

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

JAY R. YORKE,

Respondent.

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Supreme Court #SC93329

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by this Court's inherent authority to regulate the practice of law, Supreme Court Rule 5, this Court's common law, and Section 484.040 R.S.Mo. 2000.

STATEMENT OF FACTS

Respondent Jay Yorke has been licensed to practice law in Missouri for twenty-seven (27) years. (App. 38.) Mr. Yorke has been the subject of prior discipline: Mr. Yorke was issued an admonition on December 9, 2009, for violation of Rules 4-1.3 (diligence) and 4-1.4 (communication). (App. 39.) The prior December 9, 2009, admonition was for lack of diligence by failing to timely file a lawsuit within the applicable statute of limitation and failure to communicate with his client. (App. 39.)

Mr. Yorke is a solo practitioner in Dexter, Missouri. (App. 38.) Mr. Yorke has been diagnosed, by his treating mental health professional, with generalized attention deficit hyperactivity disorder, anxiety disorder not otherwise specified, and probable personality disorder. (App. 39.) Mr. Yorke filed a copy of his treating mental health professionals' records, separately, under seal.

DISCIPLINARY COMPLAINTS AGAINST MR. YORKE

Informant determined that there was probable cause to believe that Mr. Yorke had violated the Rules of Professional Conduct in four of the matters opened in 2009, 2011 and 2012. The parties agreed to enter into a stipulation with recommended discipline. The stipulated facts and rule violations are set forth below.

COUNT I of Information

Easter LaRue Complaint -- File No. 09-2388

On November 22, 2004, Mr. Yorke agreed to represent Easter LaRue in her claims arising from an automobile accident that occurred on November 18, 2004. (App. 39.) Ms. LaRue asserted a property damage claim and a claim for personal injury. (App. 39.)

Mr. Yorke resolved Ms. LaRue's claim for property damages in 2005, but not her claim for personal injury. (App. 39.)

The statute of limitations for personal injury actions is five years. Mo. Rev. Stat. § 516.120(4). (App. 39-40.) Ms. LaRue periodically asked Mr. Yorke for updates on her personal injury claim. Mr. Yorke failed to return phone calls from Ms. LaRue. (App. 40.) When Mr. Yorke last spoke to Ms. LaRue, he told her he would "push her claim forward." (App. 40.)

The statute of limitations ran with regard to Ms. LaRue's accident on November 18, 2009. (App. 40.) Mr. Yorke did not file suit or otherwise resolve Ms. LaRue's claim for personal injuries before the statute of limitations ran. (App. 40.)

Informant and Mr. Yorke agree that:

1. Rule 4-1.3 requires an attorney to act with reasonable diligence and promptness in representing a client. Mr. Yorke violated Rule 4-1.3 when he failed to timely file suit or otherwise resolve Ms. LaRue's personal injury action before the statute of limitations expired. (App. 54.)

2. Rule 4-1.4 provides that a lawyer shall keep a client reasonably informed about the status of a matter. Mr. Yorke violated Rule 4-1.4 when he failed to respond to phone calls from Ms. LaRue and when he failed to keep Ms. LaRue apprised of the status of her cases. (App. 54.)

3. Rule 4-3.2 provides that a lawyer shall use reasonable efforts to expedite litigation consistent with the interests of the client. Mr. Yorke violated Rule 4-3.2 when

he failed to timely file suit or otherwise resolve Ms. LaRue's personal injury action before the statute of limitations expired. (App. 54.)

COUNT II of Information

Thressia Simmons and Albert Simmons Complaint -- File No. 11-165

On August 20, 2008, Mr. Yorke agreed to represent Thressia Simmons in a medical malpractice claim arising from a November 15, 2007 surgery. (App. 40.) He also agreed to represent Albert Simmons in a claim for loss of consortium arising from the injury to his wife, Thressia Simmons. (App. 40.)

Mrs. Simmons periodically asked Mr. Yorke for updates on her medical malpractice claim. Mr. Yorke failed to return phone calls from Mrs. Simmons. (App. 41.) When Mr. Yorke last spoke to Mrs. Simmons, he told her she had a "real good case." (App. 41.)

The statute of limitations for medical malpractice actions is two years. Mo. Rev. Stat. § 516.105. (App. 40.) The statute of limitations applicable to Mr. Simmons' loss of consortium claim is two years as his claim is derivative of Mrs. Simmons' claim. (App. 40.) The statute of limitations ran with regard to Mrs. Simmons' medical malpractice claim and Mr. Simmons' loss of consortium claim on or before November 27, 2009. (App. 41.) Mr. Yorke did not file suit or otherwise resolve Mrs. Simmons' claim for medical malpractice before the statute of limitations ran. (App. 41.) Mr. Yorke did not file suit or otherwise resolve Mr. Simmons' claim for loss of consortium before the statute of limitations ran. (App. 41.)

Informant and Mr. Yorke agree that:

1. Rule 4-1.3 requires an attorney to act with reasonable diligence and promptness in representing a client. Mr. Yorke violated Rule 4-1.3 when he failed to timely file suit or otherwise resolve Mrs. Simmons' medical malpractice claim and Mr. Simmons' loss of consortium claim before the statute of limitations expired. (App. 54.)

2. Rule 4-1.4 provides that a lawyer shall keep a client reasonably informed about the status of a matter. Mr. Yorke violated Rule 4-1.4 when he failed to respond to phone calls from Mr. and Mrs. Simmons and when he failed to keep Mr. and Mrs. Simmons apprised of the status of their case. (App. 55.)

3. Rule 4-3.2 provides that a lawyer shall use reasonable efforts to expedite litigation consistent with the interests of the client. Mr. Yorke violated Rule 4-3.2 when he failed to timely file suit or otherwise resolve Mr. and Mrs. Simmons' claims before the statute of limitations expired. (App. 55.)

COUNT III of Information

OCDC Complaint – File No. 11-883

Informant received a report regarding Mr. Yorke's conduct representing clients seeking social security disability benefits in the United States District Court, Eastern District of Missouri. Mr. Yorke's clients referenced in Count III of the Information did not file complaints with Informant.

In *Diebold v. Astrue, Commissioner of the Social Security Administration*, Case No. 1:10CV00082AGF, Mr. Yorke represented Plaintiff Diebold. (App. 41.) A brief in support of Ms. Diebold's claim was due on August 20, 2010. (App. 41.) On March 9, 2011, noting that no brief had been filed and no extension requested, the court issued an

Order to Show Cause “why the case should not be dismissed without prejudice for failure to prosecute.” (App. 41.)

On April 19, 2011, Jim Woodward, Clerk of Court for the United States District Court, Eastern District of Missouri, telephoned Mr. Yorke two times, and referenced Ms. Diebold in the message he left requesting Mr. Yorke to return his call. (App. 42.) Mr. Yorke did not return Mr. Woodward’s phone call. (App. 42.) On April 19, 2011, Mr. Woodward sent Mr. Yorke an e-mail stating: “I am contacting you at the request of Judge Audrey Fleissig concerning your failure to respond to the court’s order to show cause in [*Diebold*]. The order was dated March 9, 2011. Please call me as soon as possible.” (App. 42.) Mr. Yorke did not respond to Mr. Woodward’s e-mail with a responding e-mail, and he did not call Mr. Woodward as he had requested. (App. 42.)

In her April 21, 2011 Order of Dismissal, Judge Fleissig detailed that nothing had been filed since the Order to Show Cause, and that the Clerk of the Court had left two telephone messages and sent one e-mail to Mr. Yorke requesting that he contact the Court regarding the Order to show cause, but Mr. Yorke had not responded. Judge Fleissig dismissed the case without prejudice “for failure to prosecute and failure to respond to Court orders.” (App. 42.)

Mr. Yorke did not communicate with Ms. Diebold regarding the deadlines he missed, the show cause order, or the dismissal of her Case No. 1:10CV00082AGF. (App. 42.)

In *Stroud v. Astrue, Commissioner of the Social Security Administration*, Case No. 4:09CV00547FRB, Mr. Yorke represented Plaintiff Stroud. (App. 42.) The brief in

support of Mr. Stroud's complaint was due on or about September 15, 2009. On January 10, 2010, Mr. Yorke requested a 90-day extension of time to file the brief in support of Mr. Stroud's claim. He was granted an extension to April 12, 2010, but Magistrate Buckles noted that no further extensions would be granted. (App. 43.) Mr. Yorke did not file a brief on behalf of Plaintiff Stroud by April 12, 2010. (App. 43.) On June 25, 2010, Magistrate Buckles issued his Order to show cause why the matter should not be dismissed "due to his failure to prosecute his case." Magistrate Buckles further stated: "Plaintiff is cautioned that failure to comply with this Order may result in the imposition of sanctions, including the dismissal of this matter with prejudice." (App. 43.)

In a document dated May 17, 2010, but not filed until June 30, 2010, Mr. Yorke filed a "Motion for Voluntary Dismissal" with prejudice. (App. 43.) Again, on July 6, 2010, Mr. Yorke filed a Motion for Voluntary Dismissal with prejudice. (App. 43.) On July 7, 2010, the court dismissed Mr. Stroud's cause with prejudice. (App. 43.)

In *Dana Sheryl Swiney v. Astrue, Commissioner of the Social Security Administration*, Case No. 1:09CV122CDP, Mr. Yorke represented plaintiff Swiney. (App. 43.) On January 12, 2010, Mr. Yorke requested a 90-day extension of time to file the brief in support of Ms. Swiney's complaint. (App. 43.) The Court denied Mr. Yorke's motion for a 90-day extension, but granted a 30-day extension. (App. 43.)

On February 12, 2010, Mr. Yorke filed another Motion for Extension of Time wherein he stated his "caseload has been overwhelming and which has been exacerbated by multiple personal and business circumstances." (App. 44.) The Court granted a 30-day extension. (App. 44.) On April 7, 2010, with no brief yet filed, Judge Perry issued

an Order stating that plaintiff Swiney must file a brief in support of her complaint no later than April 21, 2010. “Failure to comply with this order may result in dismissal of plaintiff’s case with prejudice.” (App. 44.) On June 15, 2010, still with no brief filed, Judge Perry issued an order that plaintiff “show cause, in writing and no later than June 21, 2010, why the Court should not dismiss this case.” (App. 44.)

On June 21, 2010, Mr. Yorke filed a Motion for Voluntary Dismissal Without Prejudice wherein he stated: “Due to said attorney’s overwhelming professional and personal obligations, he is unable to comply with this court’s Order of 6/15/10.” He further stated: “Plaintiff would incur prejudicial and undue harm through no fault of her own if this Motion denied.” (App. 44.) The Court granted the motion and dismissed Ms. Swiney’s case without prejudice. (App. 44.)

Mr. Yorke did not communicate with Ms. Swiney regarding the deadlines he missed, the show cause order, or the dismissal of her Case No. 1:09CV122CDP. (App. 44.)

In *Spradling v. Astrue, Commissioner of the Social Security Administration*, Case No. 1:09CV00128ERW, Mr. Yorke represented Plaintiff Spradling. (App. 44.) The brief in support of Ms. Spradling’s complaint initially was due December 23, 2009. (App. 45.) On January 12, 2010, Mr. Yorke filed a motion requesting a 90-day extension of time in which to file the brief in support of the plaintiff’s complaint. (App. 45.) Magistrate Fleissig noted in her January 12, 2010 Order that the brief already was overdue and denied the 90-day extension. She granted a 45-day extension to February 26, 2010. (App. 45.)

On March 8, 2010, Magistrate Fleissig issued an Order to Show Cause noting that the brief had not been filed and additional time had not been requested. The Order provided that the plaintiff would have until March 18, 2010 to show cause why her complaint “should not be dismissed for failure to prosecute and failure to comply with this Court’s scheduling orders.” (App. 45.) On March 19, 2010, Magistrate Fleissig issued her Report and Recommendation of United States Magistrate Judge in which she detailed the missed deadlines, including the plaintiff’s failure to respond to the show cause order, and recommended that the plaintiff’s complaint be dismissed without prejudice for failure to prosecute and failure to comply with this Court’s orders. The parties were provided 14 days to file written objections to Magistrate Fleissig’s recommendation. (App. 45.) On April 16, 2010, noting that no objections had been filed regarding Magistrate Fleissig’s recommendation, Judge E. Richard Webber dismissed Plaintiff Spradling’s complaint “without prejudice for failure to prosecute and failure to comply with scheduling orders.” (App. 45.)

Mr. Yorke did not communicate with Ms. Spradling regarding the deadlines he missed, the show cause order, or the dismissal of her Case No. 1:09CV00128ERW. (App. 46.)

In *Segers-Backus v. Astrue, Commissioner of the Social Security Administration*, Case No. 1:08CV00154AGF, Mr. Yorke represented plaintiff Segers-Backus. (App. 46.) The brief in support of Ms. Segers-Backus’ complaint was due February 9, 2009. (App. 46.) On February 26, 2009, Mr. Yorke filed a Motion for Extension of Time requesting an additional 60 days to submit the brief. (App. 46.) Magistrate Fleissig granted the

motion making the due date April 27, 2009, but stating: “No further extension of time shall be granted.” (App. 46.)

On May 4, 2009¹, Magistrate Fleissig issued an order noting that no brief had been filed and additional time had not been requested. She ordered Plaintiff to show cause by May 8, 2009 why her complaint “should not be dismissed for failure to prosecute and failure to comply with this Court’s scheduling orders.” (App. 46.) On May 13, 2009, noting that Plaintiff did not respond to the Court’s show cause order, Magistrate Fleissig issued an order dismissing Plaintiff Segers-Backus’ complaint for failure to prosecute and to comply with Court orders. (App. 46.)

Mr. Yorke did not communicate with Ms. Segers-Backus regarding the deadlines he missed, the show cause order, or the dismissal of her Case No. 1:08CV00154AGF. (App. 46.)

In *Scott v. Astrue, Commissioner of the Social Security Administration*, Case No. 1:08CV00145AGF, Mr. Yorke represented Plaintiff Scott. (App. 47.) The brief in support of Plaintiff Scott’s complaint was due January 21, 2009. (App. 47.) On June 23, 2009, Mr. Yorke filed a Motion for Extension of Time requesting a 60-day extension of time to file the brief. (App. 47.) By Order dated June 24, 2009, Magistrate Fleissig

¹ In both the Information and the Stipulation, this date erroneously was entered as May 9, 2009. Reference to the court documents clarified the date as May 4, 2009. Counsel for Informant consulted counsel for Mr. Yorke regarding this error and he had no objection to the correction in this brief.

granted Plaintiff's motion and extended the briefing time to August 21, 2009, but noted that the brief already was five months overdue and that no reasons in support of the request were provided. Magistrate Fleissig also provided that no further extensions of time would be granted. (App. 47.)

On August 25, 2009, Magistrate Fleissig issued a Show Cause Order because Plaintiff still had not filed the brief. Plaintiff was ordered to show cause by September 2, 2009 why her case should not be dismissed without prejudice for failure to prosecute. (App. 47.) On September 2, 2009, Mr. Yorke filed another Motion for Extension of Time requesting an additional 60 days to file the brief in support of Plaintiff Scott's complaint. Mr. Yorke stated that he had been unable to access the electronic case filing system or PACER and that before August 25, 2009 he had not been properly notified of filings and orders in the case. (App. 47.) On September 3, 2009, Magistrate Fleissig denied Plaintiff Scott's request for an additional 60 days, but granted a 40-day extension to October 13, 2009. Magistrate Fleissig noted that Plaintiff had requested the August 21, 2009 deadline, so she should have anticipated filing it by that date. (App. 47-48.)

On October 13, 2009, Mr. Yorke filed a Motion for Voluntary Dismissal Without Prejudice. In that motion, Mr. Yorke wrote: "Due to said attorney's overwhelming professional and personal obligations, he is unable to comply with this court's Order of 9/3/2009." He also wrote that Plaintiff Scott had "expressed dissatisfaction with [his] representation in this matter and wishes to explore obtaining another attorney to represent her..." He also wrote: "Plaintiff would incur prejudicial and undue harm through no fault of her own if this Motion is denied." (App. 48.) On October 20, 2009, Magistrate

Fleissig issued a Memorandum and Order allowing Plaintiff to November 2, 2009 to obtain new counsel and that said new counsel “must be prepared to proceed with the case expeditiously.” Magistrate Fleissig further ordered that if no substitute counsel had filed an appearance on behalf of Plaintiff Scott by November 2, 2009, that the Court would hold a hearing on November 5, 2009 at which counsel for the parties and Plaintiff Scott “shall attend. At the hearing, the Court will address the issue of Plaintiff’s representation as well as Plaintiff’s Motion to Dismiss.” (App. 48.)

On November 5, 2009, Magistrate Fleissig issued an Order following a conference with counsel in which Mr. Yorke “stated his belief that Plaintiff did not wish to proceed with the case pro se,” and that he would be able to file the brief by December 4, 2009. Magistrate Fleissig ordered that Plaintiff would have until December 4, 2009 to file the brief. Magistrate Fleissig also ordered Mr. Yorke to provide Plaintiff Scott with a copy of her Order and to file a notice with the Court, signed by Plaintiff, acknowledging that she had received a copy of the Order and that she wished to have Mr. Yorke continue to represent her and to file the brief on her behalf. (App. 48-49.) Mr. Yorke filed the brief on December 4, 2009. (App. 49.)

In *H. v. Barnhart, Commissioner of the Social Security Administration*, Case No. 1:05CV00143JCH-TIA, Mr. Yorke represented J. H. by next friend Susan Hare. (App. 49.) The brief in support of Plaintiff H.’s Complaint was due February 8, 2006. (App. 49.) On February 1, 2006, Mr. Yorke filed a Motion to File Brief Out of Time requesting a 60-day extension of time. (App. 49.) The Court granted the motion, making the due date April 3, 2006. (App. 49.)

On May 10, 2006, the Court entered an Order noting that Plaintiff H. had yet to file her brief and ordering “that Plaintiff shall file her Brief in Support of the Complaint no later than June 5, 2006. Failure to timely respond to this Order may result in the dismissal of the cause for failure to prosecute and failure to comply with Orders of the Court.” (App. 49.) On May 26, 2006, Mr. Yorke filed a Motion for Additional Time to File Brief requesting an additional 60 days to file. (App. 49.) On July 31, 2006, Mr. Yorke filed a Motion to Dismiss Without Prejudice. (App. 49.) By Order dated October 19, 2006, the Court granted Plaintiff H.’s Motion to Dismiss Without Prejudice. (App. 49.)

Informant and Mr. Yorke agree that:

1. Rule 4-1.3 requires an attorney to act with reasonable diligence and promptness in representing a client. Mr. Yorke violated Rule 4-1.3 when he missed filing deadlines, requested repeated extensions of time, and otherwise failed to timely file pleadings on behalf of his clients Diebold, Stroud, Seger-Backus, Swiney, J.H. by Susan Hare, Spradling, and Scott. (App. 55.)

2. Rule 4-1.4 provides that a lawyer shall keep the client reasonably informed about the status of the matter and shall promptly comply with reasonable requests for information. Mr. Yorke violated Rule 4-1.4 when he failed to apprise his clients of the rulings of the court and of his failure to comply with court orders. (App. 55.)

3. Rule 4-8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Mr. Yorke violated

Rule 4-8.4(d) when he missed deadlines, sought numerous extensions of time, failed to comply with and/or respond to court orders, and failed to respond to the Court Clerk's phone messages or email message. (App. 55-56.)

COUNT IV of Information

Terry and Nancy Baugus Complaint -- File No. 12-1472

On or about March 25, 2008, Mr. Yorke agreed to represent Nancy Baugus in a premises liability action arising from Mrs. Baugus' October 13, 2006 fall in a Wal-Mart store. (App. 50.) Mrs. Baugus asserted a personal injury claim and her husband Terry Baugus asserted a claim for loss of consortium arising from Mrs. Baugus' injury. (App. 50.) Mr. Yorke filed suit on behalf of Mr. and Mrs. Baugus on October 12, 2011, in the Circuit Court of Butler County, State of Missouri. (App. 50.) Only Mr. Yorke entered his appearance as counsel for Mr. and Mrs. Baugus. (App. 50.)

On or about November 14, 2011, Wal-Mart removed Mr. and Mrs. Baugus' lawsuit to The United States District Court, Eastern District of Missouri, Southeastern Division. (App. 50.) On or about February 1, 2012, Wal-Mart served its First Interrogatories and First Requests for Production to Mr. Yorke on Mr. and Mrs. Baugus by mailing same to Mr. Yorke. (App. 50.) No responses were provided by Mr. Yorke on behalf of his clients Mr. and Mrs. Baugus to the interrogatories or requests for production within 30 days per Rules 57.01(c)(1) and 58.01(c)(1). (App. 50.)

On or about March 26, 2012, Wal-Mart's counsel sent a letter in good faith to Mr. Yorke asking that the discovery be answered and otherwise attempting to resolve the failure to respond. (App. 51.) Mr. Yorke did not respond to the March 26, 2012, letter.

(App. 51.) Mr. Yorke did not communicate to the Bauguses that he had received a letter stating that their discovery responses were late and again requesting those responses. (App. 51.)

On or about April 10, 2012, Wal-Mart filed a motion to compel Mr. Yorke's clients to respond to the discovery that had been served on or about February 1, 2012. (App. 51.) Mr. Yorke did not file a response to the motion to compel on behalf of Mr. and Mrs. Baugus. (App. 51.) Mr. Yorke did not communicate to the Bauguses that Wal-Mart had filed a motion to compel their responses to the February 1, 2012 discovery requests, nor did he communicate the contents of that motion to them. (App. 51.)

On or about May 3, 2012, Wal-Mart filed Defendant's Application for Order to Show Cause and Motion for Appropriate Sanctions stating that Mr. Yorke still had not responded in any way to the discovery served, the golden rule letter, or the motion to compel, and requesting the Court to order the plaintiffs, Mr. and Mrs. Baugus, to show cause as to "why sanctions should not be entered against them, including striking of Plaintiff's Petition, and/or dismissal of the action without prejudice." (App. 51.) Mr. Yorke did not respond in any way to Wal-Mart's Application for Order to Show Cause on behalf of Mr. and Mrs. Baugus. (App. 51.)

Mr. Yorke did not communicate to his clients, the Bauguses, that Wal-Mart had filed Defendant's Application for Order to Show Cause and Motion for Appropriate Sanctions, nor had he otherwise communicated to the Bauguses the contents of such application. (App. 52.)

On or about May 3, 2012, Wal-Mart filed a Motion for Physical Examination of Mrs. Baugus, and served the motion on Mr. Yorke. (App. 52.) Mr. Yorke did not communicate to Mr. and Mrs. Baugus that Wal-Mart had filed a Motion for Physical Examination of Mrs. Baugus. (App. 52.)

On or about May 7, 2012, Mr. Yorke called the Bauguses and asked them to come to his office to answer discovery requests from Wal-Mart. (App. 52.) On or about May 7, 2012, Terry Baugus drove to Mr. Yorke's office in Dexter, Missouri, from his home in Fairdealing, Missouri, and was given a copy of the interrogatories to answer. (App. 52.)

On May 15, 2012, the Court entered its order granting Wal-Mart's motion to compel and ordering the plaintiffs Baugus to serve Wal-Mart with their responses to Wal-Mart's first interrogatories and first request for production of documents by May 25, 2012. (App. 52.) In its May 15, 2012, order, the Court also ordered the plaintiffs Baugus to "promptly notify the Court when they ha[d] complied with th[e] order." (App. 52.) In its May 15, 2012, order, the Court also stated: "Failure to comply may result in sanctions, including dismissal of this action and payment of defendant's attorney fees associated with its motion to compel." (App. 52.) Mr. Yorke did not communicate to the plaintiffs Baugus that the Court had issued its May 15, 2012, order, nor did he communicate the information in that order. (App. 53.)

On or about May 24, 2012, Terry Baugus hand-delivered the Bauguses' responses to the interrogatories to an assistant in Mr. Yorke's office. (App. 53.) Mr. Yorke did not contact the Bauguses further regarding discovery requests from Wal-Mart. (App. 53.)

Mr. Yorke did not serve Wal-Mart with the Baugus' interrogatory and/or request for production responses. (App. 53.)

On or about May 29, 2012, Wal-Mart filed Defendant Wal-Mart Stores, Inc.'s Motion for Dismissal without Prejudice requesting that the plaintiffs be sanctioned for failing to respond to the discovery requests and failure to comply with the Court's order "by way of dismissal of the present action without prejudice." (App. 53.) Mr. Yorke, on behalf of the plaintiffs Baugus, did not respond to the motion for dismissal without prejudice. (App. 53.) Mr. Yorke did not communicate to his clients, the Bauguses, that Wal-Mart had filed a motion for dismissal without prejudice of their lawsuit. (App. 53.)

On June 15, 2012, the Court issued its order dismissing the Bauguses' lawsuit without prejudice. (App. 53.) Mr. Yorke informed Mr. and Mrs. Baugus by letter dated August 23, 2012, that their case had been dismissed. (App. 53.) After receiving the August 23, 2012 letter, Mr. Baugus called Mr. Yorke, spoke to one of his assistants, and asked for their case file. (App. 53.)

Informant and Mr. Yorke agree that:

1. Rule 4-1.3 requires an attorney to act with reasonable diligence and promptness in representing a client. Mr. Yorke violated Rule 4-1.3 when he missed deadlines and failed to respond to or comply with Court orders. Mr. Yorke violated Rule 4-1.3 when he failed to timely communicate with Wal-Mart's claim representative, to timely file suit or otherwise resolve Mr. and Mrs. Baugus' claims, and to comply with court-ordered deadlines and other court orders. (App. 56.)

2. Rule 4-1.4 provides that a lawyer shall keep the client reasonably informed about the status of the matter and shall promptly comply with reasonable requests for information. Mr. Yorke violated Rule 4-1.4 when he failed to respond to phone calls from Mr. and Mrs. Baugus and when he failed to keep Mr. and Mrs. Baugus apprised of the status of their case. (App. 56.)

3. Rule 4-3.2 provides that a lawyer shall use reasonable efforts to expedite litigation consistent with the interests of the client. Mr. Yorke violated Rule 4-3.2 when he failed to respond to correspondence and phone messages left for him by Wal-Mart's claim representative and when he failed timely to forward a demand letter regarding the Bauguses' claims. Mr. Yorke violated Rule 4-3.2 when he missed deadlines and failed to respond to or comply with Court orders. (App. 56.)

Stipulation as to Aggravating and Mitigating Factors

The parties also agreed and stipulated that the following were aggravating and mitigating factors to be considered in deciding the appropriate level of discipline:

Aggravating Factors

1. Mr. Yorke has a prior disciplinary history of similar conduct. Mr. Yorke was issued an admonition on December 9, 2009, for lack of diligence by failing to timely file a lawsuit within the applicable statute of limitation and failure to communicate with his client. ABA Standard § 9.22(a). (App. 57.)

2. There is a pattern of misconduct. ABA Standard § 9.22(c). (App. 57.)

3. There are multiple offenses. ABA Standard § 9.22(d). (App. 57.)

Mitigating Factors

1. When Mr. Yorke appeared before Informant's staff he admitted wrongdoing. ABA Standard § 9.32(e). (App. 57.)
2. At the time of the misconduct, Mr. Yorke was suffering from attention deficit hyperactivity disorder, anxiety disorder not otherwise specified, which appeared to be a significant contributing cause of the misconduct. Mr. Yorke is undergoing treatment for his conditions and his treating physician believes he is much improved. ABA Standard § 9.32(c). (App. 57.)
3. Mr. Yorke is remorseful for his actions and acknowledges that he did not handle the situations in an appropriate manner. ABA Standard § 9.32(l). (App. 57.)

Stipulated Terms of Discipline

The parties also stipulated to terms of discipline, contingent upon this Court's approval. The stipulated terms involve a one year stayed suspension with two years' probation, that the costs of this discipline proceeding be assessed against Mr. Yorke, and that Mr. Yorke be assessed the \$1,000 fee for suspensions prescribed in Rule 5.19(h) (2009)². (App. 57-58.)

The proposed conditions of the probation include the standard provisions. (App. 76-84.) In addition, the probation terms require, but are not limited to, Mr. Yorke:

1. attending Informant's Ethics School (App. 79);

² The parties entered into the stipulation in 2012, prior to the January 1, 2013, effective date of the amended Rule 5.19 which prescribes a \$1,500 fee for probation.

2. attending the Solo and Small Firm Conference of the Missouri Bar (App. 79);
3. maintaining malpractice insurance of not less than \$100,000 per occurrence and an aggregate amount of not less than \$300,000 (App. 79);
4. taking and passing the MultiState Professional Responsibility Examination (App. 80);
5. obtaining an independent mental health evaluation by a mental health professional designated by his Probation Monitor (App. 80-82);
6. following the mental health professionals' recommendation for therapy or treatment including attendance at alcoholics anonymous if recommended by the mental health professional (App. 81);
7. providing the names of two individuals who will serve as personal observers of Mr. Yorke's behavior and report to Informant any problems observed (App. 82); and
8. obtaining a mentor (App. 83).

The Disciplinary Hearing Panel's Decision and Proceedings Before This Court

Informant and Mr. Yorke submitted the Stipulation to the appointed Disciplinary Hearing Panel on October 22, 2012. On November 2, 2012, the Presiding Officer of the Disciplinary Hearing Panel informed the parties that the Panel members "concurred in accepting the Joint Stipulations and Recommended Discipline and Probations Terms," and that "[t]he Panel finds no necessity in conducting any hearing." (App. 85.) On February 19, 2013, the Panel issued its decision wherein it accepted the Joint

Recommended Discipline and Terms of Probation and presented its recommendation to the Court for its consideration. (App. 86-87.)

On April 23, 2013, Informant filed a Statement of Acceptance of Disciplinary Hearing Panel Decision with this Court. On June 11, 2013, this Court ordered that this matter be briefed.

POINT RELIED ON

A STAYED SUSPENSION WITH PROBATION IS WARRANTED IN THIS CASE BECAUSE CASE LAW, COURT RULES AND ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUPPORT THIS LEVEL OF DISCIPLINE IN THAT MR. YORKE HAS ENGAGED IN A PATTERN OF CONDUCT WITH RESPECT TO HIS LACK OF DILIGENCE, FAILURE TO COMMUNICATE, FAILURE TO EXPEDITE LITIGATION AND CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BUT HE ACKNOWLEDGES HIS MISCONDUCT AND MENTAL HEALTH ISSUES AND THE PROPOSED PROBATION CONDITIONS ENSURE HIS EVALUATION AND TREATMENT AND PROVIDE A WAY FOR INFORMANT TO CLOSELY MONITOR MR. YORKE'S CONDITION AND ACTIONS.

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

In re Wiles, 107 S.W.3d 228 (Mo. banc 2003)

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

ABA Standards for Imposing Lawyer Sanctions (1992)

Rule 5.225

Rule 5.285

ARGUMENT

A STAYED SUSPENSION WITH PROBATION IS WARRANTED IN THIS CASE BECAUSE CASE LAW, COURT RULES AND ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUPPORT THIS LEVEL OF DISCIPLINE IN THAT MR. YORKE HAS ENGAGED IN A PATTERN OF CONDUCT WITH RESPECT TO HIS LACK OF DILIGENCE, FAILURE TO COMMUNICATE, FAILURE TO EXPEDITE LITIGATION AND CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BUT HE ACKNOWLEDGES HIS MISCONDUCT AND MENTAL HEALTH ISSUES AND THE PROPOSED PROBATION CONDITIONS ENSURE HIS EVALUATION AND TREATMENT AND PROVIDE A WAY FOR INFORMANT TO CLOSELY MONITOR MR. YORKE’S CONDITION AND ACTIONS.

The parties stipulated that Mr. Yorke violated Rules 4-1.3, 4-1.4, 4-3.2, and 4-8.4. The Disciplinary Hearing Panel determined that, based on the stipulations of the parties and the documentation submitted, a hearing was not necessary. (App. 85.) The Disciplinary Hearing Panel “accept[ed] the Joint Recommended Discipline and Terms of Probation,” and presented its recommendation to this Court. (App. 86.)

“The fundamental purpose of an attorney disciplinary proceeding is to ‘protect the public and maintain the integrity of the legal profession.’” *In re Crews*, 159 S.W.3d 355, 360 (Mo. banc 2005), quoting *In re Waldron*, 790 S.W.2d 456, 457 (Mo. banc 1990).

When determining an appropriate penalty for violations of the Rules of Professional Conduct, this Court assesses the gravity of the misconduct, as well as mitigating or aggravating factors that tend to shed light on the respondent's moral and intellectual fitness as an attorney. *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). Since its decision in *In re Storment*, 873 S.W.2d 227 (Mo. banc 1994), this Court consistently has relied on the ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (1992) (“ABA Standards”) “when imposing sanctions to achieve the goals of attorney discipline.” *In re Coleman*, 295 S.W.3d 857, 869 (Mo. banc 2009).

ABA Standards 3.0 provides: “In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors: (a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.” When an attorney commits multiple violations of the Rules of Professional Conduct, “the ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct among the violations.” *In re Ehler*, 319 S.W.3d 442, 451 (Mo. banc 2010), quoting *Coleman*, 295 S.W.3d at 870. “[T]he standards assume that the most important ethical duties are those obligations which a lawyer owes to *clients*.” Section II. Theoretical Framework, ABA Standards (emphasis original).

In this matter, Mr. Yorke’s most serious infraction is his failure to exercise diligence, resulting in the statute of limitations running on two of his clients’ claims. Mr. Yorke failed to timely file Ms. LaRue’s and Mr. and Mrs. Simmons’ claims or otherwise resolve those claims, and the limitations period expired. Mr. Yorke failed to

file Mr. and Mrs. Baugus' claim until the last day of the limitations period and then he failed to meet litigation deadlines and to follow court orders, resulting in the dismissal without prejudice of Mr. and Mrs. Baugus' lawsuit. Further, Mr. Yorke failed to comply with numerous litigation deadlines and court orders in the Social Security Disability cases referenced in Count III of the information and above. ABA Standards 4.42 provides that, with regard to a lack of diligence, absent aggravating or mitigating circumstances, "[s]uspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of negligence and causes injury or potential injury to a client."

Several aggravating and mitigating factors are applicable in this case. Mr. Yorke received an admonition in 2009 for lack of diligence by failing to timely file a lawsuit within the applicable statute of limitation and failure to communicate with his client. (App. 57.) ABA Standards 9.22(a). "Absent aggravating or mitigating circumstances, reprimand is generally appropriate when a lawyer has received an admonition for the same or similar conduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession." *In re Frank*, 885 S.W.2d 328, 333 (Mo. banc 1994), *citing* ABA Standards 8.3(b) (1986).

Other aggravating circumstances include Mr. Yorke's pattern of misconduct, *i.e.*, his repeated failure to act with diligence, and to adequately communicate with his clients, and his repeated conduct prejudicial to the administration of justice. ABA Standards 9.22(c); see also *In re Ehler*, 319 S.W.3d at 451-52. Further, the multiple offense aggravating circumstance is applicable. ABA Standards 9.22(d).

Certain mitigating circumstances also are present. Mr. Yorke admitted wrongdoing, is remorseful for his actions, and, at the time of the misconduct and since, he has had personal and emotional problems resulting from and contributing to attention deficit hyperactivity disorder, anxiety disorder not otherwise specified, and probable underlying personality disorder. ABA Standards 9.32(c), (e), (l).

Although Mr. Yorke plead that he has a mental disorder that is a mitigating factor in this matter (App. 36-37), Mr. Yorke and Informant disagree as to whether Mr. Yorke has met the requirements of Rule 5.285.³ Mr. Yorke contends that his treating psychiatrist is an independent, licensed mental health professional as contemplated by Rule 5.285. (App. 37.) Informant contends that a treating physician cannot be “independent” as contemplated by the Rule since a patient-physician relationship already exists.

Mr. Yorke filed his mental health records in this Court under seal. His current treating psychiatrist has diagnosed him with Attention Deficit Hyperactivity Disorder, Anxiety Disorder, not otherwise specified, and a probable underlying personality

³ Informant suggests Rule 5.285 delineates this Court’s requirements for the mitigating factor in ABA Standards 9.32(i). The ABA Standards 9.32(c) mitigating factor simply references “personal or emotional problems” with no required connection to the misconduct. Through the proposed probation condition requiring Mr. Yorke to obtain an evaluation by an independent, licensed mental health professional, as agreed to by the Probation Monitor (App. 80-82), Informant seeks an additional safeguard.

disorder. Informant believes Mr. Yorke's struggle to manage his ADHD and anxiety is a personal or emotional problem under ABA Standards 9.32(c). Informant does not believe, however, that Mr. Yorke has proven that his mental disorder is a mitigating factor as defined by Rule 5.285(c): "A mental disorder is not a mitigating factor in a disciplinary proceeding unless an independent, licensed mental health professional provides evidence that the mental disorder caused or had a direct and substantial relationship to the professional misconduct. Respondent shall bear the burden of proof that the mental disorder is a mitigating factor."

It is Informant's belief that a stayed suspension with probation is appropriate in this instance because Mr. Yorke acknowledges mental health issues and practice shortcomings, and the proposed disposition includes methods to ensure his evaluation, treatment, education, and monitoring. Rule 5.225(a)(2) provides that a lawyer is eligible for probation if he or she is: (a) unlikely to harm the public during the period of probation and can be adequately supervised, (b) is able to perform legal services and able to practice law without causing the courts or profession to fall into disrepute; and (c) has not committed acts warranting disbarment. Informant believes the two reported decisions in which the Court placed the respondent on probation support placing Mr. Yorke on probation.

In *Coleman*, 295 S.W.3d 857, this Court found that Mr. Coleman had violated multiple Rules of Professional Conduct. He violated Rule 4-1.2 by drafting and having his client execute three contingent fee contracts that contained a provision purporting to give him the "exclusive right to when and for how much to settle" the client's case, and

by further agreeing to settle one of his client's cases in direct contravention of her wishes. *Id.* at 864. He violated Rule 4-1.15(c) by commingling his funds with client funds and by failing to keep adequate trust account records. *Id.* at 866. He violated Rule 4-1.16 by failing to give his client notice that he had filed a motion to withdraw as her attorney and by failing to take "all reasonable steps to mitigate the consequence of his withdrawal ... and protect her interests." *Id.* at 866-67. Additionally, he violated Rule 4-8.4 by wasting judicial resources and engaging in conduct that "negatively impacted the judicial process." *Id.* at 868.

Mr. Coleman had a more extensive disciplinary history than Mr. Yorke. Mr. Coleman had been admonished two times, once for violations involving communication and unreasonable fees, and a second time for diligence and communications violations. The Court also had publicly reprimanded him for "violations regarding diligence, unreasonable fees and conduct prejudicial to the administration of justice." *Id.* at 859.

This Court found that Mr. Coleman's misconduct "arose out of ignorance of the rules ... instead of an intention to violate the rules." *Id.* at 871. The Court found that his misconduct could be remedied by education and supervision, and that his violations made him a proper subject for probation. *Id.* The Court ordered him suspended without leave to reapply for one year, with the suspension stayed and strict probationary terms imposed. *Id.*

In the other reported decision wherein probation was imposed, *Wiles*, 107 S.W.3d 228, Mr. Wiles also had a much more extensive disciplinary history than Mr. Yorke. Mr. Wiles previously had been admonished for four diligence rule violations, five

communication rule violations, one safeguarding client property rule violation, and one violation of the rule against engaging in conduct prejudicial to the administration of justice. *Id.* at 229. Mr. Wiles also had been admonished twice in Kansas. *Id.* The case wherein this Court imposed a stayed suspension with probation, was a reciprocal disciplinary proceeding following a finding of misconduct and imposition of a public censure in Kansas. *Id.* at 228. In the Kansas matter, Mr. Wiles was “disciplined for complaints relating to diligence, communication, fees, safekeeping property and competence.” *Id.* at 228 n. 1.

The Court in *Wiles* determined that Mr. Wiles satisfied all the requirements to be considered eligible for probation. The Court determined that he was “unlikely to harm the public during the period of probation,” stating that although he recently had engaged in conduct “worthy of admonition,” he had practiced for three decades prior “without reported incident.” *Id.* at 229. The Court also determined that Mr. Wiles could be strictly monitored during probation by the OCDC. *Id.*

The Court cited Mr. Wiles “longstanding practice” as evidence that he could perform his duties as an attorney and not “cause the courts or the profession to become the subject of disrepute.” *Id.* Finally, the Court found that Mr. Wiles’ misconduct did not warrant disbarment. *Id.*

Informant believes that Mr. Yorke’s misconduct, similarly, can be remedied with appropriate terms and conditions of probation, and the probation terms proposed are very detailed and designed to educate, rehabilitate, and supervise his activities. Checking the prerequisites to probation in Mr. Yorke’s case, the following is apparent: First, this is not

a case in which disbarment is warranted. Second, because Mr. Yorke's violations do not appear to be intentional, and his prior discipline is not extensive, *i.e.*, one admonition, probation will not cause the courts or profession to fall into disrepute.

Further, Informant believes that Mr. Yorke is unlikely to harm the public during probation and his practice can be adequately supervised. Mr. Yorke practiced law for approximately 24 years before being issued an admonition in 2009. (App. 38.) Informant believes Mr. Yorke has the required abilities to continue his practice and that the proposed conditions of the probation are designed to correct the problems Informant observed with his practice.

One of the probation requirements is that Mr. Yorke obtain an evaluation by an independent, licensed mental health professional, as agreed to by the Probation Monitor, and that Mr. Yorke follow such professional's recommendations. (App. 80-82.) These proposed conditions seek to ensure that Mr. Yorke can better address the stressors which have prevented him from diligently representing his clients, effectively managing his law office practice, and timely complying with court orders and deadlines.

The proposed probation conditions also require Mr. Yorke to obtain a mentor to assist him with his law practice management and organization. (App. 83.) Both the mental health professional and the attorney mentor will report to the Probation Monitor regarding Mr. Yorke's compliance and progress. The terms also include maintaining malpractice insurance and attending Ethics School. (App. 79.) The proposed conditions of probation are designed to provide the Probation Monitor with the information needed

to adequately supervise Mr. Yorke's conduct, and Informant believes Mr. Yorke is unlikely to harm the public during the period of probation.

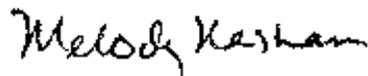
Informant believes that given the nature of Mr. Yorke's misconduct, his level of intent in that misconduct, and the extent of the stipulated conditions in the probation proposal, Mr. Yorke meets the requirements of Rule 5.225, and that probation can be successful.

CONCLUSION

For the reasons stated above, Informant asks the Court to enter an order: finding that Mr. Yorke violated Rules 4-1.3, 4-1.4, 4-3.2, and 4-8.4(d), suspending Mr. Yorke from the practice of law without leave to reapply for one year, with the execution of his suspension stayed, placing Mr. Yorke on probation for two years in accord with the proposed Probation Term and Conditions, assessing the costs of this disciplinary proceeding against Mr. Yorke, and taxing the \$1,000 fee for suspensions.

Respectfully submitted,

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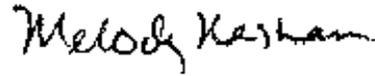
ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2013, a true and correct copy of the foregoing was served via the electronic filing system pursuant to Rule 103.08 on:

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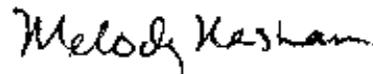
Melody Nashan

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 7,888 words, according to Microsoft Word, which is the word

processing system used to prepare this brief.



Melody Nashan

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