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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Background

Respondent William S. England was admitted to Missouri's bar in September of 1990. He was born in April of 1959. He has a general solo practice in the Kansas City area. **App. 96 (T.4)**. Respondent's disciplinary history consists of one admonition, issued in 2006, for violation of Rules 4-1.8 (conflict of interest—prohibited transactions) and 4-4.2 (communication with person represented by counsel). **App. 3-4**. Respondent's license has been administratively suspended many times over many years as a consequence of his failure to report compliance with the continuing legal education rule (Rule 15) and the rule requiring payment of the annual enrollment fee (Rule 6.01).

Procedural History Before Joint Stipulation

In July of 2006, Respondent entered into a diversion agreement with the Office of Chief Disciplinary Counsel whereby he agreed to complete and report all delinquent CLE credit hours within two years. **App. 5-8.** See Rule 5.105. The agreement included a provision that failure to comply with the terms of the agreement would constitute a violation of Rule 4-8.1(b) (knowing failure to respond to request for information from disciplinary authorities) ((b) now appears as (c) of the rule). The diversion agreement was terminated in August of 2008 because Respondent had not completed all delinquent CLE credit hours and reported them to the bar, as the agreement required. **App. 9.**

On May 8, 2009, Respondent acknowledged receiving a copy of a two-count information charging him with violation of Rule 4-5.5(e) by practicing law while non-

CLE compliant, Rule 4-8.1(b) for failing to comply with the terms of the diversion agreement, and numerous rule violations arising out of his representation of a client named Anderson. The Anderson representation rule violations included Rule 6.05(c) for practicing law after his license had been suspended for failure to comply with Rule 15, and Rule 4-8.4(c) for entering into a contingency fee agreement with Ms. Anderson when he knew or should have known his license was administratively suspended. **App. 11-22.**

Respondent's answer to the information was due to be filed on or about June 8, 2009. No timely answer was filed. An information with notice of default was filed with this Court on July 16, 2009. **App. 23-39.** The matter was assigned Supreme Court No. SC90274. On July 16, 2009, the Court issued an order disbarring Respondent. **App. 40.**

On July 20, 2009, Respondent filed two pleadings with the Court: a motion for leave to file out of time and an "emergency motion" to set aside the default order of disbarment. **App. 41-44.** Respondent stated in the motions that he had mailed his answer to the information on May 20, 2009, and had no reason to believe the answer had not been timely received until he received the notice of default on July 15, 2009.

On July 21, 2009, the Court sustained Respondent's motion to set aside the default disbarment order. **App. 45.** Respondent filed an answer to the information on August 20, 2009. **App. 46-50.** On August 27, 2009, the advisory committee appointed a disciplinary hearing panel to hear the case pursuant to Rule 5.14.

Joint Stipulation

Informant and Respondent signed a final copy of a joint stipulation as to facts and agreed to a recommendation of public reprimand in a document filed with the advisory

committee on March 3, 2010. **App. 51-87**. The factual stipulations are set forth at pages 2-9 of the joint stipulation. **App. 52-59**. They may be briefly summarized as follows.

Respondent was delinquent in paying his annual enrollment fee for the years 2004 and 2005, but is currently in good standing (meaning he is current in payment of all enrollment fees). **App. 52**.

Respondent did not report compliance with the Rule 15 continuing legal education requirements for any of the reporting periods from 1994 thru 2005. In addition to many prior notices, the bar wrote Respondent a letter on May 25, 2005, providing him additional notice about the 1994-2005 reporting delinquencies. **App. 63**.

Effective July 1, 2005, Rule 15.06(f) automatically suspended the law license of any lawyer reported by the bar to OCDC as delinquent in complying with Rule 15 as of the date the bar sent the list of delinquent attorneys' names to OCDC. Rule 15.06(f) requires that the list be reported to OCDC on or before March 1 regarding the preceding July 1 to June 30 reporting year. On March 6, 2006, Respondent was notified by OCDC of his CLE delinquency for the reporting year that ended June 30, 2005. Several months later, on July 18, 2006, Respondent entered into the diversion agreement discussed previously in this statement of facts, whereby he was granted two years to "make up" all past CLE delinquencies, in which event no discipline would be sought for the delinquencies. The diversion agreement was terminated on August 29, 2008, because as of that date the bar reported ongoing deficiencies not only with the years at issue when the diversion agreement commenced, but the intervening years as well.

Within two weeks after termination of the diversion agreement (by September 15, 2008), Respondent had filed with the bar the reports necessary to bring himself into then current compliance, less two seminars for which attendance could not be confirmed. **App. 70**. In the meantime, however, the 2007-2008 reporting year ended on June 30, 2008. The bar notified Respondent on October 3, 2008, that he had not filed his compliance report for that year. Respondent must have thereafter filed a report for 2007-2008, because the bar notified the clerk of the Supreme Court on November 17, 2008, that Respondent was finally in full compliance with Rule 15 for all past reporting years. **App. 78**.

Approximately one week later, however, the bar wrote Respondent a letter (dated November 25, 2008), advising him that his 2007-2008 report reflected an 8.4 hour deficiency. **App. 79**. The bar followed up with a letter dated January 26, 2009, sent certified mail and signed for by Respondent, advising him of the continuing deficiency in the 2007-2008 report. **App. 81-82**. Informant then communicated with Respondent, in a letter dated March 23, 2009, that his name was on the CLE delinquent list sent by the bar, and so his license was, pursuant to Rule 15.06(f), automatically suspended. **App. 87**.

Respondent stipulated to the fact that he practiced law during periods of non-compliance with Rule 15, and that he consequently violated Rule 4-5.5(e). **App. 57-58**. He also stipulated to the fact that he did not comply with the terms of the diversion agreement, and consequently violated Rule 4-8.1(b). **App. 58**.

Respondent England also stipulated to sufficient facts underlying Count II to substantiate his violation of Rule 6.05(c) in that he practiced law after his law license had

been automatically suspended for failing to comply with Rule 15. Additionally, Respondent stipulated that he engaged in conduct involving misrepresentation by taking on Ms. Anderson's case and accepting a fee from her at a time he should have known his license was suspended. **App. 59-60**.

Informant and Respondent jointly recommended a public reprimand for the foregoing rule violations. **App. 61**.

Post-Filing of Joint Stipulation

After reviewing the parties' factual stipulation and sanction recommendation, the disciplinary hearing panel noticed the matter up for hearing on January 22, 2010, inasmuch as the panel had some questions for Respondent regarding the stipulation. That hearing occurred on the noticed date. A transcript of the short hearing is included in the Appendix. **App. 95-100**.

The panel questioned Respondent about the duration and consistency of his failure to maintain compliance with the CLE reporting rule. Respondent explained that he offices out of his home and that he suspects his wife has been interfering with both his incoming and outgoing mail. **App. 97 (T. 5-6)**. Respondent testified that his marriage has been troubled for many years. He moved out and back into the marital home at least twice, losing records in the process. **App. 97 (T. 7-8)**. Respondent believes that he completed the CLE compliance reports over the years, but that his wife intercepted mail he left out for pick-up or removed delivered mail before he saw it. **App. 97-98 (T. 8-9)**. Similarly, Respondent testified that he completed the forms required by the diversion agreement and left them out, at his home, to be picked up by the mail person, but suspects

that his wife intercepted the documents before they were retrieved by the postal service. **App. 98 (T. 11-12)**.

Respondent testified that he did not receive the notices telling him that his license had been automatically suspended. **App. 98 (T. 11-12)**. He told the panel that he had been depressed over several years, in part because he was confident he completed certain tasks and mailed documents, but then would receive notice he had not done so. **App. 99 (T. 13-14)**. According to Respondent, things got to the point where he suspected the bar or the Court was "messing with him." **App. 99 (T. 13-14)**.

Respondent was, at the time of the hearing, living in the marital home with his wife and son. He has an agreement with his wife to maintain the status quo until his son graduates from high school "next spring." **App. 99 (T. 15)**. Once Respondent figured out what he believes his wife was doing with the mail, his practice has been going "very well." **App. 99 (T. 15)**. Respondent has taken measures to safeguard his mail. **App. 99 (T. 15), 100 (T. 17)**.

The disciplinary hearing panel issued its decision on March 3, 2010. The panel adopted the stipulation of facts and approved the parties' recommendation of public reprimand. **App. 105-06**. Disciplinary counsel filed an acceptance of the decision with the Court on April 20, 2010. The Court rejected the proposed discipline and activated a briefing schedule in an order dated May 25, 2010.

As of June 22, 2010, the Missouri Bar advises that Respondent is current in completing and reporting the accredited programs and activities required by Rule 15.

POINT RELIED ON

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT BECAUSE HE NEGLIGENTLY VIOLATED DUTIES HE OWES TO THE PROFESSION IN THAT OVER A THIRTEEN YEAR PERIOD HE PERENNIALLY FAILED TO COMPLETE AND REPORT THE CREDIT HOURS REQUIRED BY THE CONTINUING LEGAL EDUCATION RULE (RULE 15).

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

In re Shelhorse, 147 S.W.3d 79 (Mo. banc 2004)

Rule 4-5.5 (e)

Rule 4-8.1 (b) (now (c))

Rule 6.05 (c)

Rule 15

Rule 15.06(f)

ARGUMENT

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT BECAUSE HE NEGLIGENTLY VIOLATED DUTIES HE OWES TO THE PROFESSION IN THAT OVER A THIRTEEN YEAR PERIOD HE PERENNIALLY FAILED TO COMPLETE AND REPORT THE CREDIT HOURS REQUIRED BY THE CONTINUING LEGAL EDUCATION RULE (RULE 15).

The gravamen of Mr. England's disciplinary case is his failure to maintain compliance with the continuing legal education rule. His failure to do so is antecedent to the other ethical issues in the case, i.e., practicing law while his license was administratively suspended (Rules 4-5.5 (e), 4-8.4 (c), and 6.05 (c)) and failing to take advantage of the opportunity afforded by the diversion agreement (Rule 4-8.1(b) (now (c)).

The sanction that disciplinary authorities and Respondent agreed to recommend to the disciplinary hearing panel, which the panel subsequently agreed to recommend to the Court, is a public reprimand. The Court rejected the proposed sanction. This brief will, accordingly, address only the issue of the appropriateness of a public reprimand as a sanction for Mr. England's acknowledged violation of Rules 15, 4-5.5 (e), 4-8.4 (c), 4-8.1 (b) (now (c)), 6.05 (c), and, on a related issue, 6.01(a) (late payment of enrollment fee for two years).

Sanction analysis starts with reference to the ABA Standards for Imposing Lawyer Sanctions (1991 ed). The ABA published the Standards to provide a model that "sets forth a comprehensive system of sanctions, but which leaves room for flexibility and creativity in assigning sanctions. . . . The standards are designed to promote thorough, rational consideration of all factors relevant to imposing a sanction in an individual case." Preface to ABA Standards for Imposing Lawyer Discipline at 1 (1991 ed.).

The "thorough rational consideration" contemplated by the Standards follows a model that 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?

The heart of Respondent's ethical problems is his history of failing to comply with the Court's continuing legal education rule. Rule 15's purpose is to assist attorneys in maintaining the highest possible standards of competence and to stay abreast of legal trends. By failing to maintain compliance, Mr. England violated a duty owed primarily to the profession. The Standards identify duties owed to the profession as those that "do not concern the lawyer's basic responsibilities in representing clients, serving as an officer of the Court, or maintaining the public trust, but include other duties relating to the profession." ABA Standards

Theoretical Framework at 5. While an attorney's continuing competence ultimately impacts clients, a CLE-compliance problem does not directly violate the duty owed to clients, which the Standards recognize as the most important of a lawyer's ethical duties. Rather, failure to maintain CLE compliance is violation of a duty owed the profession, encompassed in the Standards by sanction rule 7.0.

The second area of inquiry suggested by the ABA model is perhaps the most inscrutable. What was Mr. England's mental state as the years rolled by and he continued to practice law when not in compliance with the rules governing regulation of the profession? Was his conduct knowing or the result of negligence? Knowing conduct tends to fall in the suspension sanction range, whereas negligent conduct tends to fall within the range of public reprimand. Compare Standard Rules 7.2 and 7.3.

Mr. England told the disciplinary hearing panel that he was attempting to comply with Rule 15's reporting requirements throughout his years of non-compliance. He testified that unbeknownst to him his wife may have been intercepting his mail, thereby thwarting his efforts. The panel, we may assume, found his explanation credible, because the panel agreed to recommend a public reprimand to the Court. The disciplinary office's special representative, who interacted with Respondent over many years in an effort to resolve Mr. England's disciplinary problems, signed off on a stipulation recommending a public reprimand, evidencing some confidence that Respondent's conduct was not knowing or intentional. Additionally, the fact that Respondent was able to file

nearly all the reports necessary to bring himself into compliance within a two week period after the diversion agreement terminated is an indication that Respondent had attended the necessary programs, but had not reported them as the Rule requires. In a lawyer discipline case, however, this Court makes its own determination of the credibility of witnesses. *In re Coleman,* 295 S.W. 3d 857, 863 (Mo. banc 2009). If, then, the Court concludes that Respondent knowingly or intentionally failed to bring himself into compliance, then a public reprimand may not be an appropriate sanction.

The third area of inquiry is the extent of actual or potential harm attributable to the misconduct. The only evidence of monetary client harm discernible from the joint stipulation is the recitation of the fact that Respondent required Ms. Anderson to pay him a $3,000.00 "nonrefundable" fee in a personal injury case that he agreed to handle on a contingency fee basis. She subsequently discharged him and demanded return of the $3,000.00. The stipulation is silent as to whether Respondent had done sufficient work to earn all or part of the $3,000.00 or whether any of the money was, in fact, refunded to the client. Cf. Supreme Court Advisory Committee Formal Opinion 128 – Nonrefundable Fees (2010).

Mr. England's misconduct presents a different sort of injury to the legal profession. Harm to the integrity of the profession, it may be safely assumed, occurs whenever an individual not properly licensed to practice law does so. Additionally, the time and money expended by the bar, disciplinary authorities,

and now the Court, in urging Respondent into his current state of compliance should be considered in the injury analysis.

The last leg of the ABA's sanctions analysis model is consideration of aggravating and mitigating factors. The stipulation acknowledges the presence of two aggravating factors in this case, i.e., pattern of misconduct and obstruction of disciplinary process, along with the evidence that supports each factor. The mitigating factors stipulated to by the parties are Respondent's cooperative attitude (evidenced by entering into the stipulation and acknowledging some misconduct in his answer), remorsefulness and personal or emotional problems that resulted in some of the misconduct. Respondent elaborated on his remorse at the disciplinary hearing. **App. 99 (T. 13-14).**

Public reprimand is an appropriate sanction after thoughtful and thorough consideration of the foregoing questions. The relevant Standard Rule, 7.3, reads as follows:

> Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system.

The Court's case of *In re Shelhorse*, 147 S.W. 3d 79 (Mo. banc 2004), provides additional support for the parties' recommendation. In that case, like this one, the Respondent failed to comply with Rule 15 for multiple, consecutive reporting periods. In that case, like this one, Respondent repeatedly failed to respond to inquiries and efforts

by disciplinary authorities to bring him into compliance. While there is arguably some client harm discernible in this case, in contrast to Shelhorse, where none was apparent, it must also be pointed out that, unlike Mr. Shelhorse at the time of his Supreme Court case, Mr. England has finally brought himself into compliance with Rule 15 and is in good standing with respect to the annual enrollment fees. These facts are significant to OCDC's evaluation of the case.

CONCLUSION

Respondent England has, repeatedly, failed to maintain compliance with Rule 15, and has, consequently, violated Rules 4-5.5 (e), 4-8.1 (c), 4-8.4 (c), 6.05 (c), and 15.06. Respondent is, however, currently in compliance with the Rules regulating fees and continuing legal education and purports to have identified and remedied the issues the contributed to his past compliance failures. Public reprimand is an appropriate sanction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2010, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

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_____
Sharon K. Weedin

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 3,259 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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