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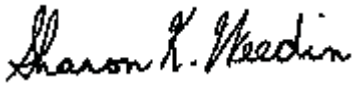
IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
JAMES P. BARTON, JR.,	)	**Supreme Court #SC92102**
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL



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STATEMENT OF JURISDICTION

Jurisdiction over this attorney discipline matter is established by Article V, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law and Mo. Rev. Stat. §484.040 (1994).

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STATEMENT OF FACTS

Background

Respondent James P. Barton, born in October of 1961, was licensed to practice law in Missouri in 1987. His office is located in Marshall, Missouri. Respondent has no disciplinary history.

Client Wrisner

In the summer of 2004, Respondent Barton agreed to represent Linda Wrisner Tomlin in a dissolution action filed against her by her then husband, James Tomlin, in Carroll County, Missouri. App. 104 (T. 10). Respondent told Ms. Tomlin he would charge $1,500.00 for the dissolution, which involved no children and little marital property. App. 104 (T. 11). The fee agreement was not put into writing. Ms. Tomlin understood that Barton's entire fee would be $1,500.00, and that he would wait to be paid until the court ordered Mr. Tomlin to pay her as part of the anticipated property distribution. App. 104 (T. 11-12).

The dissolution hearing occurred on December 20, 2005. Mr. Tomlin was ordered to pay Ms. Tomlin $10,000.00. App. 162-166. On that same day, December 20, 2005, Mr. Tomlin paid $2,500.00 to Mr. Barton on Ms. Tomlin's behalf. Mr. Barton disbursed $1,000.00 to his client and retained $1,500.00 for payment of his fee. Based on what Respondent told her when she hired him, Ms. Tomlin (now Ms. Wrisner) believed Mr. Barton's fee was fully paid on his retention of the $1,500.00. App. 104 (T. 11), 105 (T. 14).

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The court's judgment of dissolution required Mr. Tomlin to pay Ms. Wrisner the remaining $7,500.00 before January 31, 2006. App. 165. When Mr. Tomlin failed to comply with the judgment in that respect, Respondent Barton filed, on Ms. Wrisner's behalf, a motion to show cause and for judgment of contempt against Mr. Tomlin. At a November 9, 2006, hearing on the motion, Respondent Barton requested that Mr. Tomlin be ordered to pay an additional $500.00 to Mr. Barton for his work in pursuing compliance with the dissolution decree. The court ordered Mr. Tomlin to pay the additional $500.00, which was paid to Respondent Barton. App. 125.

On November 9, 2006 (the date of the contempt hearing), Mr. Tomlin's attorney gave Respondent Barton two checks: one in the amount of $2,000.00 and one in the amount of $2,500.00. Respondent Barton deposited both checks in his client trust account. App. 114-115 (T. 52-53), 209.

On November 16, 2006, Respondent Barton distributed $1,000.00 from the trust account to the Barton Law Firm, with the notation that the transaction was related to Ms. Wrisner's case. App. 115 (T. 53). A check in the amount of $2,000.00 was written to Ms. Wrisner from the trust account on December 6, 2006. App. 115 (T. 53). The trust account balance fell below $4,000.00 (the $4,500.00 paid on Ms. Wrisner's behalf on November 9, 2006, less the $500.00 additional fee ordered paid to Barton) between November 26 and 30, 2006. App. 115 (T. 54).

Mr. Tomlin thereafter, from December of 2006 through August of 2007, sent Mr. Barton checks (through Tomlin's attorney) in varying amounts ($75.00 to $100.00) as

payments toward the dissolution judgment. None of these payments were deposited in the trust account, nor were the proceeds disbursed to Ms. Wrisner. Nor did Mr. Barton tell Ms. Wrisner about the payments. App. 7, 26, 115 (T. 54).

Sometime after December of 2006, Respondent disbursed $800.00 to Ms. Wrisner,[1] although there is no trust account record of the transaction. App. 106 (T. 18), 115 (T. 54-55). Ms. Wrisner understood that her ex-husband was making payments to Respondent for the remaining sum that he owed her, and that Barton was holding the money for her. App. 105 (T. 16).

In the latter part of 2007, Mr. Tomlin sold a house and forwarded a final payment of $6,470.00 to Respondent Barton. App. 120-121 (T. 76-77). Barton did not deposit any of the $6,470.00 into his trust account. App. 115 (T. 55), 121 (T. 78). Indeed, from June through November of 2007, Respondent's client trust account reflected a negative balance. App. 115 (T. 55). Although Respondent Barton told Ms. Wrisner that her ex-husband had sold the house, he never told her about Tomlin's payment of $6,470.00. App. 127 (T. 103-104). He did not disburse any of the $6,470.00 to Ms. Wrisner; she only found out about the money when informed by disciplinary counsel. App. 127 (T. 104).

Respondent Barton filed a satisfaction of judgment in *Tomlin v. Tomlin* on January 11, 2008. App. 151. Barton did not tell his client he was filing a satisfaction of judgment. App. 127-128 (T. 104-105).

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[1] Ms. Wrisner requested the $800.00 to pay a utility bill.

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Ms. Wrisner asked Respondent Barton many,many times for the remainder of what she believed Mr. Barton was holding for her from the dissolution. App. 105 (T. 15). Finally, in June of 2008, Respondent provided Ms. Wrisner with a document titled "Final Statement." According to the statement, Respondent was holding no money for Ms. Wrisner, and, in fact, Ms. Wrisner owed Mr. Barton an additional $335.00 for attorney's fees. App. 105-106 (T. 16-17). The statement reflected that Respondent had paid himself $5,670.00 from money held for her for fees. App. 195-199. The statement reflected that Respondent had performed work for Ms. Wrisner on an hourly basis; Ms. Wrisner understood he was to be paid a lump sum of $1,500.00 for his work. App. 104 (T. 11-12). Mr. Barton never talked to her about changing the fee arrangement or charging her by the hour. App. 104-105 (T. 12-13), 128 (T. 105).

After receiving the final settlement statement, Ms. Wrisner filed a complaint against Mr. Barton with the Office of Chief Disciplinary Counsel. App. 3-4. After auditing Respondent's trust account, disciplinary counsel arranged to take Respondent's statement under oath. The day before the statement was to be taken at disciplinary counsel's office, Respondent faxed a letter to OCDC stating he had "resolved all of the pending issues" with Ms. Wrisner. Mr. Barton's letter states Ms. Wrisner had agreed to withdraw her complaint. App. 200. Ms. Wrisner recalls that at about the time of Respondent's letter to OCDC, Respondent gave her $3,500.00 and asked her to sign a document titled "Full and Final Release Agreement." App. 201-202. Ms. Wrisner kept

the $3,500.00, but never signed the release and did not "withdraw" her complaint. App. 106-107 (T. 20-21), 108 (T. 25-26).

Client Rudd

In August of 1999, Barry Rudd was injured while attending a wedding in North Carolina. Mr. Rudd was a resident of Saline County, Missouri, at the time of the accident. In February of 2001, Respondent Barton agreed to represent Mr. Rudd in an effort to obtain compensation for the personal injury Rudd had sustained in North Carolina. App. 109 (T. 29-31).

On January 14, 2004, a petition alleging Mr. Rudd's personal injury was filed in North Carolina state court by a North Carolina attorney at Respondent Barton's request. On May 15, 2004, Mr. Rudd's North Carolina case was "discontinued" because proper service had not been obtained against the Defendant, Unique Southern Estates, LLC. App. 11, 27. In a letter dated March 28, 2006, Mr. Barton informed Mr. Rudd that service had never been made on the Defendant in the North Carolina case. The letter said nothing about the statute of limitations in the case or that the case had been filed but dismissed. App. 219.

On July 14, 2006, Respondent refiled Mr. Rudd's case in North Carolina state court as Mr. Rudd's attorney. Mr. Barton is not and never was licensed to practice law in North Carolina. The North Carolina Defendant subsequently filed a motion to dismiss alleging the statute of limitations had run on Mr. Rudd's cause of action. Mr. Barton filed suggestions opposing the motion to dismiss. A North Carolina court sustained the

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motion to dismiss on October 18, 2006, on the grounds that the statute of limitations had run. App. 220-229.

Mr. Rudd learned that his North Carolina lawsuit had been dismissed by calling the court in North Carolina; Mr. Barton had not told him about it. App. 111 (T. 37-38), 122-123 (T. 84-85). Mr. Rudd subsequently sued Respondent Barton in North Carolina for malpractice and got a judgment for $75,000.00, plus $25,000.00 for punitive damages. App. 111 (T. 40). The judgment was thereafter registered in Saline County. Mr. Barton, who did not carry malpractice insurance covering Mr. Rudd's claim, has been paying Mr. Rudd as he is able out of his own pocket. Respondent had paid Rudd about $26,000.00 as of the time of the disciplinary hearing. App. 111-112 (T. 40-41).[2]

[2] Mr. Barton testified at the hearing that he is not covered by malpractice insurance. App. 48 (T. 103).

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POINT RELIED ON

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITHOUT LEAVE TO APPLY FOR REINSTATEMENT FOR TWO YEARS BECAUSE HE VIOLATED MULTIPLE RULES OF PROFESSIONAL CONDUCT, MOST SERIOUSLY THE SAFEKEEPING CLIENT PROPERTY RULE, IN THAT HE FAILED TO DEPOSIT CLIENT FUNDS IN HIS TRUST ACCOUNT, FAILED TO MAINTAIN COMPLETE RECORDS OF HIS HANDLING OF CLIENT MONEY, AND FAILED TO PROMPTLY NOTIFY HIS CLIENT OF HIS RECEIPT OF HER FUNDS.

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

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ARGUMENT

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITHOUT LEAVE TO APPLY FOR REINSTATEMENT FOR TWO YEARS BECAUSE HE VIOLATED MULTIPLE RULES OF PROFESSIONAL CONDUCT, MOST SERIOUSLY THE SAFEKEEPING CLIENT PROPERTY RULE, IN THAT HE FAILED TO DEPOSIT CLIENT FUNDS IN HIS TRUST ACCOUNT, FAILED TO MAINTAIN COMPLETE RECORDS OF HIS HANDLING OF CLIENT MONEY, AND FAILED TO PROMPTLY NOTIFY HIS CLIENT OF HIS RECEIPT OF HER FUNDS.

Procedural Background

An information charging Respondent Barton with professional misconduct was served on December 3, 2010. The information charged Respondent with multiple rule violations in the course of representing two clients. Respondent timely answered the information, admitting each charged rule violation.

A hearing was conducted before a disciplinary hearing panel on May 23, 2011. Both of the affected former clients, Respondent, and an OCDC paralegal testified. In closing remarks, Informant recommended that the panel recommend an actual (not stayed) suspension, with no leave to apply for reinstatement for two years. Respondent argued against actual suspension, instead offering to undertake any remedial measures, e.g., CLEs or probationary terms, the panel thought appropriate.

The panel issued its decision on August 26, 2011. The panel recommended license suspension with no leave to apply for reinstatement for one year. Informant

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accepted the DHP's recommendation; Respondent rejected it. The record was thereafter filed with the Court pursuant to Rule 5.19 (d).

Rule Violations

Respondent Barton admitted all charged rule violations in his answer to the information. He did not deny his misconduct at the hearing. This brief will, therefore, only recite the acknowledged rule violated, with a short description of Respondent's conduct that violated the rule. The text of the rules can be found in the Appendix.

Rule 4-1.1 (Competence). Mr. Barton failed to provide Mr. Rudd competent representation by allowing the statute of limitations to extinguish his client's cause of action and by taking a case in a jurisdiction where he was not admitted to practice law.

Rule 4-1.4 (a) (b) (Communication). At best, Mr. Barton failed to explain adequately to Ms. Wrisner what the fee for his services would be and thereby denied Ms. Wrisner the right to make informed decisions about the representation. Mr. Barton failed to advise Mr. Rudd about the running of the North Carolina statute of limitations.

Rule 4-1.15 (c) (d) (i) (Safekeeping Property). Mr. Barton failed to deposit multiple payments from Ms. Wrisner's ex-husband in his client trust account. Ms. Wrisner's funds were, therefore, comingled with Mr. Barton's funds. Respondent failed to maintain complete records of his client trust account so as to be able to account for the date, amount, source, and explanation for withdrawals, deliveries, and disbursement of Ms. Wrisner's money. Mr. Barton did not promptly notify Ms. Wrisner when he received payments from Mr. Tomlin on her behalf, most disturbingly the $6,470.00 payment received by him in September or October of 2007. Nor do his trust account records

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reflect deposit of funds sent to him on Ms. Wrisner's behalf between December of 2006 through August of 2007.

Rule 4-5.5 (a) (Unauthorized Practice of Law). Mr. Barton practiced law in North Carolina when he was not licensed or otherwise authorized to do so.

Rule 4-8.4 (d) (Conduct Prejudicial to the Administration of Justice). Mr. Barton asked Ms. Wrisner to withdraw the complaint filed by her with the Office of Chief Disciplinary Counsel and asked her to tell Informant that her complaint should be "deemed resolved without any further proceedings." Doing so was a violation of Rule 4-8.4 (d). See Missouri Supreme Court Advisory Committee, Formal Opinion 122 (2006).

Sanction Analysis

Disciplinary counsel recommended to the panel, and recommends to the Court, an actual suspension in this case. The seriousness of the safekeeping property violations requires no less sanction. The sanction analysis model set forth in the ABA Standards for Imposing Lawyer Sanctions leads disciplinary counsel to an actual suspension recommendation.

Although Respondent acknowledged violation of five different rules in his representation of clients Wrisner and Rudd, the ABA *Standards* model does not account for multiple rule violations (at least not until aggravating factors are considered in the fourth stage of the analysis). Instead, the *Standards* advised that the ultimate sanction "should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations." ABA *Standards*, at p. 6. See *In re Ehler*,

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319 S.W. 3d 442, 451 (Mo. banc 2010). Mr. Barton's most serious rule violations, it is submitted, are his violations of Rule 4-1.15 (safekeeping property). Mr. Barton's violations of Rule 4-1.15 will be referenced in the following sanction analysis, undertaken in accordance with the model set forth in the *Standards*.

Briefly, the *Standards* model asks the following questions. (1) What ethical duty did the lawyer violate? (2) What was the lawyer's mental state? (3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (4) Are there any aggravating or mitigating circumstances?

Mr. Barton violated a duty he owed as a lawyer to his client, Ms. Wrisner, to safeguard her property. The *Standards* assume the most important duties are those a lawyer owes to clients.

A lawyer's mental state must often be culled from circumstantial evidence. It is suggested that Mr. Barton's withdrawal, for his personal use, of funds belonging to Ms. Wrisner from his client trust account, as well as his failure to deposit and maintain her funds in his trust account, evidences knowing misconduct. Mr. Barton admitted in his Answer to the Information that he agreed to represent Ms. Wrisner for $1,500.00. He acknowledged taking that fee from the monies paid by his client's ex-husband on December 20, 2005. He also, however, admitted disbursing $1,000.00 of Ms. Wrisner's funds from the trust account to himself on November 16, 2006, which was obviously after he had disbursed his $1,500.00 fee to himself. He also admitted not depositing funds belonging to Ms. Wrisner in his trust account on multiple occasions between December of 2006 and August of 2007. Those funds were paid by his client's ex-

husband toward satisfaction of the dissolution decree. He has also admitted that he obtained $6,470.00 of Ms. Wrisner's money in early fall of 2007, but that those funds were likewise never deposited in his trust account.

Mr. Barton maintained a client trust account, from which fact, as well as the fact that he had been awarded a license to practice law, we can infer he understood the basic principle that client money is to be maintained separately and inviolate from his own. His multiple failures to deposit Ms. Wrisner's funds into the trust account, as well as his withdrawal of funds belonging to her from the trust account, evidence his knowing violation of the safekeeping property rule.[3]

Ms. Wrisner suffered actual injury from Mr. Barton's misconduct. She testified that she had no financial resources at the time of her divorce, necessitating her move to a room in her daughter's house. She finds it difficult to believe she owed Respondent $4,000.00 or $5,000.00, as his final settlement statement states, for a relatively straight-forward divorce, particularly when he told her he would do it for $1,500.00. Ms. Wrisner no longer likes or trusts lawyers. She, her daughter, and Respondent all attend the same

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[3] It is acknowledged that the foregoing evidence could also support the conclusion that Respondent's misconduct was intentional. Disciplinary counsel has not taken the position that Respondent intentionally misappropriated his client's property, after taking into account Respondent's relative newness to solo practice when the conduct occurred, his ready acknowledgement of his misconduct, and his clean disciplinary record.

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church in Marshall. Her daughter works for the church. Ms. Wrisner feared that pursuing her complaint against Respondent could endanger her daughter's job security (her daughter's job has not been adversely affected), as she perceived that Respondent held some sway with church authorities.

Mr. Rudd sustained harm as well. Respondent still owes him a good deal of money (at least $74,000.00 at the time of the disciplinary hearing). Rudd had entered into a separate financial transaction in anticipation of being paid the malpractice judgment he obtained against Respondent, but which Respondent has not satisfied. That situation cost Rudd $50,000.00 or $60,000.00. It is a struggle for Rudd to keep going back to Barton for payments. They live fairly close to each other and know many of the same people in their shared community.

The final inquiry in the ABA's analytical framework for sanction analysis is consideration of relevant aggravating and mitigating circumstances. Those factors are set forth at Standard Rules 9.22 and 9.32. The aggravating circumstances applicable in this case are as follows: dishonest or selfish motive; a pattern of misconduct; multiple offenses; vulnerability of victim; and substantial experience in the practice of law.

Mr. Barton's misuse of Ms. Wrisner's funds over a period of years, his failure to communicate with her about his receipt of her money, and his 2010 effort to avoid the consequences of his misconduct by asking her to sign a release and withdraw her disciplinary complaint, are all strong evidence of dishonest and selfish motive.

The multiple rules Respondent has acknowledged violating satisfy the aggravating factor noting multiplicity of violations. The fact that Mr. Barton's misuse of Ms.

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Wrisner's property went on from November of 2006 through June of 2008, when he attempted to convince her she actually owed him money, evidences a pattern of misconduct. Mr. Barton may still owe Ms. Wrisner money; whether and how much he may still owe her are all but impossible to figure out due to his poor recordkeeping.

Ms. Wrisner was an approximately 60-year old woman with a high school education and no financial resources when she sought representation from Respondent. She had little to no experience with the legal system. She trusted Mr. Barton to accumulate payments from her ex-husband. She was a vulnerable client.

Mr. Barton had enjoyed the privilege of practicing law for some nineteen years when his misconduct began, evidencing substantial experience in the practice of law.

The mitigating circumstances relevant to the case, it is suggested, are Mr. Barton's absence of a prior disciplinary record and his full and free disclosure and cooperative attitude toward the disciplinary proceeding. Mr. Barton has no prior disciplinary record in twenty-four years of practice. He has concededly been very cooperative with disciplinary authorities throughout the investigation and has freely acknowledged and admitted his wrongdoing.

At the disciplinary hearing, Respondent testified that he worked for an insurance defense firm in Kansas City for the first thirteen years of his career, then moved to his hometown of Marshall and set up a solo practice in conjunction with a position as part-time county prosecuting attorney. He testified that he was unfamiliar with firm accounting practices when he set out on his own. He testified that he spread himself too

thin in the early years of his solo practice by volunteering to serve on local charitable boards, and that the part-time prosecutor's position was actually very time consuming.

None of the foregoing "excuses" is recognized as a mitigating factor in the ABA *Standards*. That a lawyer carries a heavy caseload, does charitable work, or engages in a stressful practice should not mitigate knowing mishandling of client property. Cf. *In re Schaeffer*, 824 S.W. 2d 1, 5 (Mo. banc 1992) (poor office practices and heavy caseload do not mitigate when lawyer deposited client funds into operating account, withdrew his fee, then allowed account balances to fall below what was owed the client); *In re Haggerty*, 661 S.W. 2d 9, 10 (Mo. banc 1983) (stress of trial practice does not mitigate misconduct). As the Court said in *Haggerty*, "Representation of clients in stressful situations is common to most legal practice, but the public is nevertheless entitled to rely on an attorney's honesty and devotion to his clients' interests." 661 S.W. 2d at 10.

The ABA *Standards* contain "black letter rules" that aid in determining an appropriate sanction. The black letter rules are set up by reference to the duty violated. In this case, the duty to preserve clients' property has been violated, which is conduct encompassed by black letter rule 4.1. Rule 4.12 provides that 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 the client. Suspension is the presumptive sanction after consideration of Mr. Barton's misconduct in accordance with the sanctions model set forth in the ABA *Standards*.

Disciplinary counsel acknowledges the similarities this case has to the lawyer's conduct, which warranted her disbarment, in *In re Ehler*, 319 S.W. 3d 442 (Mo. banc

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2010). Like Ms. Ehler, Mr. Barton mishandled client funds that came into his possession from a dissolution representation and failed to safeguard client property through proper use of his trust account. Disciplinary counsel has not recommended disbarment in this case because Mr. Barton, unlike Ms. Ehler, had a clean disciplinary record at the time of his misconduct. And, significantly, Mr. Barton had not previously completed a term of probation specifically directed toward educating him about the appropriate handling of client monies and his trust account, as had Ms. Ehler. While Respondent's professed ignorance of trust accounting rules does not in any way constitute a defense to his misconduct, the extreme aggravating factor of committing the same misconduct that was the subject of a prior disciplinary order is absent in this case. See ABA Standard Rule 8.0 (concerning the effect of prior disciplinary orders in sanction analysis).

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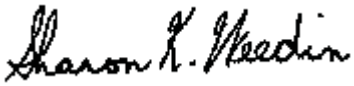
CONCLUSION

A long-term suspension is an appropriate sanction for Mr. Barton's knowing mishandling of client property in light of the unique circumstances of his case.

Respectfully submitted,

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2011, two copies of Informant's Brief and a CD containing the Brief in PDF format have been sent via First Class United Mail, postage prepaid, to:

James P. Barton, Jr.
905 S Odell Ave. #A
Marshall, MO 65340-2603

Sharon K. Weedin

_____
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 4,251 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

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

Sharon K. Weedin

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APPENDIX

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