

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

NATHAN JAMES FORCK,

Respondent.

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Supreme Court #SC88961

INFORMANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	3
STATEMENT OF JURISDICTION	4
STATEMENT OF FACTS	5
Poletti – Count I.....	8
Count II.....	9
Count III	11
Key Procedural Developments	12
POINTS RELIED ON.....	15
I.....	15
II.....	16
ARGUMENT	17
I.....	17
Change in Circumstances	17
Procedural Setting	18
II.....	21
Sanction	21
Missouri Probation Cases.....	21
ABA Sanction Standards.....	23
Competence	24

Excessive Fees.....	25
Aggravating Circumstances	27
Mitigating Circumstances.....	27
Rule 5.225.....	28
CONCLUSION	29
CERTIFICATE OF SERVICE	30
CERTIFICATION: RULE 84.06(C)	30

TABLE OF AUTHORITIES

Cases

<i>In re Coleman</i> , 295 S.W.3d 857 (Mo. banc 2009)	16, 22, 23
<i>In re Ehler</i> , 319 S.W.3d 42 (Mo. banc 2010).....	16, 21, 23
<i>In re Wiles</i> , 107 S.W.3d 228 (Mo. banc 2003).....	16, 21, 22

Other Authorities

ABA <u>Standards for Imposing Lawyer Sanctions</u> (1991 ed.).....	16, 21, 24, 27
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Rules

Rule 5.225.....	15, 16, 17, 19, 21, 28
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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

Respondent, Nathan James Forck, graduated in 2001 with an Economics degree from the University of Missouri – St. Louis. He started law school later that year at the University of Missouri – Columbia and finished in 2005, after taking eighteen months off for military service. His service began in 1994, after high school, and continued through college. **App. 122-123.** While in college, law school and the military, Mr. Forck also had a recurring problem with alcohol abuse. **App. 122-124.** He was arrested for DWI in 1999 and 2004. **App. 122-123.** After his second DWI, he attended outpatient alcohol treatment. He was admitted to the bar subject to a monitoring agreement imposed by this Court that he abstain from alcohol use. **App. 124.**

Forck continued drinking after his conditional admission, while he was working with Columbia attorney Joseph Yungwirth. When arrested for domestic assault in May 2007, he admitted that he had been drinking heavily. **App. 8-9.** Sometime that year, Forck stopped drinking. He reports that he is an alcoholic but has not used alcohol since 2007. **App. 124.**

When the Chief Disciplinary Counsel learned of Forck's 2007 alcohol abuse, an Information was filed, alleging that Forck had violated the conditions of his monitoring agreement by his alcohol use and by his failure to report attendance at Alcoholics Anonymous meetings. **App. 6.** That case was resolved when a Disciplinary Hearing Panel and this Court accepted a stipulated disposition, essentially converting the monitoring agreement to a stayed suspension. **App. 5-12.** Respondent Forck was placed on probation pursuant to Rule 5.225. *In re Nathan J. Forck*, SC88961 (Mo. S. Ct. Dec. 7,

2007). **App. 35.** Conditions of that probation included that Forck abstain from alcohol, obtain treatment, submit to random testing, and work with a probation monitor. **App. 29-34.** Respondent remains on probation and subject to the suspension and probation order imposed in Case No. SC88961. **App. 92.**

Mr. Forck's initial law practice upon admission was as an associate of Columbia attorney Joseph Yungwirth. That position grew out of a job Forck started while studying for the bar exam. **App. 124.** Yungwirth had an elder law/estate planning practice, and employed former state benefit specialist Carmen Munford. Forck's first stay with the Yungwirth firm lasted from January 2006 to July 2007. **App. 124.** From early 2008 until early 2009, he engaged in a general practice in Macon, Missouri with Attorney Philip Prewitt.

In 2009, Joseph Yungwirth, Forck's first legal employer, contacted him about taking over a practice that Yungwirth was winding down. Yungwirth's long time employee, former state benefit specialist Carmen Munford, was intending to stay. **App. 93.** Forck and Yungwirth worked out an arrangement to transfer the practice, but never reduced it to a signed writing. Forck operated the firm in Columbia as the Yungwirth Law Firm, Yungwirth and Forck, LLC, and later as the Elder Law Firm; Yungwirth never had any ownership or membership interest in the firms that Forck operated, despite the ownership of both firms shown as 'Yungwirth and Forck, LLC', in records maintained by the Secretary of State. **App. 93.** Yungwirth's elder law practice had a recognizable name in Columbia, among potential clients.

Like Yungwirth before him, Forck marketed his practice toward people with Medicaid issues. **App. 93.** He promoted himself and his firm as experienced in elder law. **App. 37-38.**

Forck was not personally experienced in the practice of elder law at the time he opened his own law firm on April 1, 2009. He did not seek the advice of mentors or experienced practitioners in the field. Forck retained Carmen Munford and the support staff from the predecessor firm of Joseph Yungwirth. Later, in 2009, Forck discharged those staff members and now does all of his legal work, including document preparation, himself.

Forck relied on what he had learned from Yungwirth in practicing elder law. His first recognition that the practices and procedures employed by Yungwirth were either erroneous and/or not ‘best practices’ occurred when the disciplinary complaints were made.

The OCDC has received no complaints regarding Forck on any matters in which Respondent was hired after September of 2009.

In the course of investigation, both the OCDC and Forck’s counsel have consulted with experts in the field of elder law, who have given the opinion that Mr. Forck made mistakes in document drafting and Medicaid eligibility evaluations. The experts concluded that Respondent’s acts were ones that in the future can be corrected by appropriate education and monitoring. **App. 100.**

Poletti – Count I

In August 2009, soon after Forck began his solo practice at Yungwirth and Forck, he was hired by James and Kathy Poletti to represent them with respect to “long-term care planning and an application for Medicaid benefits with the State of Missouri, Family Support Division.” Mr. and Mrs. Poletti paid Forck \$8,030.00. **App. 39, 43, 55, 94.**

When Mr. and Mrs. Poletti made that payment to Forck, they expected that he would be able to prepare estate planning documents so that they could avoid depletion of their resources to pay for Mrs. Poletti’s nursing home expenses.

Nine years earlier, in 2000, Mr. and Mrs. Poletti had estate planning documents prepared by another law firm in Columbia, Missouri; those documents included Wills, Revocable Living Trusts, Powers of Attorney and Health Care Directives. Forck told Mr. and Mrs. Poletti in 2009 that he would prepare new estate planning documents. By the time Forck completed the documents, Mrs. Poletti was no longer competent to execute new documents. She died on February 20, 2010. In the probate application, *In the Estate of Katherine Poletti*, Boone County Case No. 10B7-PR00338, the Last Will and Testament presented to the Probate Court was the other firm’s work, from 2000.

The Katherine Poletti probate estate was either a ‘no asset’ or ‘small asset’ estate, such that a short form probate procedure would have disposed of her assets. Forck advised James Poletti that a full probate estate would be required so that Katherine Poletti’s Medicaid application for her nursing home expenses could proceed. Despite Mr. and Mrs. Poletti having already paid Forck \$8,030.00 for long-term care planning and the application for Medicaid benefits, Forck told Mr. Poletti that he would require an

additional fee of \$2,000.00 for the purpose of opening the estate and having a personal representative appointed in the probate case. Mr. Poletti paid Respondent Forck the \$2,000.00.

A probate estate was opened by Forck on December 10, 2010. He did not, however, fully complete the application, which required Social Security numbers of all heirs; some of the heirs refused to provide their numbers. Mr. Poletti discharged Forck in the spring of 2011 and retained other counsel to process the administration of the probate estate.

Forck was not successful in representing Mr. and Mrs. Poletti in their application for Medicaid benefits for Mrs. Poletti's nursing home stay. And, ultimately, Mr. Poletti paid \$16,000.00 to Parkside Manor Nursing Home for her care.

As a condition of the probation stipulated to in the instant case, Forck has agreed to pay restitution to James Poletti in the amount of \$9,000.00. Since the date of stipulation, he has refunded \$3,700.00 to Mr. Poletti. **App. 112, 115.**

Count II

In February and March of 2009, Larry Charles and Patricia Merrill, the children of Mildred Charles and her deceased husband William Charles, met twice with Joseph Yungwirth at his law office in Columbia, Missouri. They discussed preparing a trust and other estate documents that would allow the assets of Mildred Charles to be sheltered from payment to nursing homes. At that time Mildred Charles was in Marceline Manor Care Center in Marshall, Missouri.

On April 23, 2009, Mr. Charles and Mrs. Merrill went to an appointment at the Yungwirth Law Firm, and were informed that Mr. Yungwirth was no longer practicing law and that Nathan Forck would now represent them. Mr. Forck and Carmen Munford told Mr. Charles and Mrs. Merrill that they would likely be able to protect the property of Mildred Charles so that she could immediately apply for Medicaid benefits for her nursing home expenses. At that meeting, Larry Charles and Patricia Merrill paid \$8,000.00 to the Yungwirth Law Firm.

Respondent Forck prepared a number of documents for signature by Mildred Charles, including an Affidavit that all shares of Charles Farms, Inc., (the family farm), were owned by Larry Charles. Forck also prepared a Quit Claim Deed from Mildred Charles to Larry Charles, quit-claiming all real estate to him. These documents were executed on April 27, 2009.

On September 18, 2009, Forck sent an additional directive to Mildred Charles regarding the re-titling of property to get items out of her name – in case that had not already been done.

Forck, on behalf of Mildred Charles, then filed an application with the State of Missouri for immediate Medicaid benefits. Although the application he prepared was incomplete and inaccurate, Mrs. Charles was initially awarded Medicaid benefits.

Mildred Charles, Patricia Merrill, and Larry Charles discharged Respondent from representation in late 2009 and employed new counsel, Reginald Turnbull. In reviewing the file, Mr. Turnbull discovered that several transfers of property were inaccurately reported or of questionable validity for Medicaid purposes. With his clients' consent, Mr.

Turnbull reported the matter to the State of Missouri Department of Social Services. In response to Turnbull's letter, the State investigated the award of benefits; they determined that Mrs. Charles was not eligible for Medicaid benefits because inappropriate transfers had been made. On August 4, 2011, the State sent a letter to Mrs. Charles denying eligibility and advising that the uncompensated amount before Medicaid eligibility was \$518,393.43. The State also sent a letter dated August 11, 2011, to Mr. Turnbull listing the inappropriate transfers.

As part of the Stipulation, Forck has agreed to pay restitution to the Mildred Charles Trust in the amount of \$8,000.00. Since the date of the stipulation, Forck has refunded \$3,300.00 to Mr. Charles. **App. 112-113.**

Count III

In 2007, Bernadine Anderson hired attorney Joseph Yungwirth to represent her in estate planning. On or about October 30, 2007, Bernadine Anderson executed a document called the Anderson Family Irrevocable Trust Agreement. Named as trustees in the Irrevocable Trust were Joseph Yungwirth, Erica Brandel and Carmen Munford. Brandel and Munford were employees of Joseph Yungwirth's law firm. The estate planning process was essentially completed at that time.

Between April 1, 2009, when Forck opened his law firm, and August of 2010, payments were made by Carmen Munford, as Trustee of the Anderson Family Irrevocable Trust Agreement, to Forck in the amount of \$5,975.00. The payments were for legal work that Forck was unable to document. Forck failed to provide Bernadine Anderson an itemized statement of his work.

Bernadine Anderson discharged Forck in August of 2010, revoked the Durable Power of Attorney, and directed that her original file be sent to attorney R. Scott Gardner of Sedalia, Missouri.

Forck, as part of this Stipulation, has agreed to pay restitution to the Bernadine Anderson Trust in the amount of \$5,000.00. Since the date of the stipulation, Forck has refunded \$2,000.00 to the Anderson Trust. **App. 112, 114.**

Key Procedural Developments

- | | |
|------------------|---|
| April 19, 2006 | <ul style="list-style-type: none"> • Nathan Forck was conditionally admitted to the bar, subject to being monitored by the OCDC per a monitoring agreement. App. 13-15. • Conditions included: no alcohol use and regular reporting of AA attendance. |
| May 18, 2007 | <ul style="list-style-type: none"> • Forck is arrested for domestic assault (later dismissed). |
| October 23, 2007 | <ul style="list-style-type: none"> • Forck admits heavy drinking and failure to report AA attendance. • OCDC and Forck enter stipulation to resolve pending Information for discipline. App. 3-12. |
| December 7, 2007 | <ul style="list-style-type: none"> • Supreme Court Order, Case #SC88961 • Court accepts stipulation, finds violations and enters an order suspending Forck's license for six months, but staying the suspension and placing him on probation, per Rule 5.225. |

- Conditions of Probation include: no violations of the Rules of Professional Conduct.

- Court Order notes: “If a failure to comply with the conditions of probation is determined to have occurred pursuant to Rule 5.225(f), the suspension previously stayed will be imposed with leave to apply for reinstatement after not less than six months.”

App. 35.

2009-2011

- Complaints received relating to conduct occurring from 2007 to 2009.

March 4, 2013

- Probation Order in Case #SC88961 still in effect.
- CDC and Forck submit *Joint Motion Submitting Joint Stipulation to Continue Respondent Nathan J. Forck’s Term of Probation with Changed Conditions Because of a Change in Circumstances*. Forck admits violating Rule 4-1.1 (Competence) as to Counts I and II and Rule 4-1.5 (Fees) as to Counts I, II and III.
- Joint Motion seeks a new order of suspension, also stayed, and an extension of probation with new terms and conditions. **App. 91-104.**

- Proposed Terms and Conditions (abbreviated)

Term: Six month suspension – stayed; one year probation – continued at least until restitution completed.

Conditions: 1. Probation monitored by OCDC

2. Quarterly reporting
3. Compliance with Rules of Professional Conduct
4. Ethics School attendance
5. CLE – Elder Law Institute
6. Restitution within thirty months

Poletti	\$9,000
Charles	\$8,000
Anderson	\$5,000
7. Elder Law Mentor
8. Trust Account Audits
9. Costs
10. Breach results in six month suspension.

App. 105-110.

April 30, 2013 • In Case #SC88961, the Court orders Informant to submit the record and schedules the case for briefing per Rule 84.24(i). **App. 111.**

May 31, 2013 • Record – as agreed by the parties – submitted by Informant. **App. 127-128.**

POINTS RELIED ON

I.

A. SIGNIFICANT CHANGES IN RESPONDENT'S CIRCUMSTANCES WARRANT EXTENDING HIS STAYED SUSPENSION WITH PROBATION. SIGNIFICANT CHANGES INCLUDE:

- 1. RESPONDENT'S PREVIOUS DISCIPLINARY PROBLEMS AROSE FROM HIS ALCOHOL ABUSE BUT HE HAS BEEN SOBER SINCE 2007;**
- 2. THESE VIOLATIONS ARE RESPONDENT'S FIRST VIOLATIONS RESULTING IN CLIENT HARM;**
- 3. THE OCDC HAS NOT RECEIVED CLIENT COMPLAINTS FOR CONDUCT OCCURRING AFTER 2009, WHEN HE DISCHARGED HIS PREDECESSOR'S STAFF;**
- 4. RESPONDENT HAS BEEN PAYING RESTITUTION.**

B. THE INTERESTS OF JUDICIAL ECONOMY SUPPORT ADDRESSING BOTH NEW VIOLATIONS AND RESPONDENT'S PROBATION IN THIS CASE.

Rule 5.225

POINTS RELIED ON

II.

**PROBATION IS WARRANTED UNDER RULE 5.225 AND IS
SUPPORTED BY APPLICATION OF PREVIOUS DECISIONS OF
THIS COURT AND THE ABA STANDARDS FOR IMPOSING
LAWYER DISCIPLINE.**

In re Ehler, 319 S.W.3d 42 (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 (1991 ed.)

Rule 5.225

ARGUMENT

I.

A. SIGNIFICANT CHANGES IN RESPONDENT'S CIRCUMSTANCES WARRANT EXTENDING HIS STAYED SUSPENSION WITH PROBATION. SIGNIFICANT CHANGES INCLUDE:

- 1. RESPONDENT'S PREVIOUS DISCIPLINARY PROBLEMS AROSE FROM HIS ALCOHOL ABUSE BUT HE HAS BEEN SOBER SINCE 2007;**
- 2. THESE VIOLATIONS ARE RESPONDENT'S FIRST VIOLATIONS RESULTING IN CLIENT HARM;**
- 3. THE OCDC HAS NOT RECEIVED CLIENT COMPLAINTS FOR CONDUCT OCCURRING AFTER 2009, WHEN HE DISCHARGED HIS PREDECESSOR'S STAFF;**
- 4. RESPONDENT HAS BEEN PAYING RESTITUTION.**

B. THE INTERESTS OF JUDICIAL ECONOMY SUPPORT ADDRESSING BOTH NEW VIOLATIONS AND RESPONDENT'S PROBATION IN THIS CASE.

Change in Circumstances

Since 2007, when the Court suspended Mr. Forck, stayed that suspension, and placed him on probation per Rule 5.225, several significant circumstances have changed.

First, Mr. Forck has stopped drinking. He knows that he is an alcoholic and has been sober for over six years. It was alcohol abuse that led to his initial monitoring and to his stayed suspension and probation.

Second, Mr. Forck is separated from the unfortunate circumstances of his first foray into practice as a young lawyer. His first supervisor, Joseph Yungwirth, was suspended by this Court in 2010 (SC91102). Yungwirth's staff, whom Forck naively relied on because they had significant governmental and paralegal experience in elder law issues, are no longer part of his practice.

Third, the Office of Chief Disciplinary Counsel has not received complaints from Mr. Forck's clients for conduct occurring after he separated from the former Yungwirth staffers, four years ago.

Fourth, Mr. Forck has begun providing restitution to the complaining clients and their families.

Procedural Setting

This case sits in an unusual procedural stance. In this setting, the Court is not addressing a routine discipline case; that is, the Court is not simply deciding whether a lawyer violated the Rules of Professional Conduct and determining a sanction after reviewing a Disciplinary Hearing Panel's recommendation. Instead, the lawyer is already on probation and the Court is presented with specific admissions of misconduct. Mr. Forck acknowledges violating the Rules of Professional Conduct while on probation in the instant pending case.

Under the stipulation, the Court has an opportunity to continue monitoring and retraining this attorney. Continued probation is warranted, in the view of the parties, because the circumstances and factors connected with his earlier problems have substantially changed since 2007.

Mr. Forck, the Respondent, is on probation for a 2007 breach of the monitoring agreement established by the Court upon his admission to practice. Those breaches involved continued alcohol abuse; the rules he violated at that time related to his failure to fulfill obligations under the monitoring agreement, but did not directly relate to duties to his clients. The acts of misconduct leading to this stipulation are Forck's first violations of *duties to clients* to be considered by the discipline system.

When these complaints were received, at least two procedures were available to the OCDC. The CDC could have filed an Information and sought discipline for the new misconduct. Under that approach, the probation case might have remained unresolved. A hearing panel assigned to hear the Information would not be authorized to address the pending probation matter. Another proceeding might have been necessary. Alternatively, as the parties agreed, these acts of misconduct could be addressed fully within the context of this pending probation case. After analyzing the misconduct and the changes in circumstances in Mr. Forck's practice, Informant decided that additional probation would be warranted under Rule 5.225. Upon making that determination, and upon reaching an agreement with Mr. Forck, Informant reasoned that extending probation within the instant case would be a more efficient use of disciplinary and judicial

resources than processing both a disciplinary case and a separate probation extension or revocation matter.

If approved, this stipulation would assure that Mr. Forck's clients be made whole; it would provide education, monitoring and support intended to improve Mr. Forck's practice and better protect his clients; and, it would provide a record of Mr. Forck's disciplinary history, including the admitted violations of Rule 4 established in the stipulation in this case.

ARGUMENT

II.

PROBATION IS WARRANTED UNDER RULE 5.225 AND IS SUPPORTED BY APPLICATION OF PREVIOUS DECISIONS OF THIS COURT AND THE ABA STANDARDS FOR IMPOSING LAWYER DISCIPLINE.

Sanction

An appropriate sanction, following findings of violations of the Rules of Professional Conduct, should be analyzed by applying: (a) previous decisions of this Court; (b) the ABA Standards for Imposing Lawyer Sanctions, (including Aggravating and Mitigating Circumstances); and (c) any applicable rules to the established facts. That analysis is fitting in this case setting just as it would be in more traditional disciplinary prosecutions. In all attorney disciplinary matters, the key goals are the same: to protect the public and to maintain the integrity of the legal profession. *In re Ehler*, 319 S.W.3d 42, 451 (Mo. banc 2010).

Missouri Probation Cases

The two reported decisions of this Court where probation was entered should be considered. In the first case, the Court ordered probation for Missouri attorney Stanley Wiles. *In re Wiles*, 107 S.W.3d 228 (Mo. banc 2003). Attorney Wiles had been previously admonished for four diligence violations, five communication violations, one safeguarding client property violation, and one violation for engaging in conduct prejudicial to the administration of justice. *Wiles*, at 229. And, he had received two more

admonitions from Kansas disciplinary authorities. *Wiles*, at 229. The opinion did not describe the new conduct that led to discipline, other than noting that Mr. Wiles had been censured in Kansas. *Wiles*, at 228. Unlike the attorney in the *Wiles* case, Mr. Forck has no prior discipline related to client complaints.

The more recent decision involving probation provides additional guidance. In that 2009 opinion, the Court granted probation to Missouri attorney Larry Coleman. *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009). Mr. Coleman had been admonished in 1990 for violations involving communication and unreasonable fees. Later, in 1999, he was admonished for diligence and communication violations. Finally, in 2008, the Court publicly reprimanded him for “violations regarding diligence, unreasonable fees and conduct prejudicial to the administration of justice.” *Coleman*, at 859. In the 2009 case leading to probation, the Court found that Mr. Coleman violated:

- Rule 4-1.2 by preparing a retainer agreement giving him “exclusive right to when and for how much to settle” his client’s case. And, he violated that Rule by actually agreeing with his client’s opponent to settle her case against her specific direction. *Coleman*, at 864.
- Rule 4-1.15(c) by commingling his own funds with client funds in his trust account and by failing to keep adequate trust account records. *Coleman*, at 866.
- Rule 4-1.16 by failing to notify his client at the time of his withdrawal from her case and by failing to take steps to mitigate his withdrawal. *Coleman*, at 866-867.

- That misconduct also led to a finding that Mr. Coleman violated Rule 4-8.4 in that it wasted judicial resources and was prejudicial to the administration of justice. *Coleman*, at 868.
- Upon application of the ABA Sanction Standards, the Court determined that a suspension was an appropriate sanction. *Coleman*, at 869-871.

The *Coleman* and *Wiles* decisions support the use of probation in Mr. Forck's case.

The Court has also indicated an expectation of progressive discipline. *Ehler*, at 452. Progressive discipline, under the stipulation in the instant case, does not raise the existing sanction from probation to an actual suspension. But, the stipulation does extend the period of probation, and it adds new conditions to Respondent's probation. Under these circumstances, Informant is satisfied that an actual suspension is not necessary to protect the public. That's because Mr. Forck's earlier misconduct did not directly involve clients; he has been sober for six years; and, he has avoided client complaints since practicing on his own for the past four years.

ABA Sanction Standards

The following ABA Standards appear to apply to Mr. Forck's violations, which relate to lawyer competence and excessive legal fees. Before addressing those standards, a review of the ABA standard related to probation may be helpful:

“Probation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be imposed alone or in conjunction with a reprimand or an admonition; probation can also be imposed as a

condition of readmission or reinstatement.” ABA Standards for Imposing Lawyer Sanctions (1991 ed.), Standard 2.7.

That definition is the only ‘black letter’ reference to probation in the ABA Standards. In Missouri, probation is often treated as an intermediate sanction, whether it is part of a stayed suspension, or imposed on its own. Probation imposes a greater burden on the disciplined attorney than does a Reprimand, but does not prohibit the attorney from continued practice. Both in Missouri and under the ABA Standards, probation can be designed to help lawyers improve their practice.

COMPETENCE

Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client. ABA Standard 4.52.

Reprimand is generally appropriate when a lawyer:

- (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or
- (b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.

ABA Standard 4.53.

As can be seen, the difference between Reprimand and Suspension under the ABA Standards involves the attorney’s insight into his own shortcomings. To his regret, Mr. Forck relied on the experience and methods of his predecessor and his predecessor’s staff. While harm to his clients certainly occurred as the result of his actions and

inactions, it may be difficult to establish that he actually knew that his staff may not have understood the many complications of Elder Law, Medicaid issues, and Estate Planning.

The following important concepts can be found in the *Commentary* to Standard 4.53:

“Most courts impose reprimands on lawyers who are incompetent.”

...

“While reprimand alone can be appropriate, a combination of reprimand and probation is often a more productive approach. Probation can be very effective in assisting lawyers to improve their legal skills.”

ABA Standard 4.53, Commentary

In this case at least, Informant relies on this ABA Commentary as support for extending Mr. Forck’s probation.

EXCESSIVE FEES

Suspension is generally appropriate when a lawyer knowingly 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.

ABA Standard 7.2.

Suspension is appropriate, for example, when the lawyer does not mislead a client but engages in a pattern of charging excessive or improper fees. ABA Standard 7.2, Commentary.

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.

ABA Standard 7.3.

Like the standards relating to competence, the key distinction between conduct leading to Suspension and conduct leading to Reprimand is in the lawyer's mind. Under these standards, neglect in setting fees often leads to a reprimand but knowing conduct can lead to a suspension. A fair argument for application of either Standard 7.2 or 7.3 could be made in Mr. Forck's case. Of course, the parties' stipulation in his case calls for a stayed suspension with probation; that sanction can reasonably be considered an intermediate step between reprimand and an actual suspension. It is also intended to directly improve this lawyer's practice by the imposition of many conditions attached to probation.

As additional support for a sanction less than an actual suspension in this case, the ABA *Commentary* indicates the common use of reprimands in excessive fee cases.

"Courts typically impose reprimands when lawyers engage in a single instance of charging an excessive or improper fee. See *In re Donald L. Fasig*, 444 N.E.2d 849 (Ind. 1983), where the court imposed a public reprimand where the lawyer entered into an agreement for a contingent fee in a criminal case; *Russell J. Perry*, DP 63 (Michigan Attorney Disciplinary Bd., 1983), where a lawyer charged an excessive fee by improperly adding investigation costs; and *The Florida Bar v. Sagrans*, 388 So.2d 1040 (Fla. 1980), where the lawyer improperly split fees with a chiropractor."

ABA Standard 7.3, Commentary.

The ABA Standards also suggest that the court consider both aggravating and mitigating circumstances:

AGGRAVATING CIRCUMSTANCES: ‘Pattern of Misconduct’ and ‘Vulnerable Victims’

The conduct involves a pattern of misconduct with more than one offense regarding Forck’s procurement of legal fees that were excessive for the quality of work done and the likelihood of success in making Medicaid applications for clients. ABA Standard 9.22(c).

Mr. Forck was dealing with vulnerable victims, elderly people concerned with how to maintain assets for themselves or a spouse facing nursing home expenses. ABA Standard 9.22(h).

MITIGATING CIRCUMSTANCES: Inexperience and Remorse

Mr. Forck was inexperienced in the practice of law at the time he started his own practice. ABA Standard 9.32(f).

Respondent has expressed remorse for his actions, as exhibited by his agreement to pay restitution and to submit to the imposition of additional Probation conditions and a longer period of probation. ABA Standards 9.32(k) and (l).

When analyzing aggravating circumstances it may be helpful to again recognize that although Mr. Forck has been previously sanctioned (in 2007 he received a stayed suspension and was placed on probation in the instant case), those violations were tied to his alcohol abuse and not to client harm. The parties did not find that Standard 9.22(c) (prior disciplinary offenses) was applicable in the instant case.

Rule 5.225

Before ordering probation in any case, the Court should review Missouri Supreme Court Rule 5.225, the rule that explicitly sets the requirements for probation.

Probation is an appropriate sanction in this case because:

- (a) Mr. Forck's continued sobriety since 2007 and his lack of complaints since 2009 when he separated from his former law office indicate that he is unlikely to harm the public during the period of probation, and he can be adequately supervised (Rule 5.225(a)(2)(A));
- (b) he is able to perform legal services without causing the courts to fall into disrepute (his admitted misconduct, balanced against his willingness to pay restitution, does not embarrass the profession) (Rule 5.225(a)(2)(A));
- and
- (c) his misconduct does not warrant disbarment (Rule 5.225(a)(2)(A)).

CONCLUSION

Informant asks the Court to enter an order of probation in accord with the Stipulation and to extend Respondent's probation for one year, or until completion of restitution, if restitution is not completed within one year. Conditions of probation should include those offered to the Court as attachments to the stipulation.

Respectfully submitted,

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ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2013, a true and correct copy of the foregoing was served via the electronic filing system pursuant to Rule 103.08 on:

Lori J. Levine
515 East High Street
PO Box 28
Jefferson City, MO 65102-0028

Attorney for Respondent.




Sam S. Phillips

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 5,146 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Sam S. Phillips

TABLE OF CONTENTS - APPENDIX

DISCIPLINARY HEARING PANEL DECISION	A3 - A28
CONDITIONS OF PROBATION	A29 - A34
ORDER - PROBATION	A35 - A36
RESPONDENT'S LAW FIRM BROCHURE	A37 - A38
ENGAGEMENT CONTRACT & FEE PAYMENT CHECK – POLETTI (8/18/09)	A39 - A42
DURABLE POWER OF ATTORNEY – POLETTI	A43 - A54
DURABLE POWER OF ATTORNEY FOR HEALTH CARE – POLETTI	A55 - A59
ENGAGEMENT CONTRACT & FEE PAYMENT CHECK – POLETTI (10/14/10)	A60 - A63
CASE.NET DOCKET ENTRIES & PETITION FOR PROBATE OF WILL – POLETTI	A64 - A85
MO DEPT. OF SOCIAL SERVICES HEALTHNET ADVERSE ACTION NOTICE – CHARLES	A86 - A89
MO DEPT. OF SOCIAL SERVICES LETTER TO TURNBULL – CHARLES	A90
JOINT MOTION SUBMITTING JOINT STIPULATION	A91 - A104
PROPOSED TERMS & CONDITIONS OF PROBATION	A105 - A110
ORDER ISSUED 4/30/13 – INFORMANT TO FILE RECORD & BRIEF	A111
CARSON & COIL LETTER WITH THREE RESTITUTION CHECKS	A112 - A115
OCDC 5/16/13 LETTER WITH RESTITUTION CHECK – WOLF	A116 - A117
OCDC 5/17/13 LETTER WITH RESTITUTION CHECK – POLETTI	A118 - A119

OCDC 5/16/13 LETTER WITH RESTITUTION CHECK –

CHARLES & MERRILL	A120 - A121
RESPONDENT’S AFFIDAVIT	A122 - A126
SUBMISSION OF RECORD	A127 - A128
RULE 4-1.1	A129 - A130
RULE 4-1.5	A131 - A133
RULE 5.225	A134 - A136