IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
Harold L. Holliday, Jr.,	)	**Supreme Court #SC85857**
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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ATTORNEYS FOR INFORMANT

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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

Respondent Harold Holliday, Jr., was licensed to practice law in Missouri in August of 1968. **App. 2.** Respondent is 60 years old. Respondent practices in Kansas City, Missouri. Respondent was disbarred by Court Order dated May 28, 1986. **App. - 11-12.** The disbarment followed Respondent's conviction of stealing by deceit, § 570.030 RSMo 1978, as reported at *State v. Holliday*, 703 S.W.2d 498 (Mo. App. 1985). **App. 13-15.** According to the Reinstatement Report prepared in 1995 by the Office of Chief Disciplinary Counsel, Respondent's conviction resulted in a sentence of five years probation, a $5,000.00 fine, and 500 hours of public service, all of which Respondent successfully completed. **App. 36.**

Respondent applied to the Court for reinstatement of his law license on March 13, 1995. The Reinstatement Report prepared by OCDC noted that Respondent's 1985 conviction and 1986 disbarment resulted, in part, from Respondent's use of cocaine. **App. 37.** Respondent was a candidate for a kidney transplant in 1995, according to the Report, which apparently would not have been possible had Respondent still been abusing illegal drugs.

Respondent represented a client in a domestic matter and, when she failed to pay his fee, filed suit against her. The petition Respondent filed for his fee alleged that the client retained Respondent on August 29, 1995. **App. 17.**

By order dated September 19, 1995, the Court reinstated Respondent's license to practice law. **App. 16.** In July of 1996, the client for whom Respondent had performed

the domestic work noted above wrote a complaint letter about Respondent to the Office of Chief Disciplinary Counsel. On June 20, 1997, Division 1 of Region IV issued an admonition to Respondent for practicing law (approximately three weeks) before the Court had ordered his license reinstated. **App. 17-18.** Respondent accepted the admonition and has had no discipline since then.

By letter dated January 4, 2001, Nancy Johnson complained to the Office of Chief Disciplinary Counsel about Respondent. **App. 19-22.** The complaint was investigated and ultimately evolved into Count I of an information, which alleged violations of Rules 4-1.4, 4-1.5(c), 4-1.16(a)(3), and 4-8.4(d), arising out of Respondent's representation of Ms. Johnson in 2000. **App. 23-25.**

On September 12, 2001, Valencia Davis wrote a letter of complaint against Respondent. **App. 32-33.** After investigation, Ms. Davis' complaint formed the basis for Count II of an information, which alleged violations of Rules 4-1.4 and 4-1.7(a)(b), arising out of Respondent's representation of Ms. Davis' daughter in 2001. **App. 25-27.**

On February 4, 2002, Melvin Prince faxed a letter of complaint about Respondent to the Office of Chief Disciplinary Counsel. **App. 34-35.** After investigation, Mr. Prince's complaint formed the basis for Count IV of an information, which alleged violations of Rules 4-1.2, 4-1.4, 4-1.5(c), 4-1.7, 4-5.3, 4-7.3(c), and 4-8.4(d), arising out of Respondent's representation of Mr. Prince in 2001. **App. 28-31.**

A hearing on the information was scheduled to commence on October 1, 2003. Before that hearing date, Staff Counsel Carl Schaeperkoetter and Respondent's counsel, Laura Goettsch, reached an informal settlement of the disputed issues. A proposed draft

of a joint pleading by which to file a stipulated case in the Court was forwarded to Respondent's counsel under cover of a letter dated October 9, 2003. Respondent was thereafter hospitalized for an extended period of time, delaying execution of a joint stipulation until February of 2004. In the joint stipulation, which was submitted to the Court on March 1, 2004, Respondent stipulated to violations of Rules 4-1.4, 4-1.5(c), and 4-1.7(b). The joint stipulation included a joint recommendation of a public reprimand with enumerated conditions. The Court ordered this matter briefed on March 30, 2004.

POINT RELIED ON

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT AND ORDER HIM TO COMPLY WITH THE SPECIAL CONDITIONS STIPULATED TO BY THE PARTIES BECAUSE THE SANCTION TO WHICH THE PARTIES HAVE STIPULATED IS AN APPROPRIATE STIPULATED SANCTION IN THAT THE STIPULATED SANCTION, WHICH WOULD PROMOTE EFFICIENT PROCESSING OF DISCIPLINE CASES AND JUDICIAL ECONOMY, ADDRESSES THE TWO-FOLD PURPOSE OF ATTORNEY DISCIPLINE BY PUTTING RESPONDENT'S MISCONDUCT ON PUBLIC RECORD AND REQUIRES RESPONDENT AND HIS OFFICE STAFF TO UNDERTAKE SPECIFIC TRAINING TARGETED TO ENSURE THAT THE MISCONDUCT IS NOT REPEATED

In re Downs, 363 S.W.2d 679 (Mo banc 1963)

In re Disney, 922 S.W.2d 12 (Mo banc 1996)

In re Miller, 568 S.W.2d 246 (Mo banc 1978)

In re Disciplinary Proceeding Against Boelter, 139 Wash. 2d 81, 985 P.2d 328 (1999)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

Rule 4-1.4

Rule 4-1.5(c)

Rule 4-1.7(b)

ARGUMENT

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT AND ORDER HIM TO COMPLY WITH THE SPECIAL CONDITIONS STIPULATED TO BY THE PARTIES BECAUSE THE SANCTION TO WHICH THE PARTIES HAVE STIPULATED IS AN APPROPRIATE STIPULATED SANCTION IN THAT THE STIPULATED SANCTION, WHICH WOULD PROMOTE EFFICIENT PROCESSING OF DISCIPLINE CASES AND JUDICIAL ECONOMY, ADDRESSES THE TWO-FOLD PURPOSE OF ATTORNEY DISCIPLINE BY PUTTING RESPONDENT'S MISCONDUCT ON PUBLIC RECORD AND REQUIRES RESPONDENT AND HIS OFFICE STAFF TO UNDERTAKE SPECIFIC TRAINING TARGETED TO ENSURE THAT THE MISCONDUCT IS NOT REPEATED

Attorney discipline proceedings are neither civil nor criminal in nature; they are sui generis and each case necessarily stands on its own facts. See *In re Downs*, 363 S.W.2d 679, 691 (Mo banc 1963); *In re Sparrow*, 90 S.W.2d 401, 404 (Mo banc 1935). The main purpose of a disciplinary proceeding is not to punish any particular lawyer. Rather, the main objective of a disciplinary proceeding is to make inquiry into the fitness of an attorney to practice law. *In re Randolph*, 347 S.W.2d 91, 109 (Mo banc 1961).

This inquiry into a lawyer's fitness to practice law effectuates the dual purpose of attorney discipline: protecting the public and preserving the integrity of the profession.

By its very nature, a joint stipulation of facts and a joint recommendation for discipline suggests some level of compromise. While the Office of Chief Disciplinary Counsel would not enter into a stipulation for discipline that loses sight of the dual purposes for attorney discipline, there is some room for compromise within those immovable parameters. If there were not, disciplinary personnel would have no flexibility to account for such imponderables as, for example, reticent or unavailable witnesses, a Respondent's poor health, or other problems of proof. Indeed, the ABA Standards for Imposing Lawyer Sanctions state in the Purpose section (Rule 1.3) that the "Standards constitute a model, setting forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct." By submitting a disciplinary case to the Court on a joint stipulation of facts and a joint recommendation for discipline, both sides have likely given a little, but, more to the point, are striving to gain a good resolution. The obvious advantage to both the lawyer and the disciplinary system is the savings in time and resources, no small consideration in today's world of tight budgets. Stipulated disciplines also further the aspirational goals of encouraging professionals to reach agreement and of encouraging lawyers to accept responsibility for wrongdoing.

The misconduct at issue, both as set forth by way of allegations in the information as served, and the misconduct admitted by Respondent in the joint stipulation, is not of the same nature as the misconduct that resulted in Respondent's 1985 disbarment. If

professional misconduct of the same ilk as the earlier misconduct had again shown itself as part of Respondent's character, a public reprimand, regardless of added conditions, would never have been proposed. Nor is there any indication that substance abuse was an issue in the underlying complaints, as it was in the misconduct underlying Respondent's 1986 disbarment.

The misconduct in the case at bar does not implicate dishonesty, fraud, or deceit, placing it in the sanction realm of public reprimand. See *In re Disney*, 922 S.W.2d 12, 15 (Mo banc 1996); Rule 2.5, ABA Standards for Imposing Lawyer Sanctions (1991 ed.). Additionally, this Court has recognized lack of, or minimal, financial harm to clients as tipping the scale toward public reprimand. *In re Weier*, 994 S.W.2d 554, 558 (Mo banc 1999); *In re Cupples*, 979 S.W.2d 932, 937 (Mo banc 1998). The recurring theme in the complaints at issue suggests misconduct that grew from lack of adequate supervision and training of non-legal staff, as well as a lack of understanding of basic conflicts principles, all of which were addressed at the seminar put on by Mr. Schaeperkoetter at Respondent's office.

Attaching conditions to a public reprimand, which conditions are tailored to rectify the deficiencies perceived to underlie the particular lawyer's misconduct, is not only recognized as a viable option in the Commentary to ABA Standard Rule 2.5, it has been done by this Court. *In re Miller*, 568 S.W.2d 246, 254-55 (Mo banc 1978).

Proportionality of disciplinary sanction is a legitimate concern, both to the Court and members of the bar. Given, however, the distinctly individual components that comprise each lawyer discipline case, i.e., the duty violated, the lawyer's mental state,

and actual or potential injury done by the misconduct; and then, the aggravating and mitigating factors that may serve to increase or decrease a presumptive sanction, precise uniformity in sanction is not only improbable, but undesirable. And while the perception as to proportionality of sanctions is a concern that cannot be ignored, it should be remembered that lawyer discipline is not about punishing the particular lawyer whose name is attached to the "In re." The focus should, rather, be on fashioning the sanction most likely to protect the public and bolster the integrity of the courts and bar.

Proportionality as between stipulated sanctions and those imposed only after the full panoply of a Rule 5 proceeding should pose less of a concern than the perception of proportionality of sanctions in published disciplinary cases. The Supreme Court of Washington, which sits in a state where there is perhaps more of a history and precedent for stipulated disciplines than in Missouri, has resolved any question as to the proportionality of a stipulated sanction as compared to one imposed after a case is fully litigated by recognizing that stipulated sanctions "are not precedents that bind this court." *In re Disciplinary Proceeding Against Boelter*, 139 Wash. 2d 81, 985 P.2d 328, 340 (1999).

Respondent Holliday is guilty of misconduct; he has admitted to violation of Rules 4-1.4, 4-1.5(c), and 4-1.7(b). After fully investigating the complaints, including personally interviewing many of the witnesses, after taking into account the nature of the misconduct and its likely causes, after giving due consideration to Respondent's prior disciplinary history, and after factoring in other considerations, including Respondent's health, the Chief Disciplinary Counsel's office concluded that the stipulation submitted to

the Court was a fair and just resolution. In point of fact, Mr. Schaeperkoetter has already conducted an on-site seminar for Respondent and his office staff to address specific issues raised by the pending complaints. This Court is the arbiter of attorney discipline. If the Court rejects the joint stipulation, the matter will proceed to hearing before a Disciplinary Hearing Panel pursuant to Rule 5.

CONCLUSION

After careful investigation of the facts and due consideration of all the information that factors into lawyer sanction analysis, the Office of Chief Disciplinary Counsel has, with Respondent's concurrence, reached a stipulated resolution of the pending complaints. The Office of Chief Disciplinary Counsel recommends that the Court give Respondent a public reprimand with conditions, as more particularly set forth in the Joint Recommended Discipline.

Respectfully submitted,

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By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2004, two copies of Informant's Brief 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. Complies with the limitations contained in Rule 84.06(b);

3. Contains 2,286 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

_____
Sharon K. Weedin

APPENDIX