting to give Respondent the exclusive right to settle Ms. Davis' case was void and did not constitute "consent" on the part of Ms. Davis. In accepting the settlement offer against the wishes of Ms. Davis and in later attempting to obtain a Court Order to enforce the settlement against Ms. Davis, Respondent acted in his own interest and in violation of Rule 4-1.2.

**Respondent Violated Rule 4-1.16 in Failing to Protect his Client's Interests at the Termination of Representation**

Respondent contends that pursuant to Rule 4-1.16(b)(4), he was permitted to withdraw from representing Ms. Davis because the client insisted on taking action that Respondent considered "repugnant." **Resp. brief, p. 17-18**. While it can hardly be said that a client's refusal to accept a settlement agreement for the sole purpose of ensuring her attorney's contingency fee is "repugnant," it does not matter whether Respondent was permitted to withdraw pursuant to Rule or Court Order. In any instance where an attorney is withdrawing or has withdrawn from representation, Rule 4-1.16(d) makes clear that the attorney shall take steps to protect the interests of the client. As discussed previously in Informant's brief, the failure of an attorney to inform his client of his withdrawal or to provide his client a copy of his motion to withdraw constitutes a violation of Rule 1.16. See *In re Eckert*, 867 N.E.2d 141, 142-143 (Ind. 2007) and *Office of Disciplinary Counsel v. Yoshino,* 2005 WL 3170992, [3]. **Inf. brief, p. 37**. In the present action, the evidence establishes that Respondent failed to notify Ms. Davis that he had filed a motion to withdraw from representation. The evidence further establishes that Ms. Davis did not learn of Respondent's motion to withdraw until months after he filed it with the Court.

Respondent contends that he "pleaded with his client to come in so that they could resolve their differences in all three cases." **Resp. brief, pg. 18**. However, the record contains no evidence that Respondent ever attempted to resolve any difference with Ms. Davis other than to try and persuade her to sign the settlement documents obtained after

Respondent accepted the $20,000 settlement offer against Ms. Davis' directive. In fact, the record contains no evidence that any other such "difference" existed. Once Ms. Davis made clear that she would not sign the settlement documents, Respondent withdrew in all three of her cases. Further, Respondent failed to provide Ms. Davis any of the information that would have protected her rights upon his withdrawal. Ms. Davis sent a certified letter to Respondent requesting, among other things, that he provide her the status of each of her cases, the amount of liens that Respondent was asserting and a statement as whether she needed to obtain a new attorney. Respondent repeatedly failed to provide any of the information requested by Ms. Davis and Ms. Davis testified that this lack of information contributed to her inability to obtain new counsel.

Respondent only withdrew from representation following Ms. Davis' refusal to sign the settlement agreement, again evidencing that Respondent was motivated purely by his desire to be paid a contingency fee, this in addition to the $38,000 plus that had already been paid by Ms. Davis. When Respondent did file a motion to withdraw, he failed to inform Ms. Davis of his withdrawal and failed to provide her a copy of the motion to withdraw or any other information as to the status of her case. Respondent acted in his own interest and simultaneously failed to protect the interest of his client in violation of Rule 4-1.16.

**Respondent Violated Rule 4-1.15 in that Respondent Commingled Personal and Client Funds in a Client Trust Account**

In attempting to explain Respondent's trust account practices, Respondent states:

> [U]ndersigned counsel explained that as soon as he gets his client's money,

> and it becomes good funds, he immediately gets rid of it by paying the client. He states that after the client is paid that the only thing left in the account is his own funds. In other words, there are no client funds in his IOLTA account after his client is paid. He will either transfer those funds to his checking account or pay directly out of his IOLTA account as there are no other funds in his IOLTA account, except his.

**Resp. brief, p. 11**. The problem with Respondent's practice is that after paying the first client, Respondent does not transfer his personal share of the funds to another account. Respondent then deposits the next client's proceeds on top of his personal funds, utilizing the account for both professional and personal purposes and writing checks for personal expenditures from the client trust account. Respondent's practice results in the commingling of personal and client funds.

Respondent's account is a client trust account. See **Inf. Ex. 64** (where UMB classifies the account as "Mo Lawyer Trust Acct Foundation for Larry Delano Coleman PC, Iolta Account"). According to bank records and Respondent's own testimony, Respondent was maintaining personal funds in the account before he deposited Patricia Rushing's settlement proceeds. Once he deposited Patricia Rushing's settlement proceeds into the account, on top of his personal funds, Respondent commingled funds in violation of Rule 4-1.15. Because Respondent was ostensibly entitled to some of the Patricia Rushing proceeds as attorney's fees and because the client trust account already contained some of Respondent's personal funds, Respondent proceeded to write checks for personal expenditures from his client trust account at the same time that Patricia

Rushing's proceeds were contained in the account. Patricia Rushing did not cash her check until 18 days after its deposit.

Respondent contends that because he writes a check to the client as soon as the settlement check clears, the client funds and personal funds are only contained together in the account for a short time (the time it takes for the check to clear). Setting aside that this, in and of itself, is a technical commingling of funds, Respondent fails to consider that when multiple client checks are regularly deposited in an account containing personal funds, there is a continuous and ongoing commingling of client and personal funds. Respondent further fails to consider that when he deposits retainer checks or client monies that are not settlement proceeds, these monies, belonging to the client, may be commingled with Respondent's personal funds for a much longer period of time (i.e. the time it takes for the retainer monies to be earned).

In arguing that Respondent did not commingle client and personal funds, Respondent states in his brief to this Court, "[m]oreover, all the checks cleared, even the Court's. There was never any evidence of commingling." **Resp. brief, p. 26**. Respondent appears to confuse the concepts of "commingling" and "conversion" of client funds. Informant does not allege that Respondent converted client funds. However, Respondent's own testimony establishes that Respondent does not maintain ledgers or accountings for his client trust 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). Given Respondent's regular practice of commingling client and personal funds, writing checks for personal expenditures from his client trust account and failing to maintain ledgers or records for the account, it is not difficult to see how miscountings could occur.

Respondent, in essence, uses his client trust account as a personal checking account. Between the period of March, 2008-June, 2008, Respondent wrote checks from the account to the grocery store, his home's association and his wife. In regularly depositing client funds into the account with his personal funds and in failing to maintain ledgers for the account, Respondent has failed to properly handle and protect his client's money in violation of Rule 4-1.15.

**Respondent Violated Multiple Rules of Professional Conduct**

Respondent repeatedly reiterates that he was initially charged with 21 violations of the Rules of Professional Conduct and was only found by the disciplinary hearing panel to have violated one Rule. Only Respondent's most egregious violations were presented to this Court by Informant and the evidence contained in the record demonstrates that Respondent committed more violations of Rule than were determined by the disciplinary hearing panel. In addition to Respondent's failure to follow the directive of his client in violation of Rule 4-1.2, Respondent's failure to safekeep his client's property in violation of Rule 4-1.15 and Respondent's failure to protect the interest of his client upon termination of representation in violation of Rule 4-1.16, Respondent also contracted for an excessive fee in violation of Rule 4-1.5 and created a conflict of interest with his client in violation of Rule 4-1.7. In sum, Respondent's multiple violations of Rule were incorrectly absent from the disciplinary hearing panel's findings of fact. Further, the panel's recommendation as to sanction appears not to have considered that receipt of a public reprimand on top of the public reprimand received by Respondent in April, 2008, conflicts with the idea of a progressive system of discipline. The disciplinary hearing panel appears not to have considered aggravating factors in the case at hand and the public reprimand recommended by the panel fails to reflect the severity of Respondent's conduct.

## 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**

### Suspension is Justified because Ms. Davis was Injured by Respondent's Conduct

Respondent erroneously contends in his brief that Ms. Davis was not injured by his conduct. Respondent's assertion serves to further demonstrate his complete disregard for the plight of his client.

As previously set forth in Informant's brief, this Court has considered and applied the sanctioning guidelines set forth in the American Bar Association's Standards for Imposing Lawyer Sanctions ("ABA Standards") in sanctioning Missouri attorneys. *In re Crews*, 159 S.W.3d 355, 360 (Mo. banc 2005). The corresponding sanctioning guidelines for violations committed by Respondent and suggestive of a suspension are measured in terms of "injury or potential injury to the client." See **Inf. brief, p. 44-46** (where violations of Rule 4-1.2 are governed by Standard 4.4; 4-1.7 is governed by Standard 4.3; and Rule 4-1.15 is governed by Standard 4.1). Thus, both the injury and the potential injury to the client are considered in determining the appropriate imposition of sanction.

In the present action, Ms. Davis was first injured when Respondent drafted a fee agreement, wherein Respondent was to receive a contingency fee while at the same time retaining the exclusive right to settle Ms. Davis' cases. There is an affirmative duty of disclosure to the client without regard to whether the client would be separately injured by non-disclosure because the client is entitled to make an informed decision. *Matter of Silverman*, 289 N.W.2d 683, 696 (Mich. 1980). Respondent's actions created a conflict of interest and Respondent failed to disclose to Ms. Davis that his determination as to whether the cases should settle may be limited by his own interest in being paid under the terms of the contingency agreement. Further, Respondent failed to discuss the terms of the revised fee agreement and failed to ensure that Ms. Davis was aware of the provision in the contract giving Respondent the exclusive right to settle her cases. Ms. Davis was wholly deprived of the ability to make an informed decision regarding the advisability of entering into the revised contract with Respondent, resulting in injury to Ms. Davis.

Ms. Davis was next potentially injured by Respondent when he contracted for a contingency fee, which would traditionally encompass the entirety of a legal fee, without giving Ms. Davis any credit for the $38,000-$50,000 already paid. Because none of the cases settled, no additional fee accrued to Respondent. However, Respondent went to extraordinary lengths to attempt a different result and the potential injury to Ms. Davis was the payment of an excessive and unreasonable fee.

Ms. Davis was injured when Respondent, her attorney, failed to abide her directive and accepted a settlement agreement against her wishes. Attorneys hold positions of trust with their clients. *In re Casey*, 2008 WL 5122989 (Cal.Bar Ct.). As such, a client should be able to rely on an attorney to act in his or her best interest. In the present action, not only did Respondent fail to abide the directive of Ms. Davis, but he took affirmative adverse action against her in court, thereby betraying the trust placed in him by his client. There can be no doubt that the violation of that trust resulted in injury to Ms. Davis and harm to the public's perception of the legal profession.

Finally, Ms. Davis was injured when Respondent failed to protect her interests at the termination of representation. Injuries to a client may be measured in terms of time, anxiety and aggravation in attempting to coax cooperation from the attorney. *In re Koch*, 198 P.3d 910, 917 (Or. 2008). In the present action, Respondent failed to notify Ms. Davis of his withdrawal and failed to provide Ms. Davis a copy of his motion to withdraw. Ms. Davis called Respondent numerous times and sent him a certified letter requesting status updates and other information pertinent to her cases. Respondent failed to provide any of the information requested.

Respondent repeatedly denounces Ms. Davis' injuries and goes so far as to suggest that *he* may have been the person injured as a result of their relationship. In Respondent's brief to this Court, Respondent states, "[t]hat the client decided to forfeit the $20,000 which Respondent's efforts engendered was the final <u>coup de grace</u>." **Resp. brief, p. 19**. The injuries sustained by Ms. Davis are only exacerbated by Respondent's complete refusal to acknowledge any wrongdoing.

**Suspension is Justified because Respondent Fails to Acknowledge the Wrongfulness of his Conduct**

Though lacking in legal support for his position, Respondent has consistently maintained that he is permitted to contract with a client for the exclusive right to settle a client's case with or without the client's consent. Respondent further asserts that entering into a contingency contract while at the same time retaining the exclusive right to settle a client's case is both ethical and fair. Finally, Respondent appears to wholly reject the idea that a client is entitled to make major decisions regarding his or her own case and repeatedly suggests that he was injured as a result of Ms. Davis' decision not to settle her case. ("Respondent sought to exercise his independent judgment as to what was best for his client…She thought she knew best, though;" "She simply let $20,000 go down the drain then filed a Bar Complaint against the attorney who had procured it for her through the dint of his labors;" "Neither did counsel do anything except to help his client, which she rejected to her detriment and to his." **Resp. brief, p. 17, 25 and 20,** respectively.

Though the disciplinary hearing panel did not appear to apply aggravating and mitigating factors in its sanctioning recommendation, Respondent's complete refusal to acknowledge the wrongfulness of his conduct must be considered a compelling aggravating factor. Respondent's statements demonstrate not only that Respondent refuses to acknowledge his offenses in the present action, but also that Respondent lacks familiarity with the most basic and fundamental principles of ethics in the practice of law. As such, the substantial sanction of an actual suspension is necessary to provide Respondent the motivation required to remedy the defects in his practice.

## **CONCLUSION**

For the reasons set forth above and in the Informant's Brief, 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,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 2009, two copies of Informant's Reply 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 4,577 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.

________________________
Shannon L. Briesacher