IN THE SUPREME COURT OF THE STATE OF MISSOURI
EN BANC

IN RE THE MATTER OF:	)	
	)	
ANISSA FAYE WHITTLE BLUEBAUM	)	
106 S 3rd Street	)	
Ozark, MO 65721	)	
Mo. Bar #56779	)	Supreme Court No. SC93706
	)	
Respondent.	)	

RESPONDENT'S BRIEF

Submitted by:

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF JURISDICTION

The Supreme Court of Missouri has jurisdiction to hear attorney discipline matters because it has the inherent authority to regulate the practice of law. *In Re Crews, 159 SW3d 871 (Mo 2005).*

STANDARD OF REVIEW

The Supreme Court reviews the evidence de novo in attorney discipline cases, independently determining all issues pertaining to the credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. *In Re Crews, 159 SW3d 871 (Mo 2005).*

The purpose of discipline is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession. *In re Byron G. STEWART*, 342 S.W.3d 307 (Mo banc 2011)

STATEMENT OF FACTS

As to Count I

Respondent held a long staff meeting with her paralegal, secretary, and associate attorney on November 21, 2011. During the course of that staff meeting the financial situation of the Respondent's firm was discussed as well as issues regarding the new business plan for 2012.

The topics discussed were the result of the brainstorming of the entire office. The most important topic, but not the only topic discussed, was the crunch in cash flow that was expected throughout the months of December and January. Many ideas were shared as to how to resolve the cash flow situation for the coming months.

The plan Respondent and her team came up with was to collect as much as possible on the accounts receivable and everyone was given accounts receivable to collect on. The second step was in regards to catching up on the potential clients that had met with Respondent or her associate. These file were referred to as "dead files" by everyone. This would require following up with the potential clients to see if they still needed services and if so offering them a payment plan to get their matter started or if they were no longer in need of services to prepare and mail a non-engagement letter and close the file. The third step was to work on the personal injury cases that needed attention and follow ups to try to and get those matters settled for the clients while everyone had extra time to devote to them. The

fourth step was to network and make new contacts. Several scenarios were used as examples by the team. Talk to everyone you meet wherever you are was the common theme of the scenarios discussed.

The temporary financial situation of Respondent's office was shared with the entire team. Everyone was given an opportunity to help in some way to bring in cash so no one would have to be laid off. Respondent shared the financial numbers with her staff in an effort to get everyone to work together to save one another's jobs.

During the long meeting there were some frustrations vented by Julie Carroll, the complainant. She complained that collection calls on accounts receivable were distasteful to her and the people she was having to call had no money. She told Respondent at the meeting she would not participate in collecting on accounts receivable. There were no other issues between Respondent or her staff at the meeting.

The following day on November 22, 2011 Respondent sent the email complained of to her staff to let them know what the status of their efforts were so everyone would continue to be motivated to work together to prevent lay offs. It should also be noted here Respondent had not taken a draw from the business since September so as to leave cash in place to make sure payroll was getting paid.

The email gave the status of the financial goal and reminders of the plan the team had worked on the day before. The email was extremely passionate and vivacious in an attempt to keep everyone working together toward the goal. The

result of the goal getting met would pay for payroll and rent for the next two months. Admittedly the example of networking at the courthouse was not a good example however Respondent's intention was to just get her staff to network and talk to people which would lead to referrals in the future as had been discussed extensively the day before.

On November 29, 2011 the Monday following the Thanksgiving weekend Julie Carroll sent an email to Respondent at 7:00 am quitting her position as paralegal. She did not discuss the email with Respondent at any time before or after quitting her job. Ms. Carroll applied for unemployment benefits the week she quit the firm. Respondent denied her benefits because she quit and was not fired. The unemployment decision was a denial of Ms. Carroll's benefits. She received the decision on or before December 6, 2011. Ms. Carroll filed a bar complaint against Respondent on December 6, 2011. When Respondent received Ms. Carroll's bar complaint in mid-December 2011 she revisited with her staff regarding the email and told them not to initiate contact with potential clients at the court house in violation of Rule 4-7.3. Respondent made certain that her remaining staff knew she meant that the example in the email was an example of networking and being an approachable decent person. Respondent maintains that being an approachable decent person is an excellent way to meet people and extend your network.

The informant investigated the complaint of Julie Carroll and filed a one count information against Respondent a year later in November 2012.

As to Count II

Respondent began representing Mr. Dunn on several cases in 2010. Some time in June of 2011 Mr. Dunn approached Respondent with an offer to put up a vacant lot he owned as collateral because he could no longer pay Respondent. Respondent declined several times until Mr. Dunn begged and pleaded with Respondent not to withdraw from his matters for non-payment. In August of 2011 Respondent agreed to continue with Mr. Dunn's offered arrangement. Mr. Dunn signed a quit claim deed to the property. The written agreement was that Mr. Dunn would make monthly payments and if he failed to make the payments Respondent could record the deed one year later.

In September 2011 Mr. Dunn was called for a payment as well as to inform him about his cases. Mr. Dunn was very difficult to reach and eventually stopped responding to Respondent's office completely. Finally in November of 2011 Respondent filed motions to withdraw on Mr. Dunn's matter for non-payment of fees totaling over $10,000.00 by that point, failure to communicate, failure to make the minimum agreed payments, failure to meet contractual obligations by allowing transcript judgments to pile onto the collateral, and because the FDIC had become a party to one of his lawsuits and would likely be moved to Federal Court where Respondent is not licensed.

Mr. Dunn failed to appear for any court dates set on Respondent's motions to withdraw but he was calling the courts and filing pro se motions to try to prevent Respondent's withdrawal. Due to his pro se motions and his efforts to

keep Respondent in his cases Respondent was not able to withdraw until February 2012. Respondent had had no communication with Mr. Dunn for months at that point.

In a hearing in Taney County on the Vorst v. Dunn matter Respondent testified in a 45 minute hearing on her motion to withdraw. The judge was most concerned about the quit claim deed that Mr. Dunn informed the court was payment in full for Respondent's services which was not the agreement. When the court was satisfied with the exhibits during the hearing that Respondent had not recorded any deed, that Respondent could not lawfully record the deed until August 2012 per the agreement, and every circumstance under Rule 4-1.16 existed for withdrawal the judge granted respondent's motion to withdraw. (Supp. Rec. 14, 33). The judge apologized to Respondent on more than one occasion for not granting the motion sooner indicating to Respondent that he wanted to give Mr. Dunn every opportunity to be heard on my motion to withdraw. Mr. Dunn was not at that hearing. He called the judge's clerk before hand as he had done many times before. Respondent cancelled the quit claim deed instrument in open court on that day. Copies remain that indicate "VOID" on their faces only for the purposes of this bar complaint and subsequent proceedings. Mr. Dunn has continued to refuse phone calls with Respondent and as such Respondent never had an opportunity to tell Mr. Dunn the property was released.

After Respondent withdrew from Mr. Dunn's last case Mr. Dunn called Respondent's office on February 27, 2012 for the first time in months with a new

phone number and address and requested his file. Mr. Dunn was told by Respondent's secretary his file would be ready for pick up on March 2, 2012. Mr. Dunn called again on February 27th of 2012 and said he hired an attorney. Respondent's secretary tried repeatedly to call Mr. Dunn to let him know his files could be delivered by Respondent to his new attorney. Mr. Dunn's phone was not set up for voicemail. Mr. Dunn called again February 28th and he was told by Respondent's secretary that his files were ready to be forwarded to his new attorney and if he wanted Respondent to deliver them then Respondent would need his attorneys name or his new attorney could send us a request for his files. Mr. Dunn never came to pick up his file on March 2, 2012 and he never gave Respondent his new attorneys name and no attorney claiming to represent Mr. Dunn sent a request. Mr. Dunn never came into the office in Ozark to retrieve his file. Mr. Dunn admitted at the disciplinary hearing he never came to the office to try and retrieve his file.

Mr. Dunn did not contact Respondent's office again until July 16, 2012 in the form of a certified letter. Respondent was on vacation in Florida when the letter arrived at the Ozark office on July 16, 2012 and wouldn't return until July 21, 2012. Although Respondent has policies in place to prevent documents from being overlooked Respondent's associate failed to include receipt of the letter in his daily email that day and just dropped it in the filing box where it was filed by the secretary in Mr. Dunn's closed files.

On August 15, 2012 Respondent received by mail from Mr. Dunn a copy of a complaint he had filed with informant. On that day Mr. Bates, the associate who had forgotten about the letter from July, was directed to find the letter for Respondent, call the client immediately and apologize, and get the file to him as quickly as possible. Mr. Bates complied with Respondent's directions. If Respondent had known about the certified letter and that it included yet another phone number Respondent would have had staff contact Mr. Dunn sooner letting him know his file had been ready to pick up for months.

Mr. Bates was then directed by Respondent to copy all of Mr. Dunn's files in anticipation of filing a response to Mr. Dunn's complaint. Mr. Dunn and Mr. Bates agreed Mr. Dunn would pick up his file on August 17, 2012. Mr. Dunn did not pick up his file on August 17, 2012. Respondent's office called to remind him to pick it up. On September 10, 2012 Mr. Dunn's father came to pick up his files. Mr. Dunn contacted Respondent's office on September 11, 2012 indicating part of his file was missing. After finding Mr. Dunns one file that still remained Respondent's office contacted Mr. Dunn on September 21, 2012 that it had been located and was ready for his retrieval. Mr. Dunn did not come into pick up his last file. Respondent's office contacted Mr. Dunn again on October 12, 2012 to remind him again to pick up his file. Mr. Dunn did not get his file from Respondent until July 20, 2013 when Respondent brought it with her to the disciplinary hearing.

POINTS RELIED ON

I. RESPONDENT DID NOT VIOLATE RULE 4-7.3 IN THAT THE PLAIN LANGUAGE OF RULE 4-7.3 REQUIRES THE SPECIFIC CONDUCT OF INITIATION OF IN-PERSON SOLICITATION OF LEGAL BUSINESS IN ORDER TO VIOLATE THE RULE AND IT IS UNDISPUTED THAT NEITHER RESPONDENT NOR ANY OF HER EMPLOYEES WHO RECEIVED THE EMAIL EVER INITIATED ANY IN PERSON SOLICITATION WITH ANY PROSPECTIVE CLIENT.

II. RESPONDENT DID NOT VIOLATE RULES 4.5.3, 4-8(a), 4-8(c), or 4-8(d) BECAUSE SENDING AN ISOLATED AND PRIVATE INTER-OFFICE EMAIL ENCOURAGING RESPONDENT'S STAFF TO BE AVAILABLE, HELPFUL, AND RESPONSIVE TO PEOPLE AT THE COURTHOUSE IS NOT THE EQUIVALENT OF INDUCING THEM TO ENGAGE IN IN-PERSON SOLICITATION OF LEGAL BUSINESS, IS NOT THE EQUIVALENT OF DIRECTING THEM TO ENGAGE IN CONDUCT THAT VIOLATES THE RULES, IS NOT DECEITFUL, IS NOT PREJUDICIAL TO

THE ADMINISTRATION OF JUSTICE, AND THE EMAIL IS CONSTITUTIONALLY PROTECTED SPEECH.

III. RESPONDENT DID NOT VIOLATE RULE 1.16(d) BECAUSE THE PLAIN LANGUAGE OF RULE 1.16(d) REQUIRES THAT AN ATTORNEY SHALL TAKE STEPS TO THE EXTENT REASONABLY PRACTICABLE TO PROTECT A CLIENTS INTERESTS … SUCH AS SURRENDERING PAPERS AND PROPERTY TO WHICH THE CLIENT IS ENTITLED AND RESPONDENT TOOK ALL STEPS REASONABLY PRACTICABLE TO RETURN THE CLIENTS FILE TO HIM AND THE CLIENT ADMITTED UNDER OATH AT THE DISCIPLINARY HEARING THAT HE MADE NO ATTEMPT TO COME AND PICK UP HIS FILE.

IV. RESPONDENT ASSERTS SHE HAS NOT VIOLATED RULES OF PROFESSIONAL CONDUCT BUT IF THIS HONORABLE COURT FINDS RESPONDENT DID IN FACT VIOLATE A RULE OF PROFESSIONAL CONDUCT THEN THE ABA GUIDELINES FOR IMPOSING ATTORNEY DISCIPLINE INDICATE THAT AN ADMONITION IS APPROPRIATE WHERE AN ATTORNEY COMMITTED AN ISOLATED ACT OF NEGLIGENCE CAUSING LITTLE OR NO HARM TO CLIENTS, THE PUBLIC, THE LEGAL SYSTEM, OR THE PROFESSION.

ARGUMENT

I. RESPONDENT DID NOT VIOLATE RULE 4-7.3 IN THAT THE PLAIN LANGUAGE OF RULE 4-7.3 REQUIRES THE SPECIFIC CONDUCT OF INITIATION OF IN-PERSON SOLICITATION OF LEGAL BUSINESS IN ORDER TO VIOLATE THE RULE AND IT IS UNDISPUTED THAT NEITHER RESPONDENT NOR ANY OF HER EMPLOYEES WHO RECEIVED THE EMAIL EVER INITIATED ANY IN PERSON SOLICITATION WITH ANY PROSPECTIVE CLIENT.

It is undisputed that neither Respondent nor any of her employees ever initiated any in person solicitation of legal business. (Inf. Brief 16). It is also undisputed that Respondent spoke with her employees after Julie Carroll filed her complaint to make sure they did not take her email as an order to initiate in person solicitation of legal business. (Inf. Brief 5,6). Respondent did not violate Rule 4-7.3.

Missouri Supreme Court Rule 4-7.3 states …

"A lawyer may not initiate the in-person, telephone, or real time electronic solicitation of legal business under any circumstance, other than with an existing or former client, lawyer, close friend, or relative."

Where the language of a rule is plain, ordinary, and unambiguous then the court is bound by that language and there is neither need nor

reason to apply any other rule of construction in interpreting the rule. *In Re Hess*, 406 S.W.3d 37 (Mo banc 2013). The plain language in Rule 4-7.3 is that a lawyer may not initiate in person solicitation. Applying the plain language of the rule the Respondent logically is not in violation of Rule 4-7.3 where no in person solicitation occurred.

In *In Re Madison*, Judge Wolff, stated the importance of conduct and not just speech in determining attorney discipline, in his concurring opinion he wrote, "I concur with the principal opinion. I write separately to emphasize that this case is about conduct, not speech. In my view, In re Westfall, 808 S.W.2d 829 (Mo. banc 1991), which involved only speech, was decided wrongly. *SC 89654 (Mo banc 2009)*. Rule 4-7.3 requires conduct for a violation to occur, specifically, initiation of in person solicitation of legal business. None of the three employees that received Respondent's email nor the Respondent herself initiated any in-person solicitation of legal business with any prospective client therefore Respondent cannot be in violation of Rule 4-7.3.

In cases where an attorney has been found to be in violation of Rules of professional conduct similar to Missouri Court Rule 4-7.3, the actual conduct of in person solicitation of legal business did in fact occur. See *In Re Franz and Lipowitz, 736 A2d 339,355 Md 752 (Md 1999); In Re Gregory, 311 Md 522,536 A2d 646 (1988); In Re Weiss, 300 Md 306, 477 A2d 1190 (1984); In Re Wolfe 759 So.2d 639 (Fla 2000)*. All of the cases

above are similar to each other in that the reprimanded attorneys actually approached a potential client at court, in a hospital, or at the scene of an accident identifying themselves as attorneys and urged potential clients to hire them. The obvious difference in the case against Respondent is that neither she nor any of her staff approached anyone.

II. RESPONDENT DID NOT VIOLATE RULES 4.5.3, 4-8(a), 4-8(c), or 4-8(d) BECAUSE SENDING AN ISOLATED AND PRIVATE INTER-OFFICE EMAIL ENCOURAGING RESPONDENT'S STAFF TO BE AVAILABLE, HELPFUL, AND RESPONSIVE TO PEOPLE AT THE COURTHOUSE IS NOT THE EQUIVALENT OF INDUCING THEM TO ENGAGE IN IN-PERSON SOLICITATION OF LEGAL BUSINESS, IS NOT THE EQUIVALENT OF DIRECTING THEM TO ENGAGE IN CONDUCT THAT VIOLATES THE RULES, IS NOT DECEITFUL, IS NOT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, AND THE EMAIL IS CONSTITUTIONALLY PROTECTED SPEECH.

In order to appropriately analyze informant's allegations against Respondent as to alleged violations of 4-5.3, 4-8(a), 4-8(c), and 4-8(d) it is necessary to analyze a hypothetical scenario of one of Respondent's employees actually acting on the suggestions, in the literal sense, of the email. All of

informant's allegations against Respondent pertain to violating Rule 4-7.3 and that by sending an email suggesting Respondent's employees be available, helpful, and responsive Respondent must be in violation of Rules 4-5.3, 4-7.3, 4-8(a), 4-8(c), and 4-8(d). In analyzing this hypothetical scenario it is critical to compare the plain language of the email that was sent with the plain language of Rule 4-7.3. This is critically necessary considering there was no action to cause any alleged rule violation other than sending an email.

In comparing the plain language in the email to the plain language in Rule 4-7.3 the question that begs an answer is whether or not the language in the email on its face violates Rule 4-7.3 or any other rules of professional conduct. Informant has repeatedly failed in their information, their amended information, and again in their brief to offer any analysis whatsoever of Rule 4-7.3 or any other rules and how Respondent's email violates any rule. Respondent asserts that her email does not violate any rule of professional conduct and this assertion is supported by the plain language of the rules

1. Analysis of Rule 4-7.3 and Respondent's email

   First, Rule 4-7.3, in its preface specifically states when the rule should be applied…

   "*This Rule 4-7.3 applies to in-person and written solicitations by a lawyer with persons known to need legal services of the kind provided by the*

lawyer in a particular matter for the purpose of obtaining professional employment.

On its face Rule 4-7.3 does not apply to the partially quoted language of the email that has caused the allegations against Respondent where no in-person solicitation was ever made, ever attempted to be made or ever ordered to be made in that the email does not suggest that Respondent's employees engage in in-person solicitation with persons known to need legal services of the kind provided by the lawyer in a particular matter.

Respondent respectfully avers that sending an email to employees (both lawyers and non-lawyers) suggesting they be available, helpful, and responsive to people whom are not known to need legal services of the kind provided by the lawyer in a particular matter is not a violation of Rule 4-7.3 as the clear language of Rule 4-7.3 says this is not a violation as it does not apply to the Rule.

The intention of the suggested actions in the email for the Respondent's employee's to be available, helpful, and responsive is clear from the plain wording of the partially quoted language of the email. The suggested actions in the email are:

a. Hang out at the courthouse. – Be available.

b. Look for lost people. – Be available to help people.

c. Ask them if you can help them find the clerk's office. – An Example of being helpful.

d. Only if asked if you are a lawyer, Respond, Yes, I am a Lawyer OR I work for a Lawyer. – Be Responsive if someone asks if you are a lawyer.

e. Ask what do they have there. – Be Responsive and Helpful.

f. Offer free advice OR tell them your lawyer would be happy to give them some free advice. – Be responsive and helpful.

The remaining portions of the email are exaggerations of the author of speculative actions and feelings of a hypothetical stranger one may find themselves interacting with at the courthouse.

Letters from the other two employees who received the same email received by Julie Carroll were given to informant in late 2012 with Respondent's initial answer and again attached to Respondent's second answer to the amended information in June 2012. (Record 50,51). These letters were also included with Respondent's supplemental response to the Julie Carroll complaint to Office of Chief Disciplinary Counsel. The associate attorney, Neil Fossum, explains in his letter that he understood the email to direct him to be responsive to people at the courthouse who asked him if he was a lawyer. The other non-lawyer assistant, Cait Mengwasser, states that she ignored it because she was new to the office. Although

Respondent's explanation of the email is corroborated with these letters by two other employees informant continues to read into the email intentions of Respondent that have no basis in fact or evidence.

The partially quoted language of the email does not suggest Respondent's employees engage in in-person solicitation.

The definition in Black's Law Dictionary for solicitation is "Asking; enticing; or an urgent request. The plain wording of the partially quoted language of the email lacks any sort of suggestion to Respondent's employees to ask, entice, or urgently request any person for anything. Without asking, enticing, or urgent request for business there is no in-person solicitation.

In fact the exact opposite is true. The plain wording of the email suggests offering to be helpful by guiding a person in the right direction or offering free advice. Suggesting to employees they should offer help and free advice at the courthouse is not in-person solicitation when there is no suggestion in the email for them to ask anyone for business, suggest any person hire Respondent's firm, or urgently request a person to hire Respondent's firm. In fact it was specifically suggested in the email to only tell anyone they are a lawyer or work for a lawyer if someone were to ask them this question.

Giving someone directions to the clerk's office is not solicitation. Responding to their questions is not solicitation. Offering free advice is not

solicitation.

The partially quoted language of the email does not suggest Respondent's employees to engage people who are known to them to need legal services.

The partially quoted language of the email suggests hanging out at the courthouse looking for lost people who may be trying to represent themselves. It is clear that the suggestion of hanging out at the courthouse looking for lost people may also lead to helping those who may not be trying to represent themselves and could be there for any number of other reasons. Thus the very language of the partially quoted email also suggests then that the intention of the

email was not to initiate contact with those known to need legal services.

The partially quoted language of the email does not suggest Respondent's employee's to engage people known to need legal service of the kind provided by the lawyer.

The partially quoted language of the email specifically infers that any lost person at the courthouse one may encounter who would ask one of Respondent's employees if they were an attorney could be looking for an attorney that provides services that Respondent's firm does not handle. This is clear in the language of the email that the employee would have had to ask "What do you have there?" indicating the employee did not know what the person needed or whether or not that person could even be helped by the services of Respondent's firm without asking what they have there.

The partially quoted language of the email does not suggest Respondent's employees to engage people known to need legal services of the kind provided by the lawyer in a particular matter.

The partially quoted language of the email has absolutely no suggestion that employees are to engage in contact with persons in need of legal services in a particular matter. The fact that the language of the email suggests they ask a person what they have there indicates no known need for legal services for any particular matter.

Further, in the cases cited below where attorneys were found to have violated Rules similar to Missouri Court Rule 4-7.3 the attorneys specifically asked for, enticed, or urgently requested legal business and signed up clients who the attorneys in fact pursued because the attorneys knew the persons were specifically in need of legal services of the kind provided by those attorneys in particular matters the attorneys knew were going to be litigated by the persons they were soliciting. See *In Re Franz and Lipowitz, 736 A2d 339,355 Md 752 (Md 1999); In Re Gregory, 311 Md 522,536 A2d 646 (1988); In Re Weiss, 300 Md 306, 477 A2d 1190 (1984); In Re Wolfe 759 So.2d 639 (Fla 2000).*The email Respondent sent to her employees does not suggest this type of conduct at all.

The final point of analysis when comparing the plain language of the email to the plain language of Rule 4-7.3 is to discuss how similarly situated hypothetical, scenarios have been treated by the Missouri Bar legal

ethics counsel and the informant.

- Is hanging out at the courthouse a violation of any rule? Respondent asserts attorneys are often in courthouses for many hours a day waiting for dockets to be called and associating with other attorneys, judges, clerks, patrons etc. This suggestion by Respondent in her email does not violate any rule of professional conduct.
- Is looking for lost people a violation of any rule? Respondent asserts that paying attention to people who seem lost in the courthouse and caring enough to be a decent person and help them is not a violation of any rule.
- Is asking someone if you can help them find the clerk's office a violation of any rule? According to comment 3 under Rule 4-7.3 the answer is no. The comment specifically says that Rule 4-7.3 is not intended to prohibit a lawyer from participating in constitutionally protected activities. Respondent asserts that speaking to someone in the court house and directing them to clerk's office is being a decent person and that particular speech is constitutionally protected because it is not solicitation of legal business speech which the state has an interest in regulating. Even more on point is the Missouri Bar Ethics Counsel informal opinion 950032 that you can advertise free services as long as there is no solicitation. Respondent asserts that pointing someone in the right direction at the courthouse is a free

service and does not involve solicitation. Further Rule 4-7.3 says a lawyer cannot initiate the in person solicitation of legal business, it does not say a lawyer cannot initiate a conversation unrelated to their law practice with a stranger at the courthouse.

- Is responding that you are in fact a lawyer if someone asks you that question a violation of any rule? Comment 6 under 4-7.3 says that general announcements by lawyers do not constitute communications soliciting professional employment. Further informal Missouri Bar ethics counsel informal opinion 940187 specifically says information sent at the request of a prospective client does not fall within the advertising rules.
- Is asking someone who has just asked you if you are a lawyer what they have there a violation of any rule? Rule 4-7.3 only applies to situations where the attorney is soliciting (urgently asking for business) someone in person for legal business who the attorney knows needs legal services in a particular matter AND the attorney knows she practices the type of legal business she is soliciting. Respondent asserts that if the attorney is asking a complete stranger who they have happened upon by chance there is no way asking this question would invoke rule 4-7.3 and its applicability. On this point what is shocking is that Informant considers Respondent's email so outrageous as to recommend suspension when there was no actual

engagement with anyone whatsoever when just recently in December 2013 in *In Re Trotter* SC93414 informant argued to this Honorable Court that Mr. Trotter's meeting with an injured woman in a hospital room soon after the death of her three children did not rise to the level of discipline and was dismissed. Respondent can only assume this is the case because Mr. Trotter said she asked him to come and visit her. Respondent can only take from this that if a potential client asks an attorney can respond.

- Is offering free advice or telling someone the lawyer you work for would be happy to give them some free advice a violation of any rule? Free legal consults are available everywhere. According to The Missouri Bar Ethics Counsel informal opinion 940136 it is very clear you can offer free seminars to the public as long as you are not soliciting them. This opinion goes as far as to say that an attorney can advertise free consultations to those whom he has directly spoken to at the public seminars, so long as he is not soliciting.

Respondent asserts that the suggestions to her staff in her email would not violate any rules even if they were acted upon which they were not. The Rules, comments, and the opinions on the rules are clear that the suggestions Respondent made in her email do not violate Rule 4-7.3. Lastly, in *Ohralik v. Ohio State Bar Association*, the suggested test to determine if a violation occurred under the rules governing in person solicitation is 1. Is the speech/conduct closer to general

information that is constitutionally protected or 2. is the speech/conduct closer to reaching or potentially reaching fraud, overreaching, deception, or misrepresentation that did cause harm or had the potential to cause harm. 436 U.S. 447 (1978). Respondent asserts that applying this test to Respondent's email the test would be moot considering there was no conduct. However, if the email were acted upon by Respondent or one of her employees Respondent believes under this test there would be no violation because the email cannot get any further to general information that is constitutionally protected speech.

2. Analysis of Rule 4-5.3 and Respondent's email

Rule 4-5.3(b) states

"a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."

For Respondent to be in violation of 4-5.3 the partially quoted language of the email itself, standing alone, must be a violation of 4-7.3. The analysis comparing Rule 4-7.3 above to the suggested actions in the email logically and legally are not a violation of any rule. The plain language of the partially quoted email does not apply to Rule 4-7.3 therefore Respondent is not in violation of 4-5.3 by suggesting to a non-lawyer assistant in an email that she be available, helpful and responsive to people at the courthouse who are not known to need legal services of the kind provided by the lawyer in a particular matter. If the suggested actions

in the email would not be a violation if acted on by an attorney it would also not be a violation for the attorney to instruct a non-lawyer assistant.

3. Analysis of Rule 4-8(a) and Respondent's email

Rule 4-8.4 states

"*It is professional misconduct for a lawyer to:*

4-8.4(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;"

In order to be in violation of 4-8.4(a) an attorney must necessarily violate or attempt to violate another rule of conduct. See *In Re Caranchini, 956 SW 2d 910 (Mo 1997); In Re Coleman, 295 SW 3d 857 (Mo 2009); and In Re Ehler 319 SW 3d 442 (Mo 2010).* If no underlying rule is violated or no attempt is made to violate an underlying rule there can be no violation of Rule 4-8.4(a).

For Respondent to be in violation of 4-8.4(a) the partially quoted language of the email itself, standing alone, must be a violation of 4-7.3. The analysis comparing Rule 4-7.3 above to the suggested actions in the email logically and legally are not a violation or an attempt to violate any rule. The plain language of the partially quoted email does not apply to Rule 4-7.3 therefore Respondent is not violation of 4-8.4(a).

4. Analysis of Rule 4-8(c) and Respondent's email

Rule 4-8.4 states

"*It is professional misconduct for a lawyer to:*

4-8.4(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

For Respondent to be in violation of 4-8.4(c) Respondent must have engaged in some conduct involving dishonesty, fraud, deceit, or misrepresentation. The intention of the suggested actions in the email for the Respondent's employee's to be available, helpful, and responsive is clear from the plain wording of the partially quoted language of the email. Merely sending an email to employees does not rise to the level of conduct required to violate Rule 4-8.4(c) especially since nothing in the email itself suggests that Respondent's employees engage in any conduct involving dishonesty, fraud, deceit, or misrepresentation.

Examples of violations of Rule 4-8.4(c) are as follows;

- Submitting false discovery responses. *In Re Carey 89 SW3d 477 (Mo 2002).*
- Secreting client files. *In Re Cupples 952 SW2d 226 (Mo 1997).*
- Using client funds to pay personal obligations. *In Re Ehler 319 SW3d 442 (Mo 2010).*
- Lying to the FBI. *In Re Zink 278 SW3d 166 (Mo 2009).*
- Misappropriating attorneys fees belonging to the attorney's firm. *In Re Kazanas 965 SW3d 803 (Mo 2003).*

- Lying to Disciplinary Hearing Panel. *In Re Donaho, 98 SW3d 871 (Mo 2003).*
- Lying to Clients about their case being dismissed. *In Re Crews, 159 SW3d 871 (Mo 2005).*
- Bringing a Frivolous Action. *In Re Mirabile 975 SW2d 936 (Mo 1998).*

Respondent asserts that sending an email to employees (both lawyers and non-lawyers) suggesting they be available, helpful, and responsive to people whom are not known to need legal services of the kind provided by the lawyer in a particular matter is not a violation of Rule 4-8.4(c) where there is nothing dishonest, fraudulent, deceitful, or misrepresenting about sending an email suggesting employees ask someone in the courthouse if they need help, helping them, and if that person happens to ask if one is an attorney or works for an attorney to give a positive response and offer a free consultation. These actions are not in violation of Rule 4-8.4(c) even if the underlying purpose is to hopefully gain future clients or referrals. (Full analysis of this assertion with legally supportive suggestions above.)

5. Analysis of Rule 4-8(d) and Respondent's email

Rule 4-8.4 states

"*It is professional misconduct for a lawyer to:*

4-8.4(d) engage in conduct that is prejudicial to the administration of justice;"

For Respondent to be in violation of 4-8.4(d) Respondent must have engaged in some conduct that is prejudicial to the administration of justice. The plain language of the rule requires engaging in conduct. The only conduct here is the sending of an isolated inter-office email. The intention of the suggested actions in the email for the Respondent's employee's to be available, helpful, and responsive is clear from the plain wording of the partially quoted language of the email. Merely sending an email to employees does not rise to the level of conduct required to violate Rule 4-8.4(d) especially since nothing in the email itself suggests that Respondent's employees engage in any conduct that is prejudicial to the administration of justice. (Full analysis of this assertion with legally supportive suggestions above.)

Examples of violations of Rule 4-8.4(d) are as follows;

- Bringing a frivolous Action. *In Re Caranchini, 956 SW 2d 910 (Mo 1997).*
- Wasting Judicial Resources and negatively impacting the judicial process. *In Re Coleman, 295 SW3d 857 (Mo 2009).*
- Disrupting a tribunal. *In Re Madison, 282 SW3d 350 (Mo 2009).*
- Submitting false discovery responses. *In Re Carey 89 SW3d 477 (Mo 2002).*
- Reducing a defendant's charges in exchange for sports memorabilia. *In Re Zink, 278 SW 3d 166 (Mo 2009).*

- Committing a criminal act involving dishonesty. *In Re Kazanas 965 SW3d 803 (Mo 2003).*
- Misappropriating client funds. *In Re Belz, 258 SW3d 38 (Mo 2008).*

Respondent asserts that sending an email to employees (both lawyers and non-lawyers) suggesting they be available, helpful, and responsive to people whom are not known to need legal services of the kind provided by the lawyer in a particular matter is not a violation of Rule 4-8.4(d) where there is nothing prejudicial to the administration of justice sending an email suggesting employees ask someone in the courthouse if they need help, helping them, and if that person happens to ask if one is an attorney or works for an attorney to give a positive response and offer a free consultation. These actions are not in violation of Rule 4-8.4(d) even if the underlying purpose is to hopefully gain future clients or referrals.

6. Analysis of Constitutionally Protected Speech

In *In Re Madison*, Judge Wolff, stated the importance of conduct and not just speech in determining attorney discipline in his concurring opinion "I concur with the principal opinion. I write separately to emphasize that this case is about conduct, not speech. In my view, *In re Westfall, 808 S.W.2d 829 (Mo. banc 1991)*, which involved only speech, was decided wrongly." *282 SW3d 350 (Mo banc 2009)*.

"Lawyers possess First Amendment rights. Before a court can legitimately impose discipline, chilling the First Amendment, the state must articulate a compelling interest. Lawyers do not surrender their First Amendment rights when they accept their licenses. See *Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); In re R.M.J., 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982); reversing Matter of R.M.J., 609 S.W.2d 411 (Mo. banc 1980). NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); In re Primus, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978)*. These cases demonstrate that First Amendment rights must be respected in disciplinary actions, and put a substantial burden on the states to show compelling public interest in order to support limitations on freedom of expression. There must be narrowly drawn rules to protect a compelling public interest." (Citing BLACKMAR, Chief Justice, dissenting opinion in *In re Westfall, 808 S.W.2d 829 (Mo. banc 1991)*.

"The quotation from our case of *In re Woodward,* 300 S.W.2d 385, 393–94 (Mo. banc 1957) must be read in the light of the numerous intervening Supreme Court decisions demonstrating that courts are seriously limited in sanctioning lawyers for what they say, and that disciplinary rules must consist with the First Amendment. The reprimand is a scar on the lawyer's record and, in a case impacting the First Amendment, has an obvious chilling effect on further expression. We are not at liberty to

give a lawyer a "chewing" for rudeness or insolence not committed in the presence of the court." (Citing BLACKMAR, Chief Justice, dissenting opinion in *In re Westfall, 808 S.W.2d 829 (Mo. banc 1991)*.

Even if the language of the email did suggest a violation of Rules 4-5.3, 4-7.3, 4-8.4(a), 4-8.4(c) or 4-8.4(d) a private email to private employees expressing the idea that being available, helpful, and responsive would develop trust with people in general who then may refer clients to Respondent's office or hire Respondent themselves is free speech protected by the 1st amendment of the United States Constitution. Where no conduct of the nature prohibited by Rules 4-5.3, 4-7.3, 4-8.4(a), 4-8.4(c) or 4-8.4(d) occurred, nor any initiation to violate Rules 4-5.3, 4-7.3, 4-8.4(a), 4-8.4(c) or 4-8.4(d) occurred, nor any substantial step toward any violation of Rules 4-5.3, 4-7.3, 4-8.4(a), 4-8.4(c) or 4-8.4(d) occurred it is overreaching for the Informant to restrict this type of expression in free speech between a private employer and her employees by disciplining the Respondent. To discipline the Respondent and restrict her speech for expressing an idea in a lone email to three employees serves no substantial purpose to protect the public, the court system, or the integrity of the profession and would be a violation of the Respondent's 1st amendment right to freedom of expression.

III. RESPONDENT DID NOT VIOLATE RULE 1.16(d) BECAUSE THE PLAIN LANGUAGE OF RULE 1.16(d) REQUIRES THAT AN ATTORNEY SHALL TAKE STEPS TO THE EXTENT REASONABLY PRACTICABLE TO PROTECT A CLIENTS INTERESTS … SUCH AS SURRENDERING PAPERS AND PROPERTY TO WHICH THE CLIENT IS ENTITLED AND RESPONDENT TOOK ALL STEPS REASONABLY PRACTICABLE TO RETURN THE CLIENTS FILE TO HIM AND THE CLIENT ADMITTED UNDER OATH AT THE DISCIPLINARY HEARING THAT HE MADE NO ATTEMPT TO COME AND PICK UP HIS FILE.

Respondent agrees that Mr. Dunn's files have always belonged to him. Respondent asserts that Rule 4-16(d) requires her to take steps to the extent reasonably practicable to protect a client's interest…including but not limited to… surrendering papers and property to which the client is entitled. Respondent asserts that she and her office staff did everything reasonably practicable to get Mr. Dunn his files. Respondent further asserts that Mr. Dunn's files were surrendered to him on March 2, 2012. Not once did Mr. Dunn come into Respondent's office to retrieve his surrendered files and he admitted so at the disciplinary hearing. (T. p.45 lines 1-3).

Missouri court Rule 4.16(d) states..

"Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law."

The timeline of events indicated below demonstrates that Mr. Dunn's files have been available to him since March 2, 2012. This timeline is a summary of the file documentation in Mr. Dunn's file maintained in Respondent's office in connection with the efforts taken by Respondent and her office staff to return Mr. Dunn's files to him. The file documentation provided are all of the notes documented by several employees of Respondent on Mr. Dunn's case in Vorst v. Dunn from 2010 - 2013. All of the following paragraphs are statements taken from those office notes.

The same copies of this file documentation in Mr. Dunn's matter were presented to informant on three occasions. They were given to informant as an attachment to Respondent's response to Mr. Dunn's original complaint in September 2012. They were given to informant as an attachment to Respondent's amended answer to informant's amended

information adding the Count relating to Mr. Dunn. They were also admitted as an exhibit in the disciplinary hearing. (Supp. Rec. 16-20). The below timeline of events taken directly from Respondent's file documentation indicating what Respondent and her office did to get Mr. Dunn his files can be found specifically. (Supp. Rec. 16-18).

1. On January 23, 2012 Respondent's office mailed Mr. Dunn his invoices at the address the office had for him in their file.
2. On January 25, 2012 Mr. Dunn's invoices were returned to Respondent's office. Someone had written on the envelope "not at this address."
3. On February 6, 2012 Mr. Dunn called Respondent's office and gave a new address and phone number.
4. After resending Mr. Dunn's invoices to the new address he had given on February 6th, Mr. Dunn's invoices were again returned to Respondent's office on February 14th 2012. This time the envelope indicated "Return to Sender. Vacant. Unable to Forward."
5. On February 22, 2012 Respondent's office attempted to contact Mr. Dunn to remind him of his court date on February 23, 2012. Mr. Dunn did not answer and the voicemail was not set up so a message could not be left.

6. Respondent withdrew representation in Vorst v. Dunn on February 23, 2012.
7. On February 27, 2012 Mr. Dunn contacted Respondent's office requesting his files and he was told they would be available for him to pick up on Friday, March 2, 2012. Mr. Dunn was told that due to the voluminous nature of his seven files it would take until March 2, 2012 for Respondent's office to gather them all up and have them available for him.
8. On February 27, 2012 in another phone call by Mr. Dunn to Respondent's office he informed that he had an appointment with another attorney.
9. On February 27, 2012 Respondent's office attempted to call Mr. Dunn to inform him we would provide his new attorney anything they need. Mr. Dunn's voicemail was still not set up and a message could not be left.
10. On February 28, 2012 Mr. Dunn called the Respondent's office and was told his new attorney would be provided anything they needed.
11. Mr. Dunn never gave Respondent the name of the new attorney to forward the files to. The public records on CaseNet show that Mr. Dunn never hired another attorney and continued pro se representation.
12. Mr. Dunn did not pick up his files on March 2, 2012.

13. From February 29, 2012 until July 16, 2012 Respondent's office had no communication with Mr. Dunn and Mr. Dunn did not come in to pick up his files.
14. It was not unusual to Respondent that Mr. Dunn did not stay in contact or pick up his files. Mr. Dunn stopped communicating with Respondent about his case in the Fall of 2011. It took three months to withdraw from Mr. Dunn's matters because he continued to refuse to appear for the court dates although he would contact the judge ahead of time and communicate his desire for me to stay in the case. In February of 2012 Respondent was finally allowed to withdraw after a recorded 45 minute evidentiary hearing on her motion to withdraw including reasons such as non-payment of fees, failure to meet contractual obligations, failure to communicate with Respondent, and making the representation so difficult that it was impossible to represent Mr. Dunn.
15. On July 16, 2012, Respondent's office received a certified letter from Mr. Dunn requesting his files.
16. The certified letter was received in Respondent's Ozark, Missouri location and signed for by Respondent's associate Dylan Bates.
17. Respondent was out of the office from July 14, 2012 through July 21, 2012 on vacation.

18. Respondent has a daily email policy in place where all employees must record documents that came in the mail each day among other required daily information.
19. Mr. Bates forgot to put the receipt of the certified letter in his daily email and put the letter in the file basket for the secretary to file. Please see Mr. Bates Letter to OCDC explaining what happened with the certified letter. (Rec. 58,59)
20. The certified letter was filed in Mr. Dunn's file by the secretary on July 19, 2012.
21. The first time Respondent knew of the certified letter was August 15, 2012 when Mr. Dunn mailed a copy of his bar complaint directly to Respondent.
22. On August 15, 2012 Mr. Bates (Respondent's associate) called Mr. Dunn and apologized for not responding to his certified letter more promptly and losing it in the shuffle. He also told Mr. Dunn his files would be ready to pick up on August 17, 2012. During that conversation Mr. Dunn agreed to pick up his file on August 17, 2012.
23. On August 15 and August 16, 2012 Mr. Dunn's file were not available to him for pick up. Respondent's office took these two days to copy Mr. Dunn's voluminous files in preparation for defending his bar complaint. Pursuant to Rule 1.16(d) an attorney "may retain papers relating to the client to the extent permitted by other law."

24. On August 15 and 16 2012 Mr. Bates copied the files for the benefit of Respondent and billed for his time and for copies during this process.
25. Respondent inadvertently overlooked the billings during the mass billing in September 2012.
26. Respondent removed the charges when the next round of invoices went out in November 2012.
27. From March 2, 2012 until August 17, 2012 Mr. Dunn's files were only not available to him for pick up for six days. February 27 – March 1, 2012 and August 15 and 16, 2012.
28. Mr. Dunn did not pick up his files on August 17, 2012 as he agreed to do.
29. On September 10, 2012 Mr. Dunn called Respondent's office and told the secretary he had filed a complaint with the bar because Anissa would not give his files back. Mr. Dunn was told his files have been sitting in the office waiting for him to pick them up since August 17, 2012 the last date that he had said he would be in to get them.
30. Mr. Dunn's father came to pick up Mr. Dunn's files on September 10, 2012.
31. On September 11, 2012 Mr. Dunn called Respondent's office and said there were some documents missing from his files.

32. On September 21, 2012 Respondent's office called Mr. Dunn to let him know the missing parts of his file had been located and were available for pick up.
33. Mr. Dunn did not come and pick up the rest of his file.
34. On October 12, 2012 Respondent's office called Mr. Dunn again to remind him the remainder of his file has been waiting for him to pick it up.
35. As of the date of the disciplinary hearing Mr. Dunn had still not come in to pick up the last remaining part of his file.
36. Respondent brought the remainder to his file to the disciplinary hearing to give them to Mr. Dunn.
37. The disciplinary hearing was held in July of 2013.
38. Informant asked Mr. Dunn at the hearing how he was harmed by not having his file and he changed the subject and didn't answer (T. p. 55 lines 5-16). Throughout the course of the hearing he also admitted he was under no deadlines (T. p. 43 lines 2-6) and he had filed a motion to amend a mechanics lien but then he also testified that he never came to pick up the remainder of his file because there was no need in getting his file back for those changes because Respondent was in OCDCs hands now (T. p. 54 lines 18-25).

In cases where Missouri attorneys have been found in violation of 4-1.16 the attorney coerced payment from client by intentionally withholding important documents from client, *In Re Lim 210 SW3d 199 (Mo 2007)* and failed to return clients unearned fees, *In Re Donaho 98 SW3d 871 (Mo 2003)*. It is clear that Respondent did not withhold Mr. Dunn's files from him for any length of time or for any purpose. Respondent in fact has had Mr. Dunn's files available to him since March 2, 2012 and Mr. Dunn failed to pick them up. Respondent as well offered to deliver the files to Mr. Dunn's new attorney on February 28, 2012. Respondent did not call to let us know what attorney he wanted them delivered to.

Considering that Mr. Dunn's mail had been returned from all addresses he had given the Respondent, the Respondent did not attempt to mail the files as this had been proven to be an ineffective form of delivery to Mr. Dunn during the course of time Respondent was attempting to get his files to him. Additionally, Respondent's office was unable to reach Mr. Dunn unless he called Respondent's office as his voicemail was never set up.

Ms. Cait Mengwasser, Respondent's secretary testified to the following…verifying the documentation in Mr. Dunn's file was prepared by her and to all of the reasonable practicable steps she took conforming with the requirements of Rule 1.16(d) in that Mr. Dunn was

told on February 27, 2012 his files would be ready for pick up on March 2, 2012. Additionally, he was told Respondent's office would deliver them to his new attorney if he would tell the office who to give them to or have them send a request. He was told this on February 28th. No other calls were made to Mr. Dunn for him to pick up his file because he was unreachable unless he called Respondent's office. Mr. Dunn's files were not mailed to him because Respondent continued to get returned mail from addresses given by Mr. Dunn. Ms. Mengwasser further testified that all phone calls are documented and that Mr. Dunn did not call the office regarding his file from February 28th 2012 until August 15th 2012 when Mr. Bates called him as well as to the fact that Mr. Dunn's files remained on her desk in the Ozark office from March 2, 2012 until Mr. Dunn's father came to pick them up in September.

Additionally, mailing Mr. Dunn's files to him would have been extremely difficult because Respondent held 7 large binder files of Mr. Dunn's cases.

After taking all steps reasonably practicable to return the files to Mr. Dunn they sat on Ms. Mengwasser's desk for months. She testified he could have walked in on any business day to retrieve them and never did. Respondent is not in violation of rule 4-1.16 where she made Mr. Dunn's files available for him to pick up since March 2, 2012 and took all steps reasonably practicable to return the files to him.

IV. RESPONDENT ASSERTS SHE HAS NOT VIOLATED RULES OF PROFESSIONAL CONDUCT BUT IF THIS HONORABLE COURT FINDS RESPONDENT DID IN FACT VIOLATE A RULE OF PROFESSIONAL CONDUCT THEN THE ABA GUIDELINES FOR IMPOSING ATTORNEY DISCIPLINE INDICATE THAT AN ADMONITION IS APPROPRIATE WHERE AN ATTORNEY COMMITTED AN ISOLATED ACT OF NEGLIGENCE CAUSING LITTLE OR NO HARM TO CLIENTS, THE PUBLIC, THE LEGAL SYSTEM, OR THE PROFESSION.

Respondent asserts she has not violated rules of professional conduct but if this Honorable Court finds Respondent has in fact violated a rule of professional conduct then the ABA guidelines for imposing attorney discipline indicate that an admonition is appropriate where attorney committed an isolated act of negligence causing little or no harm to clients, the public, the legal system, or the profession.

Informant on at least two occasions Respondent is aware of has agreed that an admonition would be appropriate for a file return issue. Once in their brief in this case and once in oral argument to his court in December 2013 in *In Re Riehn*, SC93412. The informant additionally in this case has stated in her brief that Mr. Dunn's file

return was the most serious of the two counts. If the most serious count is agreed by informant to be Mr. Dunn's file being returned then the ABA guidelines and Informant agree that an admonition is appropriate if this Court in fact finds Respondent violated a rule at all.

In addition to considering Respondent's analysis of the matters before this court Respondent would also ask this Court to consider the multiple mitigating factors presented below if the Court finds Respondent has violated a rule of professional conduct.

1. Respondent made a good faith effort at the first opportunity to ensure that her employees understood they were not being asked to violate rules of professional conduct and to rectify any misunderstandings that would create any possible chance of misconduct.
2. Respondent corrected Mr. Dunn's bill at the earliest opportunity during the next round of invoices.
3. Respondent made all possible effort under the circumstances to return Mr. Dunn's file to him.
4. Respondent had only been in private practice for 18 months when the email was written and was still learning how to run an office with a full staff.
5. Respondent was a public defender prior to opening her practice in May 2010.

6. Since the complaint was written Respondent has taken over 10 hours of CLE dedicated to "Keeping Your Law Office On Track" and continues to participate in teleconferences regarding running a law office, supervising employees, etc.

7. Respondent learned of this program by contacting Sam Phillips directly in an attempt to get access to resources to assist her in managing her practice and prevent future bar complaints.

8. Mr. Phillips obliged and sent Respondent several resources that Respondent has been using for over a year.

9. Respondent has no disciplinary record.

10. Respondent had no dishonest or selfish motive when sending the email. Respondent's thoughts and intentions were focused on making sure she could pay her staff and not have to lay anyone off during the holidays.

11. Respondent has maintained full and free disclosure to the disciplinary board and a completely cooperative attitude toward the proceedings.

12. Respondent took the initiative to contact OCDC herself in November 2012 to learn of resources that are available through the Missouri Bar to help her in learning to run an ethical and efficient law practice and has taken advantage of the resources provided by OCDC's suggestions.

13. Respondent agrees that the language in the email is ugly and understands why it was taken so seriously by the OCDC and has learned of other ways to communicate more clearly with her employees.

Respondent is remorseful in that she has caused resources to be expended for her lack of judgment in drafting the wording of the email to her employees.

14. The email written to Respondent's employees did not result in any actual or potential harm or injury to any client, potential client, the court system or the integrity of the profession.

15. Respondent has not caused actual or potential harm or injury to the client when client's files have been available to him for pick up or tell Respondent where to deliver them since March 2, 2012.

16. Mr. Dunn testified he was not harmed by not having his file indicating he was able to put together what he needed to get documents filed.

17. The documents that Mr. Dunn was concerned about had been photocopied and given to him early in Respondent's representation of Mr. Dunn. Mr. Dunn would have had access to those copies as well as the one in the courts file.

18. The two counts of this information stem from a complaint filed in December 2011 and August of 2012. The original information with the one count regarding the email wasn't filed until November 2012 and the second count regarding Mr. Dunn was not added until May or June of 2013.

19. Respondent has had no bar complaints filed against her since Mr. Dunn filed his in August of 2012.

CONCLUSION

1. As to Count 1.

First, the plain language of the partially quoted email does not apply to Rule 4-7.3 and would not be a violation of 4-5.3 or 4-8.4(a) even if it was attempted or acted upon by someone, which it was not. Second, sending an email does not rise to the level of conduct described and required in 4-8.4(c) or 4-8.4(d).

Third, where no conduct of the nature prohibited by Rules 4-5.3, 4-7.3, 4-8.4(a), 4-8.4(c) or 4-8.4(d) occurred, nor any initiation to violate Rules 4-5.3, 4-7.3, 4-8.4(a), 4-8.4(c) or 4-8.4(d) occurred, nor any substantial step toward any violation of Rules 4-5.3, 4-7.3, 4-8.4(a), 4-8.4(c) or 4-8.4(d) occurred it is overreaching for the Informant to restrict this type of expression in free speech between a private employer and her employees by disciplining the Respondent.

To discipline the Respondent for expressing an idea in a lone email serves no substantive purpose to protect the public, the court system, or the integrity of the profession and would be a violation of the Respondent's 1st amendment right to freedom of expression.

2. As to Count II.

In cases where Missouri attorneys have been found in violation of 4-1.16 the attorney coerced payment from client by intentionally withholding important documents from client, *In Re Lim 210 SW3d 199 (Mo 2007)* and

failed to return clients unearned fees, *In Re Donaho 98 SW3d 871 (Mo 2003)*. It is clear that Respondent did not withhold Mr. Dunn's files from him for any length of time or for any purpose. Respondent in fact has had Mr. Dunn's files available to him since March 2, 2012 and Mr. Dunn has failed to pick them up. Respondent as well offered to deliver the files to Mr. Dunn's new attorney on February 28, 2012. Considering that Mr. Dunn's mail has been returned from all addresses he has given the Respondent the Respondent has not attempted to mail the files as this has been proven to be an ineffective form of delivery to Mr. Dunn.

Respondent is not in violation of rule 4-1.16 where she made Mr. Dunn's files available for him to pick up since March 2, 2012 and took all steps reasonably practicable to return Mr. Dunn's files to him.

PRAYER

WHEREFORE, Respondent, with complete respect for Rule 4 and the Missouri Rules of Professional Conduct and Rule 5 governing the processes and procedures of determining and disciplining attorneys in violation of the Rules of Professional Conduct humbly avers that Respondent has not violated the Rules of Professional Conduct as set out in Informant's Amended Information and prays this Honorable Court dismiss both Counts I and II of Informant's Amended Information and for whatever further relief is deemed just and fair according to this Honorable Court.

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned certifies that on this 21st day of January, 2014, this brief was filed electronically and a copy of such was served upon all counsel of record by means of the ECF system.

Additionally, this brief complies with the rule 103 and was created using Microsoft Word for Mac 2008 and contains 11,010 words.

Respectfully Submitted,

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