

Ethics: Learning from Others' Mistakes

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Boone County Bar Association

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Attorney Discipline

Some of the following summaries are excerpted from, or based on, summaries found on the Supreme Court website.

For a previous CLE I did some analysis of disciplinary cases argued to the Supreme Court from March 2014 to March 2015. The Court heard oral argument in 20 attorney discipline cases. 14 of the cases involved trust account issues, exclusively or in addition to other issues. The majority of the disciplinary cases in the remainder of 2015 involved trust account issues.

In 2015, the Court disbarred 17 attorneys. In 7 of those cases, the attorney defaulted. 2 disbarments were in reciprocal cases based on disbarment of the attorney in another state. In 2 of the cases, the attorney surrendered the license. In 5 of the cases, the disciplinary action was based on a guilty plea or conviction. One case went through the basic disciplinary process for a violation of the Missouri Rules of Professional Conduct.

Of the 9 suspensions in 2015, 8 were based on criminal conduct or discipline in another state. The Court also suspended 11 attorneys for failing to file or pay Missouri taxes. The Court entered interim suspension orders in 4 cases.

The Court suspended 11 attorneys in 2015 but stayed the suspension and placed the attorney on probation. 5 of those cases involved trust account violations.

All three reprimands in 2015 were based on criminal conduct, reciprocal discipline, or both.

Primarily Trust Account Issues

The seven cases described below are representative of trust account cases.

In re: JLM SC93720

Respondent was licensed in September 2004 and began a solo practice one year later. Following a report from the bank regarding his client trust account, the chief disciplinary counsel's office audited the trust account. Disciplinary counsel found that client funds made for payment of attorney fees were deposited into the trust account and not the operating account and that non-lawyer employees wrote checks from the trust account and deposited them into the operating

account. Disciplinary counsel also found that Respondent did not reconcile two of his monthly bank statements and that Respondent had failed to train his non-lawyer employees as to professional obligations for the trust account. Disciplinary counsel also found Respondent failed to give some clients their settlement check funds for periods of two to three months. The parties stipulated to the violations. OCDC and Respondent agreed that the discipline should be a stayed suspension with one year probation.

Court Order: Suspended indefinitely from the practice of law and no petition for reinstatement will be entertained for a period of one year. The Court stayed the suspension and Respondent was placed on probation for a period of eighteen months. Costs plus \$1500 probation fee assessed to Respondent.

In re: DLS SC93781

Following a report of an overdraft, OCDC determined that there was limited activity overall in Respondent's trust account. The investigator further determined Respondent violated the rules of professional conduct by depositing personal funds into his trust account, paying his personal expenses from the trust account on five occasions and failing to keep complete records of the account for five years. The investigator determined that no clients were harmed financially. Several documents the investigator received were printed on paper containing various client documents on the reverse side, and the investigator found the clients had not consented to the release of their information. Respondent has stipulated to the investigation's findings and recognizes a need for training on the proper handling of funds. OCDC and Respondent stipulated to the violations and agreed that the discipline should be a stayed suspension with one year probation.

Court Order: Suspended Respondent's license indefinitely but stayed the suspension and placed Respondent on probation for one year. Costs plus \$1500 probation fee assessed to Respondent.

In re: JCS SC93895

The chief disciplinary counsel's office received Respondent had overdrawn his trust account, which Respondent keeps at the same bank as his operating account. The investigation revealed that Respondent had paid personal expenses with his trust account twice, had deposited client's advanced fee payments into his operating account, had paid client and third-party distributions from his operating account, and had failed to keep adequate records for the trust and operating account. Respondent failed to provide the account records to the disciplinary counsel upon request, forcing the office to subpoena them. Respondent later replied to the disciplinary counsel, entering into a joint stipulation regarding the violations. OCDC and Respondent agreed that Respondent should be suspended but the suspension should be stayed and Respondent should be placed on probation for one year.

Court Order: Suspended indefinitely. Suspension stayed and Respondent placed on probation for one year.

In re: KAL SC93930

Respondent has been a solo practitioner his entire career. Following tragic personal events, Respondent was diagnosed with major depressive disorder and receives regular medical care. Respondent received admonitions twice before for violations of the rules of professional conduct regarding competence, scope of representation, diligence, communication, fees, candor to the court and impartiality and decorum of the tribunal.

Respondent reported an overdraft of his trust account to OCDC. An investigation revealed several incidents where Respondent had allowed his trust account amount to fall below the necessary amount to pay his clients' settlement proceeds, had advanced money to clients prior to receiving their settlement checks, had paid his wife's credit card bill using the account, had drawn a tax check from the trust account and had deposited personal funds into the account. Respondent's clients had all been paid the amounts owed them. Respondent turned his trust account over to a bonded accounting firm to maintain the account. OCDC and Respondent stipulated to the violations and that Respondent's license should be suspended but the suspension should be stayed and Respondent should be placed on probation for two years. The Court ordered the agreed discipline.

In re: RD SC94017

Respondent was previously disciplined for failure to complete and truthfully report his required continuing legal education hours. Respondent mishandled funds in his trust account by allowing personal and client funds to commingle, depositing funds into the trust account as advances for case expenses and failing to properly maintain records of the trust account. He failed to enter into a contingency fee arrangement with a client and failed to document payment of her expenses. Respondent depleted settlement funds through client disbursements and attorney fee payments related to a proceeding without paying medical bills associated with the case. He obtained a personal loan to cover his trust account after he overdrew the account. He failed to properly provide the office of chief disciplinary counsel with requested documentation until the office subpoenaed the information. Respondent and OCDC stipulated to the violations and that the discipline should be suspension but stay the suspension and place him on probation for two years. The Court ordered the agreed discipline.

In re: FRB SC94121

Respondent has practiced since 1997. Respondent's bank reported five trust account overdrafts to OCDC over a one year period. Respondent commingled personal and trust account funds by depositing earned legal fees into the trust account, paying personal or operating expenses out of the trust account and purchasing cashier's checks from the trust account for advertising and lease payments. It further determined he retained funds to pay third parties and often allowed the account to fall below the amount of those payments prior to making them, occasionally making payments directly from the operating account instead. The panel also determined Respondent failed to keep proper records of trust account funds and misappropriated client funds for personal use. Respondent and OCDC stipulated to the violations but not the appropriate sanction.

Court Order: Suspended indefinitely. No application for reinstatement for six months.

In re: SET SC94172

Respondent collected \$3,500, which was deposited entirely into his operating account instead of his client trust account, and never provided the client an invoice. Respondent failed to timely respond to court requests for information or request a continuance in two proceedings. He failed to timely provide trust account records following several requests from OCDC. Clients received payments much lower than their settlement checks and a check made out only to the firm was deposited into the trust account. Respondent did not maintain settlement sheets for his clients and could not produce documentation to OCDC.

Court Order: Suspended indefinitely. No application for reinstatement for one year.

Dishonesty and Other Violations

In re: DSP SC94050

OCDC and Respondent stipulated that Respondent violated several Rules. Respondent violated Rule 4-1.3 regarding diligence by failing to act with reasonable diligence and promptness in his representation and Rule 4-1.4 by failing to keep his client informed of her cases as well as failing to supervise a non-lawyer's conduct. Respondent violated Rule 4-1.2 by failing to follow a client's directives; Rule 4-1.5(a) by charging an unreasonable fee; Rule 4-1.7 by engaging in a conflict of interest between current clients; Rule 4-1.8(f) by accepting money from a client's trust account without their consent; Rule 4-1.16(d) by failing to surrender a client's files; Rule 4-3.4 by failing to act in fair competition; and Rule 4-8.4(c) by acting with dishonesty, fraud, deceit or misrepresentation. Respondent violated Rule 4-1.1 by failing to provide competent representation; Rule 4-3.4(d) by failing to comply with a discovery request; and Rule 4-8.4(d) by acting in a way prejudicial to the administration of justice. OCDC and Respondent agree that suspension is proper in cases involving client conflict of interests and dishonesty, fraud, deceit or misrepresentation.

Court Order: Disbarred.

In re: LJF SC94203

Respondent practiced over 45 years and was already on probation.

With respect to one client, Respondent made misrepresentations to his client about actions and other matters related to the client's cases and then told OCDC that he had not made any misrepresentations to the client; told a court he had his client's permission to dismiss an appeal when he did not; and told his client he had deposited the client's inheritance in an interest-bearing account but failed to transfer it out of a non-interest-bearing account. With respect to the second client, Respondent guaranteed he would not charge the client for services for which he later billed the client. Respondent charged and collected unreasonable fees in violation of Rule 4-

1.5(a) by collecting substantial attorney fees despite performing little or no discernable work. Respondent violated Rules 4-1.1, 4-1.2 and 4-1.3 by failing to enter appearance for months after agreeing to do so, failing to file documents or institute actions after being hired and directed to do so, dismissing an appeal without his client's permission, and failing to respond to court orders or motions filed by opposing parties. Respondent violated Rule 4-1.4(a) by failing to give proper advice to one client and failing to communicate adequately with another client. Respondent violated Rule 4-1.15(c) and (d) by holding a large sum of client money for almost a year in a non-interest bearing account and depositing unearned fees in his personal account instead of his client trust account. Respondent violated Rule 4-1.16(d) by failing to return client files in a reasonable time after his representation of the client ended and despite his former client's repeated requests that he do so.

Court Order: Disbarred

In re: LDK SC94158

Respondent violated Rule 4-1.1 regarding competence by serving as attorney and trustee of a trust and dissipating the trust's assets. She violated Rule 4-1.7 regarding conflicts of interest by representing different clients with different interests in real estate transactions without proper disclosure or obtaining conflict waivers. She violated Rule 4-1.8(a) by entering into business transactions with clients without disclosing the nature of the transaction in writing or giving the clients the opportunity to seek independent counsel. She violated Rule 4-1.15 regarding the safekeeping of client property by failing to protect trust assets while serving in a fiduciary capacity as attorney and trustee. Respondent violated Rule 4-1.16(d) by failing to return all client property following termination of her representation. She violated Rule 4-8.4(c) by engaging in misrepresentation by failing to advise her clients of conflict or the fee she was generating from client investments. She violated Rule 4-8.4(d) by engaging in conduct against the administration of justice by allowing her employees to notarize documents without witnessing the signings. OCDC and Respondent stipulated to the violations and that Respondent should be suspended with no leave to apply for reinstatement for three years.

Court Order: Disbarred.

Discipline Cases with Opinions

In re Hess, 406 S.W.3d 37 (Mo., 2013)

Facts: Lawrence Hess was terminated from the law firm where he worked, and he claimed the firm owed him compensation. He filed lawsuits and attorney's liens against former clients claiming they owed him money for legal services. The circuit court found Hess's claims were meritless, dismissed them with prejudice and sanctioned Hess. The Illinois disciplinary hearing board determined Hess knowingly and deliberately filed frivolous claims and liens for the purpose of pressuring his former employer during his employment dispute, and the Illinois Supreme Court suspended his Illinois law license for violating two Illinois rules of professional conduct.

Court en banc holds: Hess is suspended indefinitely from the practice of law in Missouri without leave to apply for reinstatement for six months. Hess violated Missouri Supreme Court Rule 4-3.1, Meritorious Claims and Contentions, by expressly authorizing the filing of attorney's liens and lawsuits alleging breach of contract, breach of promise, interference with attorney's liens, and unjust enrichment, when those liens and claims were frivolous and meritless. Hess also violated Rule 4-8.4(d)'s admonition not to "engage in conduct prejudicial to the administration of justice" because those frivolous liens and claims wasted the time and resources of the courts, delayed the former clients' receipt of their settlement money, required the hiring of additional legal counsel, and harmed the integrity of the profession. The fact that Hess hired another attorney to file the frivolous claims on his behalf does not relieve him of his duties as an attorney to abide by the rules of professional conduct.

Concurring opinion by Judge Breckenridge: The author agrees that Hess violated Rule 4-8.4(d), but believes Rule 4-3.1 applies to an attorney acting as an advocate and not as a client.

Dissenting opinion by Judge Teitelman: The author dissents believing Rule 4-3.1 applies to a lawyer who is acting as an advocate and not as a client, and because the alleged violation of Rule 4-8.4(d) was based on the alleged violation of Rule 4-3.1 neither Missouri rule was violated.

In re Forck, 418 S.W.3d 437 (2014)

Original offenses related to alcohol addiction resulted in suspension, stayed pending probation. Later offenses related to competence and fees, but not alcohol. Aggravating circumstances include pattern of misconduct toward vulnerable clients. Mitigating circumstances include remorse, restitution, and reform of internal office procedures. Progressive discipline includes extended probation. Factors favoring probation include whether the attorney "(1) is unlikely to harm the public during the probationary period and can be supervised adequately; (2) is able to perform legal services and practice law without causing the courts or profession to fall into disrepute; and (3) has not committed acts warranting disbarment." Offenses unrelated to grounds for probation do not support revocation of probation.

Result: Probation Extended

Epilogue: On 12/23/14, the Supreme Court revoked his probation and suspended him indefinitely with no petition for reinstatement for six months. Respondent violated his probation by failing to: (1) send several quarterly reports to OCDC, (2) attend the Elder Law Institute, (3) provide documents requested by OCDC for the purpose of performing a trust account audit, and (4) provide information related to his trust account to OCDC saying all client matters were confidential. Respondent also violated Rules 4-1.2, 4-1.3, 4-1.4, and 4-1.16 while representing some clients.

In re: Farris, 472 S.W.3d 549 (Mo. banc 2015)

Portions of Summary from the Supreme Court website:

Facts: This case involves Farris' representation of clients in two personal injury cases. In the first case, client A hired Farris to represent her in June 2005. The case was settled for \$197,500, and Farris deposited the settlement proceeds into his client trust account. From the proceeds, Farris paid client A \$65,000 and deducted a reduced attorney fee of \$64,000 and expenses of about \$2,140. This should have left about \$66,340 in the trust account for the benefit of client A and her medical creditors. After a check Farris paid to client A bounced, he met with the client in November 2011 and reassured her the hospital had been paid in full and that she had no need to worry.

In the second case, for client B, the personal injury claims settled in September 2010 for \$90,500, and Farris deposited the settlement proceeds into his client trust account. From the proceeds, Farris paid client B nearly \$32,600 and deducted \$30,000 in attorney fees and nearly \$775 in expenses. This should have left about \$27,130 in the trust account for the benefit of client B and client B's medical providers.

Neither client nor any of the clients' medical providers received any of the funds Farris held in his trust account for their benefit. Instead, nearly all the remaining funds were transferred to Farris' office account, from which it was used to pay his personal and business expenses. To date, he has not paid the clients or their medical creditors what they are owed.

Farris testified his then-wife managed his office's administrative, financial and accounting matters and accused her of stealing his clients' funds from his trust account without his knowledge. He testified that he ultimately reported her conduct to the authorities and that she is being prosecuted.

DISBARRED.

Court en banc holds:

(1) Farris committed misconduct.

(a) Farris knowingly violated Rule 4-1.15. He failed to: maintain the \$93,000 in his trust account he promised for the benefit of client A, client B and their medical creditors; provide a prompt and accurate accounting when client A asked about her settlement; and produce his trust account records to the chief disciplinary counsel. He knowingly failed to distribute the \$93,000 in his trust account promptly to its rightful owners. He also claimed he was unable to locate his clients' files despite his obligation to retain them for at least 10 years following the conclusion of his representation of them.

(b) Farris also violated Rule 4-8.4(c). His conduct in knowingly commingling the \$93,000 from his trust account with funds in his operating account and knowingly converting those funds when the balance of his operating account fell below the amount he was to have held in trust violated Rule 4-8.4 because it involved dishonesty, fraud, deceit and misrepresentation. Even if he ignored the fact that, in November 2011 when he met with client A, nearly all the \$93,000 had been transferred to and spent from his operating account, such knowledge became inescapable in November 2012, when the chief disciplinary counsel's office completed its investigation and confronted Farris with the facts. Accordingly, he knowingly misappropriated funds then and thereafter and, for more than 30 months, knowingly has failed to make good on his obligations to client A, client B and their medical creditors. Further, he told client A he had paid her hospital bill in full when he had not, and he never

made any attempt to follow through on his promises to client B. He then provided tardy, incomplete and false responses to the chief disciplinary counsel's office.

(2) Farris cannot avoid responsibility by blaming his ex-wife or failing to keep records. The evidence shows it was Farris – and not his then-wife – who: told client A and client B he would hold some of their settlement proceeds in trust and use it to pay their medical providers; told the clients he would try to negotiate discounts on their medical bills and distribute any resulting savings to them; failed to respond promptly and truthfully to inquiries from client A and the chief disciplinary counsel's office; and failed to maintain his clients' files and trust account properly. The evidence shows the \$93,000 Farris was supposed to be holding in his trust account was deposited into his office account – through a series of transfers of odd amounts, including transfers of \$9,999 that would not trigger the bank's federal reporting obligations – and then spent for his benefit.

Farris knew the salient facts by November 2011, and his argument that the transfers were his ex-wife's fault is immaterial. Under Rule 4-1.15, Farris is accountable for the misappropriation of client funds whether he made the transfers and expenditures himself or his then-wife made them.

Rule 4-1.15 also makes Farris accountable for maintaining detailed records of deposits into and expenditures from his trust fund on behalf of his clients. His failure to do so gives rise to an inference he knew there was a problem with the account. As such, he knew or should have known his then-wife was depleting the trust account by transferring funds to the operating account. The duty to safeguard and distribute trust account funds under Rule 4-1.15 is non-delegable. Farris alone is responsible for fulfilling his obligations and responsibilities imposed by the rules of professional conduct.

(3) Disbarment is the appropriate discipline.

(a) This Court historically has refused to tolerate the misappropriation of a client's money – there is no room for attorneys who take property held in trust for others and use it as their own. Although disbarment is not automatic in misappropriation cases, it is the baseline sanction. A proper application of the American Bar Association standards for imposing lawyer discipline, which are merely guidance, confirms this Court's cases that disbarment is the presumptively appropriate discipline for misappropriating client funds. Because Farris knowingly misappropriated nearly \$93,000 belonging to his clients or their medical creditors, disbarment is the presumptive discipline for his misconduct.

(b) There are no mitigating circumstances sufficiently compelling to overcome the presumptive discipline of disbarment. The ex-wife's conduct is not a mitigating factor. A lawyer cannot escape responsibility for misappropriation by blaming someone acting within the lawyer's authority and for the lawyer's benefit. By November 2011, there were enough warning signs for Farris to know something was seriously wrong with his trust account, and the duty to comply with the rules of professional conduct rests with Farris, not his wife. That Farris was in ill health in November 2010 and in 2013 also was not a mitigating factor. These episodes came well before and well after the conduct at issue, and Farris does not explain what effect these events had on his actions or why they should be considered mitigating factors. That Farris had other satisfied clients also is not a mitigating factor; none of these clients had large sums of money held in Farris' trust account on their behalf.

(c) Aggravating circumstances reinforce the conclusion that disbarment is the proper discipline. The evidence of the aggravating circumstances present in this case include: prior discipline; dishonest or

selfish motive; a pattern of misconduct; multiple offenses; bad faith obstruction of the disciplinary process; submission of false evidence or statements or other deceptive practices during the disciplinary process; refusal to acknowledge the wrongful nature of the conduct; substantial experience in the practice of law; and indifference to making restitution.

Dissenting opinion by Judge Draper in which Stith and Teitelman, JJ., concurred: The author agrees with the findings of misconduct but disagrees with the discipline imposed by the Court.

Although Farris committed multiple rule violations and assigns all blame to his former wife, his prior admonishment is not “discipline” and his conduct did not arise out of an intentional choice to violate the rules of professional conduct and to take advantage of his clients. He represented to this Court concern for his clients and a desire to return all funds to them. He reported his former wife’s conduct, and she is being prosecuted. Disbarment is not appropriate because there is no preponderance of the evidence in the record demonstrating Farris knowingly converted his clients’ property. By disbarring Farris, the Court loses all authority and influence over him to seek restitution for the clients affected. The author would suspend Farris indefinitely from the practice of law with no leave to apply for reinstatement for two years and would require that Farris make complete restitution to clients A and B before applying for reinstatement.

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MS. SARA RITTMAN is in private practice providing ethics consultation and advice to attorneys as well as representing attorneys in disciplinary and reinstatement matters. She represents applicants in attorney admission matters. She also represents other licensed professionals in disciplinary proceedings.

She was Missouri’s first Legal Ethics Counsel from 2003 to 2012. She became Deputy Chief Disciplinary Counsel in 2000 after becoming Staff Counsel for the Office of the Chief Disciplinary Counsel in 1993. Beginning in 1985, Ms. Rittman was the Unit Chief of the Professional Licensing Unit of the Attorney General’s Office. Ms. Rittman became an Assistant Attorney General for Missouri in 1981.

She served as an officer of the National Organization of Bar Counsel from 2008 to 2012. She served as President from 2011 to 2012.

She received her B.S.Ed. in 1978 from The University of Missouri at Columbia. In 1981, she received her J.D. from The University Of Missouri-Kansas City.