

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:)	
)	
TARAK A. DEVKOTA,)	Supreme Court #SC91579
)	
Respondent.)	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Background

Respondent, who is 38 years old, was licensed to practice law in Missouri in September, 1999. **App. 21, 119.** He has maintained a solo practice in the Kansas City area throughout almost his entire legal career. **App. 22-24.** Although he graduated from law school with a heavy emphasis in intellectual property law intent on becoming a patent attorney, his first job as a licensed attorney was with a general practice firm handling a variety of cases. **App 21, 22.** After 10 months of employment at the firm, he opened his own solo practice handling any matter that came in the door including traffic, criminal, personal injury and domestic cases. **App. 22, 23.**

Although Respondent maintained an IOLTA trust account in connection with his practice, he was ignorant of how it was supposed to function in accordance with the Rules of Professional Conduct. **App. 23, 24.** Essentially, he used the IOLTA trust account for everything, including payment of his own personal expenses, believing he was exempt from the application of Rule 4-1.15(c). **App. 24.** According to Respondent, he did not believe he needed a client trust account because he did not hold client funds for any extended time period and he believed he could transfer funds from his trust account for his personal use without first putting them into his operating account. **App. 7.** He carried this belief until he attended a three-hour-long continuing legal education course presented by an investigator at the Office of Chief Disciplinary Counsel (OCDC) on February 26, 2010. **App 11, 25, 27.**

Currently, Respondent operates a general practice at 4010 Washington, Suite 204, Kansas City, MO 64111 where he employs and supervises two full-time employees and one part-time clerk. **App. 28, 32.**

Respondent's Previous Disciplinary History

Respondent has a substantial history of professional discipline. Respondent was issued an admonition in Missouri in April, 2004, for violating Rule 4-1.15(b) for his involvement in cashing a check in which a third party had an interest without notification or authorization from the interested party. **App. 32, 120.** After cashing the check, it also took some time before Respondent dispersed the funds to the interested party. **App. 32.**

In December, 2004, Respondent was issued an interim suspension for alcohol related issues and neglect of his practice. **App. 26, 120.** During his suspension, Respondent was required to complete an alcohol rehabilitation program, which he did so successfully. **App. 26.** He remained on interim suspension until September 26, 2006. **App. 120.**

On December 9, 2005, the Supreme Court of Kansas publicly censured the Respondent for his conduct prior to his Missouri interim suspension. **App. 120.** Specifically, Respondent was found to have violated the Kansas Rules of Professional Conduct 1.3 (diligence), 3.4(d) (failure to make reasonably diligent efforts to comply with pretrial discovery requests, and 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) by signing a client's name on a legal document and subsequently allowing a notary to certify it as the client's true signature. **App. 27, 120.** Although the

client did give oral authorization to Respondent to sign on his behalf, Respondent violated the Rules by signing the client's name instead of his own. **App. 27.**

On September 26, 2006, the Missouri Supreme Court considered a Joint Stipulation of Facts and Joint Recommendation of Discipline filed by the Respondent and the OCDC regarding the prior conduct that resulted in his interim suspension. Respondent was suspended, with the suspension stayed by probation for a period of twelve months, based upon the findings that he had violated Rules 4-1.3 (diligence), 4-1.4 (communication), as well as the Kansas censure. **App. 120. App. 153-160.** The order thereby terminated Respondent's interim suspension which approximated a total of eighteen months. **App. 120.** The conditions of probation were set forth on pages 12-19 of the Joint Stipulation of Facts, Joint Proposed Conclusions of Law, and Joint Recommendation of Discipline filed by the parties. **App. 163.**

Respondent completed the terms of his probation twelve months later and was reinstated. **App. 120, 121.** One of the terms of the probation, which Respondent fulfilled, required attendance at continuing legal education programs sponsored by the Missouri Bar which included a program on the handling of client funds and trust account management. **App. 121.** Additionally, Respondent's probation required that his client trust account be monitored. **App 27.** On at least one occasion during the probationary period, Respondent was informed that his failure to keep a ledger of client funds and expenses was a violation of the rules and advised to make the necessary adjustment to comply with 4-1.15(c). **App. 27.**

Facts Underlying Disciplinary Case

Preliminary Information

The case presented to the disciplinary panel consisted of complaints regarding the commingling of funds in the client trust account of Respondent in violation of Rule 4-1.15(c) of the Missouri Supreme Court Rules of Professional Conduct. **App. 3.** The panel also reviewed evidence of a delay in the payment of client funds which violated Rule 4-1.15(i) and whether the Respondent made false statements to the investigator of the OCDC when the trust account was being audited, thus breaching Rule 4-8.1(a). **App. 3, 124.**

On or about January 25th, 29th and 30th of 2010, Bank Midwest sent the Office of Chief Disciplinary Counsel three separate notices of overdraft for Respondent's client trust account.¹ **App. 5-6, 66-72, 73-76, 77-80.** Acting in her capacity as an investigator and paralegal for the OCDC, Kelly Dillon received the notices and later mailed correspondence to Respondent requesting a letter of explanation for the insufficient funds. **App. 5-6.** The correspondence from Ms. Dillon also requested that Respondent, absent excuse of banking error, remit the previous three months of banks statements and one month of canceled checks. **App. 6.**

¹ A new regulation that accompanied Rule 4-1.15 was enacted on Jan. 1, 2010 and required that all client trust accounts be held in approved financial institutions. **App. 5.** These approved institutions are required by agreement to send all notices of overdraft to the OCDC for purposes of regulation and oversight. **App. 5.**

On or about February 4, 2010, Respondent telephoned Ms. Dillon to protest the assertions made in the letter from the OCDC that his client trust account was being used in a manner that violated Rule 4-1.15. **App. 6-7.** During the conversation, Respondent was very combative and insisted that the account was not a client trust account and that he had no use for such an account. **App. 6-7.** Respondent also expressed to Ms. Dillon that he felt he was being unfairly targeted due to his past disciplinary violations. **App. 7.** Ms. Dillon then referred Respondent to Sara Rittman, Legal Ethics Counsel, to address his complaints and concerns. **App. 7.**

Following the conversation with Respondent, Ms. Dillon subpoenaed Respondent's account records for audit. **App. 7.** Ms. Dillon then prepared a spreadsheet of the records gathered for a one year period. **App. 7, 81-97.** Upon review of the information, Ms. Dillon found many transactions that indicated the account was being used to hold both client funds (personal injury settlement and client fees) and to pay Respondent's personal expenses (which included mortgage payments, utilities, donations and day care). **App. 7-8.**

In addition to the evidence indicating the account was being used as both a client trust account and for personal use, there also was also an indication that at least one of the checks that was returned for insufficient funds was issued to Respondent's client, Richard Smiley, for a personal injury settlement. **App. 8, 81-97.** That check was written on January 13, 2009 in the amount of \$28,259.25 and was later returned for insufficient funds on January 15, 2009. **App. 8, 81-97.** The records also showed that on January 15,

2009, Respondent obtained a cashier's check written to Mr. Smiley for \$20,500. **App. 81-97.** There was no evidence of the difference in amount between the original settlement check and the cashier's check ever having been paid to Mr. Smiley through the trust account. **App. 8, 81-97.**

Additionally, there was evidence of a deposit of client settlement funds in the name of Mr. Singalreddy being placed in the account on February 25, 2009 in the amount of \$3,000 where it remained until a check was issued on March 10, 2009. **App. 8, 81-97.** The portion of the \$3,000 originally deposited and owed to the client amounted to \$1,000 but, while being held in the trust account, the balance dropped as low as \$362 on March 4th. **App. 8, 81-97.**

Furthermore, a similar transaction occurred on June 5th, 2009 when settlement funds for the benefit of Mr. Segani were deposited in the amount of \$8,791.68. **App. 9, 81-97.** The account balance thereafter reached an amount as low as \$368.08 on July 2, 2009. **App. 9, 81-97.** The settlement paid to Mr. or Ms. Segani was finally made on July 7, 2009, after a cash deposit had been made in the amount of \$3,850, thus compensating for the shortfall in the account. **App. 9, 81-97.**

Ms. Dillon also noted that during the year 2009, Respondent had insufficient funds in his client trust account on roughly a monthly basis. **App. 9, 81-97.** The reason those overdrafts went unnoticed by the OCDC was due to the fact that before January 1, 2010,

those overdraft notices were being sent to the account holder only and not the OCDC.²

App. 9.

On or about February 26, 2010, Respondent attended a Continuing Legal Education course in Kansas City where Ms. Dillon was speaking on the subject of properly maintaining client trust accounts. **App. 10, 11.** At the conclusion of the course, Respondent shared some of his bank records with Ms. Dillon and briefly discussed the manner in which he had been handling the account. **App. 11.** His demeanor on that day was calm, responsive, and respectful. **App. 11.** He accepted the opinion of Ms. Dillon regarding the misappropriation of client funds. **App. 11.** He did, however, also inquire into the severity and penalty of his violations and Ms. Dillon informed him that she could not make any decision regarding punishment. **App. 11.**

Subsequently, in a letter addressed to Informant from Respondent and dated August 5, 2010, Respondent apologized for his demeanor in his initial telephone conversation with Ms. Dillon and for his discussion with Ms. Dillon at the Kansas City CLE, when he attempted to discuss the disposition of his case after it had been assigned to the Special Representative in Kansas City for investigation. **App. 11, 98.**

² The rule change was designed to prevent overdrafts in client trust accounts from going unnoticed as they had in the past and help the OCDC be more proactive in the enforcement of Rule 4.1-15. **App. 10.**

Despite the multiple violations of Rule 4-1.15 – violations that were admitted and uncontested before the Disciplinary Hearing Panel by Respondent – at no time did the OCDC receive any complaints from any of Respondent’s clients that they were not paid funds for which they were entitled regarding settlement proceeds or refunds of fees. **App. 4, 11, 49.** Moreover, Richard Smiley (one of Respondent’s clients who was issued a check that was returned for insufficient funds), testified on Respondent’s behalf before the panel. **App. 18.** Mr. Smiley said that he was satisfied with the representation of Respondent and that he would use his services in the future. **App. 19.** He also added that he was paid all the funds that he was owed and that Respondent was very proactive in rectifying the issue with the returned check. **App. 19.**

Disciplinary Proceeding

On July 2, 2010, Informant determined, pursuant to Rule 5.11 that probable cause existed to believe that Respondent was guilty of professional misconduct and thereafter filed an Information asserting that Respondent violated Rule 4-1.15(c) (commingling funds in a client trust account), Rule 4-8.4(c) (dishonesty, deceit, fraud and misrepresentation by using client funds for his own personal use), Rule 4-8.4(d) (conduct prejudicial to the administration of justice) and Rule 4-8.1(a) (making false statements to the OCDC) **App. 3, 124.** Respondent’s answer was filed August 31, 2010 and basically admitted all of the allegations asserted in the Information. **App. 60-65.** A hearing panel was appointed and a hearing was held November 11, 2010, wherein Informant was represented by Charles W. Gotschall and Respondent was represented by Robert G.

Russell. **App. 3.** At the hearing, Informant sought leave to amend the Information to include a violation of Rule 4-1.15(i) (failure to promptly deliver client funds). **App. 3.** The panel allowed the amendment over objection by Respondent. **App. 3.**

The Disciplinary Hearing Panel ultimately determined that Respondent violated Rule 4-1.15(c) and 4-1.15(i) in both commingling funds in his client trust account and delaying the release of those funds earmarked for client distribution. **App. 81-97, 123, 124.** They also found Respondent violated Rule 4-8.1(a) in making false statements through comments made to an investigator at the OCDC. **App. 124.** The panel made no specific findings as to the alleged and admitted violations of Rules 4-8.4(c) and 4-8.4(d). **App. 60-65, 124, 125.**

In arriving at their final decision and recommendation, the panel noted Respondent's disciplinary history, which amounted to four violations in Missouri (including the present case) and other violations in Kansas. **App. 124.** The panel found it somewhat alarming and certainly concerning that after a previous suspension, a year of probation, and attending legal education programs in ethics specifically devoted to the handling of client funds, that Respondent would have such a fundamental misunderstanding of his responsibilities of properly maintaining a client trust account. **App. 124.** Moreover, the panel noted that should Respondent have so many issues with interpreting a fundamental rule of professional conduct that Respondent may not be competent to properly represent his clients. **App. 124.** To Respondent's credit, however,

the panel took in account that they found him to be earnest, sincere, and anxious to avoid further disciplinary problems. **App. 125.**

The panel recommended a stayed suspension with probation pursuant to Missouri Supreme Court Rule 5.225. **App. 126.** The recommendation was that Respondent be suspended for a period of three years and placed on probation for a period of three years on the following terms and conditions: (a) that the Respondent secure the services of a trust account manager to handle all financial affairs; (b) that Respondent be required to secure the services of John Kurtz or another attorney deemed acceptable by the OCDC to oversee and supervise Respondent's law practice; and (c) that Respondent not violate any of the rules of Professional Conduct during such period of suspension and probation. **App. 126.**

Respondent filed his Notice of Acceptance of Panel Decision on January 24, 2011. **App. 164-165.** Informant notified the Missouri Supreme Court Advisory Committee by letter dated January 26, 2011 of its acceptance of the written decision of the Disciplinary Hearing Panel. **App. 166.** The Court rejected the proposed discipline and activated a briefing schedule.

POINTS RELIED ON

I.

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT’S
LICENSE FOR ADMITTED VIOLATIONS OF RULES OF
PROFESSIONAL CONDUCT 4-1.15(C), 4-1.15(I), 4-8.1(A), 4-8.4(C)
AND 4-8.4(D) IN THAT RESPONDENT COMMINGLED CLIENT
FUNDS WITH PERSONAL FUNDS IN HIS CLIENT TRUST
ACCOUNT, USED ACCOUNT FUNDS TO PAY PERSONAL
EXPENSES, MADE FALSE STATEMENTS REGARDING THE
ACCOUNT TO AN INVESTIGATOR OF THE OFFICE OF CHIEF
DISCIPLINARY COUNSEL, AND ENGAGED IN DISHONEST
PREJUDICIAL CONDUCT.**

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010)

In re Coleman, 295 S.W.3d 857 (Mo. banc 2009)

In re Hardge-Harris, 845 S.W.2d 557 (Mo. banc 1993)

Rule 4-1.15(c)

Rule 4-1.15(i)

Rule 4-8.1 (a)

Rule 4-8.4(c)

Rule 4-8.4(d)

POINTS RELIED ON

II.

**THE SUPREME COURT SHOULD SUSPEND RESPONDENT
FROM THE PRACTICE OF LAW, STAY THE SUSPENSION, AND
PLACE HIM ON PROBATION FOR THREE YEARS IN THAT
SUSPENSION IS THE APPROPRIATE SANCTION FOR
RESPONDENT'S PROFESSIONAL MISCONDUCT AND HE IS
OTHERWISE ELIGIBLE FOR PROBATION UNDER RULE
5.225.**

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010)

In re Coleman, 295 S.W.3d 857 (Mo. banc 2009)

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

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT’S LICENSE FOR ADMITTED VIOLATIONS OF RULES OF PROFESSIONAL CONDUCT 4-1.15(C), 4-1.15(I), 4-8.1(A), 4-8.4(C), AND 4-8.4(D) IN THAT RESPONDENT COMMINGLED CLIENT FUNDS WITH PERSONAL FUNDS IN HIS CLIENT TRUST ACCOUNT, USED ACCOUNT FUNDS TO PAY PERSONAL EXPENSES, MADE FALSE STATEMENTS REGARDING THE ACCOUNT TO AN INVESTIGATOR OF THE OFFICE OF CHIEF DISCIPLINARY COUNSEL, AND ENGAGED IN DISHONEST AND PREJUDICIAL 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.* 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).

Violations of Rule 4-1.15(c) Regarding the Commingling of Funds

Comment 1 of Missouri Supreme Court Rule 4-1.15 states that “all property that is the property of clients or third persons, including prospective clients, must be kept

separate from the lawyer's business and personal property and, if monies, in one or more trust accounts.” Rule 4-1.15, Comment [1]. The Rule also requires that complete records of the client trust account be maintained and preserved for a period of at least five years, and an accounting must be completed promptly on a client's request. Rule 4-1.15(c).

An account registered as a client trust account will be found to contain commingled funds if the attorney uses it to both hold funds related to client settlements or attorney fees while making expenditures that are personal in nature in the utilization of those funds. *See In re Ehler*, 319 S.W.3d 442, at 450 (Mo. banc 2010). In *Ehler*, an attorney was found to have violated Rule 4-1.15(c) by using her client trust account to pay personal bills such as office and utility expenses. *Id.* It is also a violation of Rule 4-1.15(c) to use a trust account to pay personal expenses even when none of the funds remaining in the account are being held for a client's benefit and are instead the fees already earned by the attorney for the services he had performed. *See In re Coleman*, 295 S.W.3d 857, 866 (Mo. banc 2009). In *Coleman*, an attorney who had dispersed all client trust funds from a trust account and had subsequently used the remainder of the funds in the account to pay personal expenses argued that he was not in violation of the Rule because the funds used were not client funds. *Id.* The Court, however, iterated that the account must be strictly used for holding client trust funds and any personal expenditures made there from is a violation of the Rule. *Id.*

Here, the Respondent does not contest the findings from the panel that he improperly used the client trust account to pay personal expenses. Like the attorneys in both *Ehler* and *Coleman*, the Respondent has used a client trust account to issue personal

payments, including mortgage payments, payments to employees for services rendered, utility payments and payments for charitable donations. Although Respondent did claim he only violated the Rule due to ignorance and not malfeasance, as the Court concluded in *Coleman*, the Rule must be strictly enforced – personal expenditures are a violation of trust account rules.

Violations of Rule 4-1.15(i) Regarding Prompt Distribution of Client Funds

Rule 4-1.15(i) requires that an attorney, “upon receiving funds or other property in which a client or third person has an interest ... shall promptly notify the client or third person” and that he “shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.” Rule 4-1.15(i). In *Ehler*, the attorney received the proceeds from the sale of marital property in a domestic relations case amounting to \$67,539.51 and was instructed by the Court to pay creditors and attorney’s fees before distributing the remainder to the two parties in the suit. *Ehler*, at 446. Although she paid one of the two trust clients a majority of which was owed, the attorney failed to remit any sums to the other party, which exceeded \$24,000. After a complaint was submitted to the OCDC, the attorney remitted payments to both parties but still fell short of paying all funds owed to both trust clients. *Id.* When the panel hearing occurred in November of that year, the attorney still had yet to pay all funds owed to those clients which she had received and deposited into the trust account in June. *Id.* The panel determined that in doing so, the attorney had violated Rule 4-1.15(i)³ by not

³ In *Ehler*, the Rule violated was 4-1.15(f) which is essentially the same as today’s Rule

promptly delivering funds to a client to which he was entitled.

Here, Respondent deposited client trust funds for Mr. Singalreddy on February 25, 2009 and did not release those funds to which the client was entitled until March 6, 2009. In the interim time period between the deposit and eventual payment to the client, the account balance was allowed to drop as low as \$362.21. Additionally, Respondent deposited settlement proceeds for the benefit of Mr. Segani amounting to \$8,791.68 into the Trust Account on June 5, 2009 and the share of funds that belonged to the client (\$4,329.34) was not paid until July 7, 2009. Both the Singalreddy and Segani delays in client distribution violate the promptness required by Rule 4-1.15(c). Although the violations in “promptness” were not as extreme as that which was seen in *Ehler*, which involved a delay of months instead of weeks as in this case, the Rules require that payments be made sooner than they were made to both Mr. Singalreddy and Mr. Segani.

Violation of Rule 4-8.1(a) Regarding False Statements Made to the OCDC

Rule 4-8.1(a) states that an attorney “in connection with a disciplinary matter shall not knowingly make a false statement of material fact.” Rule 4-8.1(a). Thus, it is a “professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct.” Rule 4-8.1(a), Comment [1]. In the event of an investigation, an attorney has a duty to not only fully comply by providing honest information to the disciplinary committee but he also must

4-1.15(i) in failing to promptly deliver client funds.

be prompt in cooperating with their requests and inquiries even though he may be charged with wrongdoing. *In re Hardge-Harris*, 845 S.W.2d 557 (Mo. banc 1993).

During Respondent's telephone conversation with Ms. Dillon, an investigator and paralegal for the OCDC, on or around February 4, 2010, Respondent claimed that the account in question was not a client trust account and that the Rules did not apply. However, in his statements he made before the hearing panel, Respondent admitted that he had registered as a client trust account and that he knew it to be titled as such. Thus, he knowingly made a false statement while under investigation to a staff member at the OCDC. Moreover, Respondent's demeanor during the conversation was contemptuous and abrasive, thus violating the professional standard set forth by the Court in *Hardge-Harris*.

Respondent admits he is guilty of professional misconduct under Rule 4-8.4(c) for using client funds for his own personal use. Respondent further admits to the extent his conduct is prejudicial to the administration of justice that he is then guilty of professional misconduct under Rule 4-8.4(d). The disciplinary panel's failure to make any findings on these rule violations must be an oversight and the Court should make a finding and reach its own conclusion of law as to these violations. *In re Crews*.

ARGUMENT

II.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT FROM THE PRACTICE OF LAW AND PLACE HIM ON PROBATION FOR THREE YEARS IN THAT SUSPENSION IS THE APPROPRIATE SANCTION FOR RESPONDENT'S PROFESSIONAL MISCONDUCT AND HE IS OTHERWISE ELIGIBLE FOR PROBATION UNDER RULE 5.225.

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 standards 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: (1) violations of duties owed to the clients, (2) violations of duties owed to the public, (3) violations of duties owed to the legal system, and (4) violations of duties owed to the profession. *See* Standards for Imposing Lawyer Sanctions, American Bar Association, 1991. This Court has also 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 include prior disciplinary offenses, dishonest or selfish motives, 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).

An attorney who is found to have violated both 4-1.15(c) and 4-1.15(i) may be disbarred. *In re Ehler*, 319 S.W.3d 442, 453 (Mo. banc 2010). In *Ehler*, an attorney that received a prior stayed suspension involving trust account violations had apparently complied with the probation requirements and had been reinstated. *Id.* at 445. However, new complaints arose including trust account violations and the attorney was later disbarred. *Id.* at 452. However, the court noted that the disbarment came about, not only as a result of several prior incidents for which the attorney was cited regarding the misuse and mismanagement of a client trust account, but because the attorney's clients were obviously and significantly harmed by the attorney's conduct, thus resulting in a need to protect the public from the future practice of the attorney. *Id.* at 451-52.

In another Missouri disciplinary proceeding, an attorney who had three prior incidents of discipline, appeared in front of the disciplinary hearing panel regarding allegations of commingling trust funds belonging to clients in violation of Rule 4-1.15(c). *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009). In *Coleman*, the attorney argued that his conduct did not violate the Rules because, even though he paid personal obligations from the trust account, the funds which remained in the account belonged to him. *Id.* at 866. The court noted that, while it may be true that Coleman did not misuse funds or convert any client funds, he did use his IOLTA account for personal use which is strictly prohibited. *Id.*

The court relied on the ABA Standards to arrive at the appropriate discipline including the ethical duty owed to the client, the attorney's mental state, the potential injury to the client, and aggravating and mitigating factors. *Id.* at 871. The court

considered the attorney's past disciplinary history as an aggravating factor and the absence of a dishonest motive as a mitigating factor. *Id.* Applying the ABA Standards, the court determined the nature of the attorney's conduct justified the suspension of his license for one year. *Id.* However, the court noted the ABA Standards suggested that probation is the appropriate punishment when the conduct can be corrected and the attorney's right to practice law needs to be monitored or limited rather than revoked. *Id.* at 871 (citing ABA STANDARDS, Rule 2.7 Probation, Commentary). The Court stayed *Coleman's* one year suspension and placed him on probation.

The *Coleman* Court added that a lawyer is eligible for probation "if he or she: (1) is unlikely to harm the public during the period of probation and can be adequately supervised; (2) is able to perform legal services and is able to practice law without causing the Courts or profession to fall into disrepute; and, (3) has not committed acts warranting disbarment." *Id.*

In the present action, Respondent's misconduct resulted in no harm to his clients or the public. The ABA Standards as well as the *Ehler* case speak to the most important ethical duties as being those obligations which a lawyer owes to his clients, including safekeeping property. In the *Ehler* case, the Court concluded her most egregious act of misconduct was the attorney's misappropriation of her client funds or her mishandling of the client trust account and determined that disbarment was the appropriate sanction by utilizing a progressive disciplinary scheme.

Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

ABA STANDARD, Rule 4.12. Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct. *Id.*, Rule 8.2. Disbarment is generally appropriate when a lawyer has been suspended for the same or similar misconduct and intentionally or knowingly engages in further acts that cause injury or potential injury to the client, the public, the legal system or the profession. *Id.*, Rule 8.1(b). Under a progressive disciplinary scheme, the facts of this case could easily result in discipline being imposed at either level. The aggravating factors of prior disciplinary offenses and a pattern of misconduct suggest a more severe sanction. The mitigating factors, including the absence of a dishonest motive, the lack of harm to any client, and Respondent's remorse and willingness to comply with any terms of probation would suggest a lesser sanction.

The purpose of probation is to educate, rehabilitate, and supervise the attorney in order to enable the attorney to modify his or her professional behavior. *Coleman, Id.* at 871. The Informant believes that Respondent's professional behavior can be appropriately modified through education and monitoring and therefore joins in the panel's recommendation of probation in this case. Although it is a close case, the recommendation is an appropriate sanction both under the ABA Standards and prior disciplinary cases cited by this Court.

CONCLUSION

For the reasons set forth above, the Chief Disciplinary Counsel respectfully requests that this Court:

- (a) Find that Respondent violated Rules 4-1.15(c), 4-1.15(i), 4-8.1(a), 4-8.4(c), and 4-8.4(d).
- (b) Suspend Respondent from the practice of law with no leave for reinstatement until the expiration of three years, stay the suspension, and place Respondent on probation pursuant to Rule 5.225 for period of three years, with the conditions for probation recommended by the disciplinary hearing panel along with any other conditions deemed necessary and appropriate by this Court; and
- (c) Tax all costs in this matter to Respondent, including the \$1,000 fee pursuant to Rule 5.19(h).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of ____, 2011, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

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Sharon K. Weedin

CERTIFICATION: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;
2. Complied with the limitations contained in Rule 84.06(b);
3. Contains 5,550 words, according to Microsoft Word, which is the processing system used to prepare this brief; and
4. That Trend Micro Security Agent Anti-Virus software was used to scan the disk for viruses and that it is virus free.

Sharon K. Weedin

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