

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

BRADFORD C. EMERT,

Respondent.

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Supreme Court #SC94974

RESPONDENT'S BRIEF

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF JURISDICTION 3

SUPPLEMENTAL STATEMENT OF FACTS 3

POINTS RELIED ON 7

 I 7

 II 8

 III 9

ARGUMENT 10

 I 10

 II 12

 III 13

 Reprimand in SC90933 (Snyder Complaint DHP-2009-0041) 17

 ABA Sanction Analysis 17

 Mitigating Circumstances 17

 Aggravating Factor 18

CONCLUSION 19

CERTIFICATE OF SERVICE 19

CERTIFICATION: RULE 84.06(c) 20

TABLE OF AUTHORITIES

Cases

In re Coleman, 295 S.W.3d 857, 869 (Mo. banc 2009). 17

In re Forck, 418 SW 3d 437 (Mo. banc 2014). 18

Rules

Rule 5.245..... 15

Other Authorities

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)..... 16-18

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.

SUPPLEMENTAL STATEMENT OF FACTS

Respondent does not disagree with the facts presented by Informant. Respondent believes that a Supplemental Statement of Facts will be helpful to the Court. Respondent requests that this Court take judicial notice of the files in SC91633 and SC90933.

	Respondent experienced many personal problems during the period leading up to the complaints in this case. (Record 121-122)
October 2007	Respondent's mother died of lung cancer. (Record 187 - Stip. ¶ 8).
October 2008 -- December 2009	Respondent was involved in a contentious divorce. (Record 187 - Stip. ¶ 9).
2009	Respondent's home was foreclosed upon. (Record 187 - Stip. ¶ 10).
June 29, 2010	This Court entered an Order requiring Respondent to attend ethics school and to file a certificate of completion with the Court. (Record 28).
Fall of 2010	Respondent attended ethics school. (Record 164 - Recommendation ¶ 3). Informant was aware that Respondent had attended ethics

	school. (Record 38 - Response to Order to Show Cause, Exhibit B).
January 1, 2011	Respondent failed to file a certificate of completion with the Court by the date due. (Record 31).
	During the above time periods, Respondent began to suffer from mood issues that affected his ability to deal with his cases. (Record 187 - Stip. ¶ 11).
January 12, 2011	Respondent was suspended for nonpayment of taxes. (Record 39).
March 2011	Respondent entered into a payment agreement with the Missouri Department of Revenue that called for an initial payment of \$20,000 and a payment of \$1,771.87, each month for three years. (Record 157 - Report, Exhibit M).
March 22, 2011	Respondent filed a Petition for Reinstatement from the tax suspension. (Record 41-45).
March 9 – December 18, 2011	After Respondent's tax suspension, Informant received five complaints against Respondent related to lack of diligence and communication, one of which was closed with no action. (Record 164-165 - Recommendation ¶ 7).
April 12, 2011	Informant was given leave to conduct a full investigation and file a report and recommendation.
July 1, 2011	Respondent became eligible for reinstatement when the rule was changed so that Respondent was no longer required to take and pass

	the MPRE in order to seek reinstatement. (Record 63-64 - Report ¶¶ 14-15).
February 14, 2013	Informant filed its Recommendation stating that it initially intended to recommend Respondent's reinstatement, but Respondent's failure to keep Informant apprised of his current address and the handful of diligence and communication complaints received after Respondent's suspension, caused Informant concern. (Record 165-166 – Recommendation ¶ 9).
March 1, 2013	Although Respondent had made his payments to the Department of Revenue for many months, he was unable to keep up with his payment plan from the time he became eligible for reinstatement due to the rule change, on July 1, 2011, until February 14, 2013, when Informant filed the Report and Recommendation, following investigation of the complaints that were received after Respondent's suspension. As a result, Respondent defaulted on his payment plan and it became necessary for Respondent to dismiss his Petition for Reinstatement (Record 169-171 – Supplement to Recommendation).
January 9, 2015	Informant filed an Information (Record 174-185) in the instant case, after Informant investigated the complaints and Informant and Respondent negotiated a Joint Stipulation. (Record 186-210).

March 27, 2015	The Disciplinary Hearing Panel issued a decision adopting the stipulation of the parties. (Record 233).
May 6, 2015	The Disciplinary Hearing Panel decision and the acceptance of that decision by the parties was filed in this Court.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO PROPERLY COMMUNICATE WITH HIS CLIENTS IN VIOLATION OF RULE 4-1.4(a) IN THAT RESPONDENT:

- a. FAILED TO TELL MR. BOYD THAT RESPONDENT WAS UNABLE TO LOCATE A MEDICAL EXPERT THAT COULD SUPPORT MR. BOYD'S CLAIM;**
- b. NEGLECTED TO INFORM MR. BOYD THAT RESPONDENT WOULD BE UNABLE TO REFILE MR. BOYD'S CASE WITHIN THE ONE YEAR TIMEFRAME OF THE SAVINGS STATUTE;**
- c. DID NOT NOTIFY MS. THORNTON THAT RESPONDENT DID NOT BELIEVE THAT HE COULD SUSTAIN A MALPRACTICE ACTION AGAINST MS. THORNTON'S FORMER ATTORNEYS;**
- d. FAILED TO INFORM MS. PARKS THAT RESPONDENT'S INABILITY TO RETAIN A MEDICAL EXPERT WOULD PREVENT RESPONDENT FROM MOVING FORWARD WITH HER CASE; AND**
- e. NEGLECTED TO INFORM MS. PARKS THAT HE WOULD**

**REFILE MS. PARKS' CASE FOLLOWING THE DISMISSAL
IF THE CAUSATION ISSUE COULD BE REMEDIED.**

POINTS RELIED ON

II.

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S
LICENSE BECAUSE RESPONDENT DID NOT UTILIZE PROPER
PROCEDURE FOLLOWING RESPONDENT'S TAX SUSPENSION
IN VIOLATION OF RULE 5.27 IN THAT RESPONDENT:**

- a. FAILED TO NOTIFY MR. PHILLIPS, MR. BOYD AND MS.
THORNTON OF RESPONDENT'S SUSPENSION FROM THE
PRACTICE OF LAW;**
- b. NEGLECTED TO WITHDRAW FROM MR. PHILLIPS'
CASE UPON RESPONDENT'S SUSPENSION FROM THE
PRACTICE
OF LAW; AND**
- c. FAILED TO RETURN MR. PHILLIPS', MR. BOYD'S AND
MS. THORNTON'S FILES FOLLOWING RESPONDENT'S
SUSPENSION FROM THE PRACTICE OF LAW.**

POINTS RELIED ON

III.

UPON RESPONDENT’S REINSTATEMENT TO THE PRACTICE OF LAW, THE SUPREME COURT SHOULD ISSUE THE REPRIMAND RESERVED IN THE TONI SNIDER MATTER AND PLACE RESPONDENT ON PROBATION FOR A PERIOD OF TWO YEARS SUBJECT TO TERMS AND CONDITIONS OF COMPLETION BECAUSE PROBATION IS APPROPRIATE WHEN THE NATURE OF RESPONDENT’S VIOLATIONS ARE NOT SO EGREGIOUS AS TO WARRANT SUSPENSION OR DISBARMENT BUT REQUIRES MONITORING BY THE DISCIPLINARY SYSTEM.

In re Coleman, 295 S.W.3d 857, 869 (Mo. banc 2009).

In re Forck, 418 SW 3d 437 (Mo. banc 2014)

Rule 5.245

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO PROPERLY COMMUNICATE WITH HIS CLIENTS IN VIOLATION OF RULE 4-1.4(a) IN THAT RESPONDENT:

- a. FAILED TO TELL MR. BOYD THAT RESPONDENT WAS UNABLE TO LOCATE A MEDICAL EXPERT THAT COULD SUPPORT MR. BOYD'S CLAIM;**
- b. NEGLECTED TO INFORM MR. BOYD THAT RESPONDENT WOULD BE UNABLE TO REFILE MR. BOYD'S CASE WITHIN THE ONE YEAR TIMEFRAME OF THE SAVINGS STATUTE;**
- c. DID NOT NOTIFY MS. THORNTON THAT RESPONDENT DID NOT BELIEVE THAT HE COULD SUSTAIN A MALPRACTICE ACTION AGAINST MS. THORNTON'S FORMER ATTORNEYS;**
- d. FAILED TO INFORM MS. PARKS THAT RESPONDENT'S INABILITY TO RETAIN A MEDICAL EXPERT WOULD PREVENT RESPONDENT FROM MOVING FORWARD WITH HER CASE; AND**
- e. NEGLECTED TO INFORM MS. PARKS THAT HE WOULD**

**REFILE MS. PARKS' CASE FOLLOWING THE DISMISSAL
IF THE CAUSATION ISSUE COULD BE REMEDIED.**

Based on the stipulation entered into between the parties, Respondent accepts Informant's argument on this point.

Respondent would like to call the Court's attention to the fact that Respondent believed each of the cases covered by this Point to be lacking in merit. Although that does not excuse Respondent's conduct, it provides context to the reason Respondent did not transfer these cases to another firm. Informant and Respondent have stipulated that Respondent transferred the majority of his files to another firm. (Record 188 – Stip. ¶ 22). As Informant's brief notes, with the exception of Ms. Parks, the clients did not complain about Respondent's actual representation but regarding his failure to properly handle matters after his suspension.

In Mr. Boyd's case, previous counsel had notified Mr. Boyd that he could not locate an expert to sustain the claim and would be dismissing the case, without prejudice. After Mr. Boyd hired Respondent, Respondent tried to locate a medical expert, but was unable to do so due to the rare and aggressive form of cancer that caused the death of Mr. Boyd's son in prison. (Record 189-191). Respondent failed to communicate the status of the case to Mr. Boyd and failed to return his file, which Respondent has admitted violated the Rules. (Record 197, 198-199, Stip. ¶¶ 100-102, 110-111)

Ms. Thornton hired Respondent to pursue a legal malpractice claim against a law firm that did not file her medical malpractice claim. Her medical malpractice claim was based on her claim that she had received a laxative instead of blood pressure medication

for a one month period. Ms. Thornton instructed the law firm handling the medical malpractice case that she demanded \$750,000 for this alleged medical malpractice. Respondent concluded that Ms. Thornton did not have a viable legal malpractice case against the other firm. (Record 191-193). Respondent has admitted that failure to inform her that he had been suspended and, in conjunction, failure to return her file to her violated the Rules. (Record 198-199, Stip. ¶¶ 103, 112-113).

Ms. Parks alleges that she fell while being transferred to a wheelchair in a nursing home. Respondent filed a lawsuit for Ms. Parks but was unable to find a causation expert. Respondent dismissed the case without prejudice on October 26, 2009, and continued to try to find a causation expert. On April 29, 2010, Respondent communicated with Ms. Park by letter and explained that a causation expert would be necessary. He also explained that he had presented the records to several experts and had not been able to locate the type of expert that would be needed. Respondent refiled Ms. Parks case in October of 2010, so that it was refiled within the limitations period. Ms. Parks filed her complaint with OCDC on approximately May 3, 2010. (Record 193-194). Respondent has admitted that his communication with Ms. Parks was not adequate, under the Rules. (Record 197, Stip. ¶¶ 103-104).

ARGUMENT

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT DID NOT UTILIZE PROPER

**PROCEDURE FOLLOWING RESPONDENT'S TAX SUSPENSION
IN VIOLATION OF RULE 5.27 IN THAT RESPONDENT:**

- a. FAILED TO NOTIFY MR. PHILLIPS, MR. BOYD AND MS. THORNTON OF RESPONDENT'S SUSPENSION FROM THE PRACTICE OF LAW;**
- b. NEGLECTED TO WITHDRAW FROM MR. PHILLIPS' CASE UPON RESPONDENT'S SUSPENSION FROM THE PRACTICE OF LAW; AND**
- c. FAILED TO RETURN MR. PHILLIPS', MR. BOYD'S AND MS. THORNTON'S FILES FOLLOWING RESPONDENT'S SUSPENSION FROM THE PRACTICE OF LAW.**

Based on the stipulation entered into between the parties, Respondent accepts Informant's argument on this point.

ARGUMENT

III.

UPON RESPONDENT'S REINSTATEMENT TO THE PRACTICE OF LAW, THE SUPREME COURT SHOULD ISSUE THE REPRIMAND RESERVED IN THE TONI SNIDER MATTER AND PLACE RESPONDENT ON PROBATION FOR A PERIOD OF TWO YEARS SUBJECT TO TERMS AND CONDITIONS OF COMPLETION BECAUSE PROBATION IS APPROPRIATE WHEN

**THE NATURE OF RESPONDENT'S VIOLATIONS ARE NOT SO
EGREGIOUS AS TO WARRANT SUSPENSION OR DISBARMENT
BUT MONITORING BY THE DISCIPLINARY
SYSTEM IS APPROPRIATE.**

Respondent agreed to accept a two year probation for the conduct he committed in relation to the complaints involved in this case. Respondent agrees with Informant that this Court should enter an Order now that will establish the disposition of these complaints, upon Respondent's reinstatement.

These complaints have essentially already resulted in Respondent's suspension since a short time after he became eligible for reinstatement on July 1, 2011, when the MPRE requirement changed. Respondent's reinstatement proceeding essentially began on July 1, 2011, and should have only taken a few months if it had not been put on hold, due to the complaints. Respondent's agreement with the Missouri Department of Revenue should have allowed for the process to progress smoothly and quickly. Other than these complaints, the only concerns Informant expressed about Respondent's reinstatement related to difficulty in contacting Respondent after his suspension. (Record 166 – Recommendation ¶ 9). Respondent was difficult to contact because his personal circumstances resulted in the need for him to move residences and offices on multiple occasions. (Record 191 – Stip. ¶ 13).

Although Respondent's tax issues do not reflect misconduct in the practice of law, his reinstatement was put on hold until these complaints could be fully investigated. When Respondent entered into his agreement with the Department of Revenue, he

obviously did not anticipate the lengthy reinstatement process. He anticipated he would be able to return to practice and therefore would be able to earn a good living and make the payments as agreed. Unfortunately, after an extended period of being unable to practice law, Respondent defaulted on his agreement with the Department of Revenue.

In this case, the policy of holding the reinstatement proceeding until the separate complaints were investigated has resulted in a de facto suspension for Respondent and has, to date, interfered with the goal of Rule 5.245. Respondent's continued suspension pending investigation has resulted in Respondent's inability to pay the funds owed to the state of Missouri.

In order to permit Respondent to pay off his tax debt, Respondent requests that this court establish the sanctions that it will impose, once Respondent is reinstated. Respondent believes that this level of certainty is necessary for him to be able to make arrangements to pay off his tax debt.

Deferring determination of the appropriate discipline for these complaints will keep Respondent in the disciplinary debtor's prison that he has been in since he defaulted on his agreement. He has been unable to pay his tax debt because he could not work as an attorney. He has been unable to work as an attorney because he has been unable to pay his tax debt. That is a situation that does not serve the goals of the attorney discipline system or Rule 5.245.

As discussed in Informant's brief, the types of violations involved in this case (Record 186-204) are the types of violations for which this court would normally impose probation or less. In fact, one of the complaints that was involved in holding

Respondent's reinstatement was closed with no action. (Record 164 – Recommendation ¶ 7).

Three of the four cases, Boyd, Thornton, and Parks had little merit. Respondent should have communicated that fact and he probably should have withdrawn even before he was suspended, rather than continuing to try to make something work for these clients. The lack of merit of the cases does not excuse the conduct but it is a factor to consider under the ABA Standards for Imposing Lawyer Sanctions (1991 ed.) (ABA Standards). Standard 4.44 provides that an admonition is appropriate when the misconduct causes little or no actual or potential injury to a client.

In the fourth case, Phillips, Respondent's conduct also caused little or no actual or potential injury. Mr. Phillips had a Second Injury Fund claim. Although there was some confusion in Mr. Phillips' case due to Respondent's failure to properly withdraw, the actual delay in Mr. Phillips case was caused by the fact that the Second Injury Fund was not making offers, was withdrawing previous offers, and Second Injury Fund cases were routinely continued due to an inability to pay from the fund. (Record 192 – Stip. ¶¶ 18 and 20).

This Court knows the facts of all four of these cases, now. Nothing about proposed action by the Court will take away this court's authority to rule on a reinstatement petition or any other issues that might arise between now and then. The proposed action will only resolve, in a manner that is certain, the specific complaints involved in this case (DHP-2015-010) and the other pending case (DHP-2009-0041).

Reprimand in SC90933 (Snyder Complaint DHP-2009-0041)

Informant and Respondent agree that this Court should enter the reprimand that it originally contemplated in Case SC90933. Although Respondent failed to comply with the letter of the Order, Respondent complied with its substance. Respondent knew that Informant was aware that he had attended Ethics School, since Informant is involved in presenting the Ethics School programs, particularly the in-person portion.

Although the parties have agreed to recommend that the Court enter a reprimand simultaneous with Respondent's reinstatement, Respondent believes this Court could also enter that Order now, to dispose of that case. Respondent's suspended status does not impede the Court's ability to reprimand him.

ABA Sanction Analysis

As noted by Informant, this Court has frequently cited the ABA Standards as persuasive in analyzing the appropriate discipline in the circumstances of the case at bar.

In re Coleman, 295 S.W.3d 857, 869 (Mo. banc 2009).

Mitigating Circumstances

The following mitigating factors found in Standard 9.32 of the ABA Standards apply in this case:

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems;

* * * *

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

* * * *

(k) imposition of other penalties or sanctions;

As discussed in Informant's brief, Respondent's misconduct resulted from neglect and difficult circumstances. There is no evidence of dishonest or selfish motive.

The stipulation establishes that Respondent was experiencing personal problems and that those personal problems resulted in emotional problems. (Record 191, Stip. ¶¶ 8-13).

Informant has acknowledged that Respondent has been cooperative throughout these proceedings.

Respondent believes that he would have been reinstated from his tax suspension while he could still make the payments under his agreement, if it weren't for these complaints. As a result, these complaints have already effectively suspended Respondent since at least March 1, 2013, when he dismissed his reinstatement petition. (Record 176 – Motion to Dismiss Petition for Reinstatement).

Aggravating Factor

ABA Standard 9.2 establishes that prior disciplinary offenses are an aggravating factor. Respondent has received several admonitions and anticipates that he will receive a reprimand in response to the Snyder complaint. Pursuant to the Court's progressive discipline approach, the probation to which the parties have agreed, is well within the range of appropriate discipline. *See, In re Forck*, 418 SW 3d 437 (Mo. banc 2014).

CONCLUSION

Respondent asks this Court to discipline him in a manner no more severe than the two year probation agreed by Informant and Respondent and recommended by the Disciplinary Hearing Panel and to impose that discipline upon his reinstatement. Respondent further asks this Court to impose the reprimand in SC90933, as agreed to in the stipulation. Respondent believes that the Court can impose the Reprimand now or at the time of reinstatement.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify I signed the “original” in accordance with Rule 103.04 and that this ___ day of August, 2015, I have served a true and accurate copy of the foregoing via efile to: Shannon Briesacher, Attorney for Informant, Shannon.Briesacher@courts.mo.gov



Sara Rittman

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 2,999 words, exclusive of the cover, certificate of service, Rule 84.06 certificate, and signature block, according to Microsoft Word, which is the word processing system used to prepare this brief.



Sara Rittman