IN THE SUPREME COURT
STATE OF MISSOURI

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

RESPONDENT'S BRIEF

KEMPTON & RUSSELL

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ATTORNEY FOR RESPONDENT

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STATEMENT OF FACTS

Background

Respondent Accepts the Statement of Facts submitted by Informant, but adds the following facts for completeness.

Respondent graduated from the University of Missouri, Columbia in 1994 with a degree in biochemistry and then took post graduate work in political science. **Tr. 74**. He then decided to go to law school and become a patent attorney. **Tr. 74-75**. He graduated from UMKC Law School in 1999 with a heavy emphasis on intellectual property. **Tr. 76**. He never thought he would be working as a general practitioner. **Tr. 76**.

His first experience with trust accounts was with the Holliday Law Office in Kansas City. He learned how to handle trust accounts there**.** **Tr. 78, 79**. As a result he believed personal injury funds were not subject to trust account rules. **Tr. 78, 79**. He continued that belief up until he talked with Kelly Dillon and wrote to Sarah Rittman. **Tr. 18, 116**.

He has now changed his trust account procedure so that he now does not keep filing fees, fines or expense monies from clients in his trust account. **Tr. 90, 91**. When a client brings money for filing fees, fines or expenses he now requires that the client either bring a money order or bring cash which is then converted to a money order. That money order is stapled to the file folder. **Tr. 91**. The only funds that now go through his trust account are personal injury or other lawsuit settlements. When he receives funds in trust he purchases a cashier's check for the client's proportion when the underlining check becomes good. Respondent pays the fees for the cashier's check. **Tr. 104**. He zeroes his

trust account out every month so there is no chance for error or co-mingling. **Tr. 103, 104**. He has corrected the problems that got him to the attention of the OCDC. **Tr. 127**.

In his previous probation arising from his alcohol abuse the OCDC looked at Respondent's trust account practice. As a condition of his probation Respondent's trust account was monitored by the OCDC. Respondent was never advised that his practice of co-mingling was a problem. **Tr. 146**. The only trust account problem of which he was advised was his failure to maintain a ledger of the monies he received from clients for fines and expenses. **Tr. 146**.

On the Singalreddy and Segani matters, they were both itinerant cab drivers. **Tr. 108**. They agreed to have Respondent hold their funds until they came to pick them up. **Tr. 109**. When they came to pick up their checks they were paid. **Tr. 109, 110, 111**. Kelly Dillon of the OCDC testified that she was not concerned with delay in payment in the Singalreddy and Segani matters. **Tr. 47**. She indicated that she would not have been concerned even if Respondent had held the funds for several weeks more. **Tr. 47**.

As a result of his prior interim suspension the Respondent had to take bankruptcy. **Tr. 96**.

Respondent is married and has a wife and two daughters. **Tr. 102**. He has a three year lease on his present office and has three employees. **Tr. 106, 119**.

Respondent does work in the Hispanic community **Tr. 120, 121** and with the City Union Mission **Tr. 177**.

He is presently handling some major cases that no one else would take. **Tr. 122, 123**. His suspension would adversely affect those clients. **Tr. 123, 124, 171**.

According to Kelly Dillon of the OCDC Respondent has made full disclosure and been cooperative with the OCDC. **Tr. 52**. She did not testify that Respondent was untruthful. **Tr. 19**.

The new trust account reported rule went into effect in January 2010. **Tr. 39**. By the time of the hearing in this case in November 2010 there had been over 250 violations reported and it was expected that number would rise to 300. **Tr. 39, 40**. Those violations were primarily from solo and small firm practitioners. **Tr. 50**. There have been very few large firm reports because large firms have accountants to handle their trust account matters. **Tr. 50**. Discipline has been from diversion to admonition, to interim suspension to disbarment. **Tr. 40, 41**.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE FOR ADMITTED VIOLATIONS OF RULES OF PROFESSIONAL CONDUCT 4-1.15(C) AND 4-8.4(A) IN THAT RESPONDENT COMMINGLED CLIENT FUNDS WITH PERSONAL FUNDS IN HIS CLIENT TRUST ACCOUNT AND USED ACCOUNT FUNDS TO PAY PERSONAL EXPENSES.

Rule 4-1.15(c)

Rule 4-1.15(i)

Rule 4-8.1(a)

Rule 4-8.4(a)

Rule 4-8.4(c)

Rule 4-8.4(d)

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

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 Belz, 258 S.W. 3d (Mo. banc 2008)

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

In re Donaho, 98 S.W. 39 871 (Mo. banc 2003)

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

In re Littleton, 719 S.W. 2d 772 (Mo. banc 1986)

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) AND 4-8.4(A) IN THAT RESPONDENT COMMINGLED CLIENT FUNDS WITH PERSONAL FUNDS IN HIS CLIENT TRUST ACCOUNT AND USED ACCOUNT FUNDS TO PAY PERSONAL EXPENSES.

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

Respondent has never contested that he improperly commingled funds and used commingled funds to pay personal expenses. He agrees he should be disciplined for that conduct.

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

Respondent should not be disciplined for violation of this rule. Both Segani and Singalreddy were itinerant taxi drivers who chose to pick up their checks rather than have them mailed. Segani and Singalreddy both agreed to have Respondent hold their checks until they came in to pick them up. **Tr. 109**. Rule 4-1.15(i) provides for an exception to the prompt delivery rule when the client agrees to the delay. The rule states among other things "…except… by agreement with the client, a lawyer shall promptly deliver to the client…".

Kelly Dillon, the trust account specialist for the OCDC, testified that she was not concerned with the length of time it took Respondent to pay his clients and that she would not have been concerned if Respondent had held the Segani and Singalreddy funds for several weeks more. **Tr. 47**.

Respondent should not be disciplined for conduct which is agreed to by the clients, permitted by the rule and for conduct which causes no concern to the OCDC.

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

Respondent should not be disciplined for violation of that rule. In his conversations with Kelly Dillon he advised her that he did not need a trust account and that it was his belief that personal injury monies would not be held long enough to require that they be placed in a trust account. **Tr. 18, 45, 46**. The account in question was clearly captioned as a trust account. As Respondent testified it would have been asinine for him to say it wasn't a trust account. **Tr. 112**. His letter in response to the complaint letter from Kelly Dillon does not deny it is a trust account. **Respondent Exhibit E**. His position was that he was exempt because of the Supplemental Missouri Comment to Rule 4-1.15.

At the hearing before the Disciplinary Hearing Panel, counsel for Informant pointedly asked Kelly Dillon if the statements Respondent made to her concerning the trust account not being a trust account were true. **Tr. 19**. She did not testify that Respondent was untruthful. **Tr. 19**. She testified Respondent took the position that he did not need a trust account because he did not hold funds long enough to require one. **Tr. 18**.

There may well have been a misunderstanding under Respondent and Kelly Dillon but Respondent did not lie or make a false statement to Kelly Dillon.

Respondent does admit that he should be disciplined for violation Rule 4-8.4(a) because he violated Rule 4-1.15.

Respondent should not be disciplined for violating Rule 4-8.4(b) for conduct prejudicial to the administration of justice. The Disciplinary Hearing Panel, found no

violation of this rule and there was no evidence presented at the hearing of how Respondent's conduct prejudicially affected the administration of justice. To find a violation would require sheer conjecture.

The ABA Standards for Imposing Lawyer Sanctions addresses conduct prejudicial to the administration of justice in Standard 6. In that Standard conduct which is prejudicial to the administration of justice deals with communications to the court, violations of court rules, falsification of evidence, withholding of evidence, and improper communication with judges, jurors, witnesses or other officials. None of that is present in this case. Respondent's conduct did not in any way affect the administration of justice as that term is used in the rules and as understood by the legal community.

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.

Respondent generally agrees with the argument of the informant that Respondent should be suspended and placed on probation. Respondent commingled funds and used account funds to pay for his own personal expenses. He has admitted this and the question has always been what is the proper discipline given Respondent's prior disciplinary history.

Respondent was trained as a biochemist. **Tr. 74.** He went to law school to become a patent attorney expecting to work for a law firm or the U.S. Patent Office. **Tr. 75, 76.** When he decided he did not want to do patent work he didn't have a job. He answered an ad in the Kansas City Star and was hired at the Holliday Law Firm. **Tr. 77.** He received no positive trust account training there and in fact learned and believed that personal injury settlement cases were exempt from trust account rules. **Tr. 78, 79.** When the FBI began investigating Mr. Holliday, Respondent left and started working out of his

apartment. **Tr. 79, 80.** Since leaving Holliday Respondent has been a solo practitioner although he has shared office space with other attorneys.

He has three prior disciplinary matters. The first was an admonition for negotiating a check without the endorsement of Safeco Insurance which was a lien holder. The check was negotiated without notice to Safeco. Safeco was paid its proceeds. This was Respondents only discipline relating to a trust account. This occurred on April 9, 2004.

His second disciplinary matter arose from his alcohol usage. He begin drinking in substantial quantities and was failing to communicate with his clients, wasn't keeping his appointments and was neglecting his practice. The OCDC sought and properly obtained an order of interim suspension. Mr. Christopher A. Bowers of Kansas City was appointed as the trustee to take over Respondent's practice. This occurred on December 22, 2004. Mr. Bowers has submitted a letter in support of Respondent indicating Respondent's commitment to the practice of law and the turn around that has taken place in his life. **Respondent's Exhibit I.**

On December 9, 2005 the Kansas Disciplinary Authority issued a public censure to Respondent. That was for signing his client's name to interrogatory answers. Respondent had the authority of his client to do so, but the signature was notarized as that of the client rather than that of the Respondent.

Respondent remained on interim suspension from December 22, 2004 until September 26, 2006. At that point this court terminated the interim suspension and suspended Respondent indefinitely for violations of Rule 4-1.3, Diligence and 4-1.4,

Communication. Respondent's suspension was stayed and he was placed on probation for one year. At that time his trust account was in disarray. **Tr. 97.** His probation required him to take one CLE hour having to do with management of trust accounts and to report on any funds he held in trust. **Tr. 60.** During his probation he reported that he held no funds in trust. He continued his practice of putting personal injury funds in to the account, paying the clients, and then using the balance as his own without transferring it to his operating account. **Tr. 133.**

Respondent did not have a mentor or a law office management consultant during his probation nor was he required to do so. He completed his probation on September 26, 2007 and continued his practice of commingling funds which he erroneously thought he could do.

In late January 2010, Bank Midwest sent overdraft notices on Respondent's trust account to the Office of Chief Disciplinary Counsel. That was in response to a new Advisory Committee regulation that went in to effect in 2010 requiring financial institutions to report to the Office of Chief Disciplinary Counsel whenever there was an overdraft on a trust account. At the time of Respondent's hearing in November of 2010 the Chief Disciplinary Counsel's representative indicated that they had received upwards of 250 such notifications and they expected it to go to 300 for the year. **Tr. 39, 40.** Disciplines involved were everything from admonitions and diversions to interim suspensions and one disbarment. **Tr. 40, 41.**

Respondent agrees suspension with probation is the appropriate remedy in this case because it is clear that no client has complained and no client has been harmed and Respondent meets the requirements of Supreme Court Rule 5.225.

The DHP suggested to this court that a three year suspension with probation for three years be imposed. Both Informant and Respondent agree. Both filed Notices of Acceptance of the Disciplinary Hearing Panel's findings and recommendations. This court gives considerable weight to the suggestions of appropriate discipline by the Disciplinary Hearing Panel. *In re Donaho*, 98 S.W. 3d 871, 873 (Mo. banc 2003). In this case the court should follow the suggestion of the Disciplinary Hearing Panel. It is clear the Disciplinary Hearing Panel attentively listened to the evidence, participated in the questioning, and carefully analyzed the facts and the law before reaching its findings and conclusions. This court should give considerable weight to the findings of the Disciplinary Hearing Panel and the recommendations and should follow those findings and recommendations.

The three year suspension suggested by the Disciplinary Hearing Panel is a long suspension for a case where there is no client harm and no misappropriation of client property. In the case of *In re Belz*, 258 S.W. 3d 38 (Mo. banc 2008) attorney Belz had been misappropriating client property for four years. This court suspended him indefinitely with leave to reapply after three years. While three years could be argued to be excessive in Respondent's case, Respondent agrees it is appropriate in connection with probation.

The Disciplinary Hearing Panel was impressed by the similarity of Respondent's case with the case of *In re Coleman,* 295 S.W. 3d. 857 (Mo. banc 2009) although the DHP found the misconduct of Coleman to be more serious. **A. 125.** Both Coleman and Respondent had three prior disciplinary matters, both wrote a trust account check to this court, both believed they were able to handle the trust account as they did, and there was no client harm. Coleman had more experience than Respondent. Coleman was licensed in 1997 and disciplined in 2009. Coleman had other violations aside from the trust account issue and particularly was found to have violated Rules 4-1.2, 1.7, 1.16 and 8.4(d). Coleman was required to have a law office management consultant and a mentor among other probation conditions. The suggested discipline form the Disciplinary Hearing Panel mirrors the probation in Coleman, but the period of suspension recommended is two years longer than that imposed in Coleman. Respondent is willing to abide by these suggested conditions. Both Respondent and Informant have accepted the DHP recommendation and believes that Respondent is a proper candidate for supervision. In order to achieve consistency this court should impose the recommended sanctions. **ABA Standards. 1.3(3).**

The Disciplinary Hearing Panel did not consider the case of *In re Ehler*, 319 S.W. 3d. 442 (Mo. banc 2010) because it found Ehlers conduct to be much more egregious than that of Respondent. Respondent agrees the conduct of Ehler was much more egregious but believes that the important aspect of Ehler as it applies to this case relates to Ehler's earlier probation. That probation required her to have a mentor and to consult a law office management professional. She did both of those things and successfully

completed her probation. Had Respondent been required to have a law office management consultant and a mentor in his earlier probation for matters dealing with diligence and communication he would have appreciated how to handle his trust account and we would not be here.

Respondent is a proper subject for probation in this case under Supreme Court Rule 5.225. He is unlikely to harm the public. A mentor, a law office management professional and the OCDC can certainly provide adequate supervision. He is able to practice law and perform legal services as witness the testimony of Ms. Alery, **Tr. 170, 171** and Mr. Oaks. **Tr. 175, 176**. He has not committed acts which would warrant disbarment.

The ABA Standard for Imposing Lawyer Sanctions indicates that probation is appropriate in this case. See ABA Standard 2.7. The commentary to that standard references periodic audits of trust accounts as a possible condition of probation. It says that probation is appropriate for conduct which may be corrected. In this case the conduct is already corrected in that Respondent zeros out his trust account monthly, obtains certified funds for client proceeds, and uses a procedure on fines and expenses that makes their deposit in to a trust account unnecessary.

The ABA Standards recognize both aggravating and mitigating factors. Respondent agrees that there are aggravating factors of prior disciplinary offenses and a pattern of misconduct. The mitigating factors are absence of a dishonest or selfish motive, timely good faith effort to make restitution or to rectify, full and free disclosure to the Disciplinary Board or cooperative attitude towards proceedings and remorse. In

regard to the timely good faith effort to make restitution or to rectify the conduct, when Respondent learned that the check that he had given to Mr. Smiley was going to be insufficient, Respondent immediately got a new check with certified funds and delivered it to Mr. Smiley. **Tr. 105, 106.** He did this before Mr. Smiley was ever aware that the check he had received was insufficient. **Tr. 67.** When Respondent learned in early 2010 from Sara Rittman and Kelly Dillon that he was wrong about how he was handling his trust accounts he immediately changed and rectified that practice. **Tr. 114, 116.** Kelly Dillon testified that Respondent had made full disclosure and was cooperative with the Chief Disciplinary Counsel. **Tr. 52.** The Standards recognize that inexperience in the practice of law is a mitigating factor. While Respondent is not inexperienced in the practice of law he is inexperienced in the proper handling of a trust account. His earliest training taught him to use improper methods. His reading of the Supplementary Missouri Comment to Supreme Court Rule 4-1.15 reinforced that thought. His mindset was the same as that of Mr. Coleman. Respondent has submitted letters attesting to his good character and his competence and the testimony of Mrs. Alery and Mr. Oaks was supportive of both of those factors. **Tr. 172.** Respondent has demonstrated his remorse in this case by his actions and by his testimony.

The purpose of discipline is to protect the public and maintain the integrity of the legal profession, but is not to punish. *In re Littleton*, 719 S.W. 2d. 772 (Mo. banc 1986). If this court denies probation to Respondent it will be punishing the Respondent for conduct which caused no client harm, which has already been corrected and the nature of which Respondent did not appreciate.

If this court is concerned that there should be a progressively greater discipline because Respondent has been previously suspended and placed on probation then the court need only look at ABA Standard number 8. That Standard provides that progressive discipline should be imposed when the prior suspension was for the same or similar conduct. The prior conduct for which Respondent was suspended dealt with communication and diligence not with safe keeping of property. His prior safe keeping issue resulted in an admonition and had nothing to do with the issue of commingling funds.

Respondent's suspension without probation would not operate to protect the public. It would deprive his clients of his services, causes three employees to lose their jobs, cause Respondent to default under his three year lease, wreak financial havoc on his wife and two daughters, and cause the Hispanic community and the Kansas City Union Mission to lose a loyal friend and supporter. Respondent asks that he be given the same opportunity given to Coleman and to Ehler and let him operate with a mentor and a law office management consultant. The Informant believes Respondent is a fit subject for probation. The Disciplinary Hearing Panel believes Respondent is a fit subject for probation. The recommendation of the Disciplinary Hearing Panel is an appropriate sanction under both the ABA Standards and the prior disciplinary cases cited to this court and particularly the Coleman case. Consistency would be served by placing Respondent on probation.

CONCLUSION

For the reason set forth above, Respondent respectively requests that this court:

(a) Find that Respondent violated Rules 4-1.15(c) and 4-8.4(a).

(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 a 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).

Respectively submitted,

KEMPTON & RUSSELL

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2011, one copy of Respondent's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to Sharon Weedin, Office of Chief Disciplinary Counsel, 3335 American Avenue, Jefferson City, MO 65109-1079 and one copy of Respondent's Brief have been sent via First Class mail to Charles W. Gotschall, 4700 Belleview, Suite 215, Kansas City, MO 64112-1359.

:

_____
Robert G. Russell

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 3,686 words and 333 lines, according to Microsoft Word, which is the processing system used to prepare this brief;
4. That the diskette has been scanned for viruses and it is virus free.

_____
Robert G. Russell