

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:)
)
AURORA MOZELLE FLUHR,) Supreme Court #SC90496
)
MISSOURI BAR NO. 52490,)
)
Respondent.)

RESPONDENT'S BRIEF

AURORA M. FLUHR, #52490
7515 Delmar Blvd.
St. Louis, MO 63130
(314) 337-1565
(314) 534-3834 Facsimile
RESPONDENT PRO SE

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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 and Disciplinary History

Respondent Fluhr has not been previously disciplined. Respondent further concurs with Informant as to the Respondent's date of admission to the Missouri Bar.

OCDC Initial Contact with Respondent Fluhr and Offer of the Diversion Program

Respondent Fluhr was contacted by phone Ms. Cheryl Walker from the Office of Chief Disciplinary Counsel (OCDC). Ms. Walker left a message at Respondent Fluhr's mother's home and Respondent Fluhr returned her call from that same phone number. Upon speaking to Ms. Cheryl Walker, Respondent Fluhr was asked about complaints that had been filed against Respondent Fluhr in her capacity as an attorney Respondent Fluhr indicated to Ms. Walker at that time that Respondent Fluhr had not received notice of said complaints as Respondent Fluhr had moved from her office at 3920 Lindell. Ms. Walker proceeded to discuss said complaints and ask Respondent Fluhr regarding the substance of the complaints. Respondent Fluhr was fully cooperative and fully compliant with Ms. Walker's investigation. Ms. Walker, as representative of the OCDC, offered Respondent Fluhr to enter into the Diversion Program and, at that time, Ms. Walker asked Respondent Fluhr for a "verbal acceptance" of the offer to enter into the Diversion Program. Respondent Fluhr verbally accepted to enter into the Diversion Program. Respondent Fluhr informed Ms. Walker that she needed help with organization and asked Ms. Walker if there were resources that the Bar offered to help me with managing my practice. Ms. Walker indicated that there was and that, in the Diversion Program, Respondent Fluhr would be able to have access to those programs. **App. 58 (T. 74-77).**

Ms. Walker went further to say that because Respondent Fluhr had accepted said Diversion Program that Respondent Fluhr would not be required to appear at a scheduled hearing in April of 2008 as Respondent Fluhr had verbally accepted being placed into the Diversion Program. **App. 58 (T. 75).** After that conversation, Respondent Fluhr received nothing from the OCDC regarding the Diversion Program. Ms. Walker fully recollects the conversation and admits to sending said correspondence in Bryan Cave envelopes instead of labeling it Missouri Bar or OCDC communication. **App. 57 (T. 71).** Further, in fully cooperating and in full compliance with Ms. Walker's investigation, Respondent Fluhr informs Ms. Walker during the same phone conversation that there may be a few more complaints that may be filed in the near future at that time. Ms. Walker's indicated to Respondent Fluhr that the complaints would not affect Respondent Fluhr's entry in to the Diversion Program as long as there wasn't an overwhelming amount. Shortly thereafter, in compliance with what Respondent had informed Ms. Walker, two complaints were filed. Ms. Walker rescinded the agreement of the Diversion Program in direct contradiction to what was agreed upon and conveyed to Respondent Fluhr in the previous phone conversation. **App. 58 (T. 74-77).** We are here because of that rescission. **App. 58 (T. 77).**

From the point at that Respondent Fluhr addressed the fact that she didn't receive any correspondence from the OCDC but that she later discovered some of the paperwork in a Bryan Cave envelope, the communication between Respondent Fluhr and Ms. Walker was completely broken down.

Respondent Fluhr addressed this issued with Mr. Alan Pratzel who, in turn, advised Respondent Fluhr to “cc” him on all correspondence and to communicate with him if it was necessary. Respondent Fluhr’s response to him was that she wanted to try to reach out to Ms. Walker and start fresh so that we could make this process flow smoothly and get over any “personality” conflicts, if they existed.

During the meeting with Mr. Pratzel, he advised Respondent Fluhr to take the law Practice Management courses and that the process would likely result in Respondent Fluhr not losing my license. It appears now that the same office is challenging what they anticipated would be the punishment. This falls in line with the original issue of the agreement between Respondent Fluhr and the OCDC, by and through Ms. Cheryl Walker, where Respondent Fluhr was to participate in the Diversion Program. If promises of help are merely tools used to gather information for investigative purposes then how is this serving the public and instilling the attorney’s confidence in the OCDC. Respondent Fluhr still maintains that confidence in the OCDC as it has recommended valuable programs and seminars to Respondent Fluhr that have made a vast difference in her law practice management. The questions that remains in Respondent Fluhr’s mind is whether these changes and assistance could have been done sooner had they honored their original agreement of the Diversion Program. That would have promoted public welfare as it has now but in a more timely manner unless the purpose intended here is also to punish. If that should be the flip side to the coin, Respondent Fluhr believes that that goal has been accomplish as this process is severely humbling.

With regards to the recommendations made by the OCDC, Respondent Fluhr has completed the recommended Law Practice Management courses. In addition, Respondent Fluhr has a permanent law office address to receive all correspondence and Respondent Fluhr has implemented mechanisms learn in those practice management courses in her everyday function of her office. Some of these changes include keeping phone logs, returning calls within 24 hours, implementing two docketing systems, changing the language in fee agreements, and receiving all mail in one central location for routine review.

The Rodney Twitty Representation and Judge Julian Bush Complaint (Count I)

Respondent Fluhr has Crohn's Disease and, in March 2006, Respondent Fluhr had surgery and two (2) feet of my colon removed. **R-App. 5.** Crohn's Disease is a severely debilitating disease that affects the colon and the joints in your body as well as other organs and the normal uses of your body. In its severe stage, a Crohn's patient can suffer blood loss and can lose her life. Subsequently to being released from the hospital, Respondent Fluhr was rushed back in with an infection. Prior to the surgery, Respondent Fluhr provided every court in which she had a case pending that she would be having surgery and would be out for a period of time. A letter written by her surgeon, Dr. Ha, was included. **R-App. 2, 3, 4.** After the surgery, Respondent Fluhr provided the courts with another letter extending my recovery time. This letter was from my Crohn's physician, Dr. David Margolis. Judge Julian Bush was provided with all of these correspondences and chose to ignore them. Because of the onset of an infection, Respondent Fluhr was cleared from having to appear in court by my physician. She had

lost a substantial amount of weight. This is characteristic of someone who had the type of surgery she had and the type of illness she has to this day. Crohn's disease can drastically affect your health in times of stress and likely result in severe weight loss. Respondent Fluhr's illness, her surgery, and the letters from my physicians were completely disregarded by Judge Bush and she was called to the point of harassment by his court staff demanding that she appear. She had not been released from care and informed, in fact, her mother had to drive her to court as she was too weak to drive. Upon appearance, Judge Bush proceeded to comment on her physical appearance and criticize the amount of time it had taken her to arrive in his courtroom. Respondent Fluhr informed him that she had not been released to go back to work and she was out of breath. This was completely ignored by Judge Bush. He continued to criticize me and comment on my appearance. She had lost weight due to her illness and had no suits that fit so she had to use a belt to hold them up and he used that time to make inappropriate comments regarding her dress and her weight in front of the court staff and all others present in court.

Respondent Fluhr represented Rodney Twitty in a case involving a number of counts. During the representation, Rodney Twitty resided in Rolla, Missouri. Therefore, Respondent Fluhr and Mr. Twitty communicated via phone. During the representation Respondent Fluhr became severely ill. Consequently, Respondent Fluhr was required to undergo surgery consisting of a bowel resection and substantial hospitalization. This was communicated to Mr. Twitty and Judge Julian Bush. In fact, at some point prior to being hospitalized, Respondent Fluhr provided documentation, in the form of a letter from her

surgeon, to every division in St. Louis City and County Circuit courts in which Respondent Fluhr had cases pending indicating that Respondent Fluhr was scheduled to undergo major surgery and would not be able to appear for a significant period of time. Like many times when people undergo such an invasive procedure, things can go wrong and infections can be transferred to the patient. Respondent Fluhr contracted an infection and was hospitalized again within days of being released from the hospital from the bowel resection surgery. Despite being given documentation to that effect and not being released from her physician's care to return to work, Judge Bush required Respondent Fluhr to appear in court on this case. Even when Respondent Fluhr was ill and couldn't make it, she asked another attorney to cover that case for her.

At a time during the case, Rodney Twitty failed to appear and the judge issued a warrant for his arrest. After Respondent Fluhr asked the judge not to issue a warrant as Rodney lived in Rolla, Missouri and to afford Mr. Twitty the opportunity to appear, the judge declined her request. Respondent Fluhr asked Judge Bush in chambers with opposing counsel present if Rodney Twitty's eligibility for the Public Defender could be reinstated because Mr. Twitty did not have the resources to pay her to defend such a large amount of counts. Respondent Fluhr explained to Judge Bush that there were a substantial amount of victims and that depositions should be taken and an investigator would aid in Mr. Twitty's defense. These resources were readily available through the public defender's office and that Mr. Twitty would benefit at trial if the public defender could represent him and have those resources available for his defense.

At no point did Respondent Fluhr ever tell Judge Bush that she couldn't handle the trial or that she was not competent to try such a case. It was a question of Mr. Twitty's resources that were being addressed. Respondent Fluhr made an oral motion to withdraw and Judge Bush orally denied that motion. On the day of trial, before we began to conduct voir dire, Judge Bush asked Respondent Fluhr and opposing counsel how long we thought the trial would last because he had a vacation scheduled that week. He indicated that if we didn't finish voir dire that day that it was likely he would have to declare a mistrial since there would not be enough days left in the week to complete the trial. During the voir dire, Judge Bush had allowed 24 of the 42 jurors to be disqualified for cause. The peremptory strikes had not been made by either side yet. We would not be able to proceed with this panel and it was understood that a new panel of jurors would have to be requested. The question before the court was whether there was another panel available. If Respondent Fluhr's memory serves correct, Judge Bush was told that the court would have to call the next morning for jurors and, at that time, he would be advised whether a panel was available. There was a strong likelihood that a mistrial would be declared.

That evening Respondent Fluhr returned home and became ill. She called Judge Bush's court first thing in the morning. It is her belief that she, first, left a message on the court clerk's phone. While Respondent Fluhr was calling back a second time, Judge Bush's call came on my call waiting and she informed the clerk that Judge Bush was calling her on the other line. Respondent Fluhr then clicked over to talk to Judge Bush. Respondent Fluhr informed the Judge that she had called and left a message and that she

had been ill through the night and was still very ill that morning. Respondent Fluhr told him that she was calling him first and then would be calling her mother shortly thereafter as she was so ill she needed help. Judge Bush told Respondent Fluhr that he had already declared a mistrial. It was understood that a mistrial was a strong possibility as you cannot have a jury trial without a panel of jurors. Respondent Fluhr was not surprised that he had already declared a mistrial considering the circumstances that surrounded jury selection and the lack of jurors.

Judge Bush had expressed the intention of declaring a mistrial before we even started voir dire. And, that intention became more evident after a large amount of jurors had been stricken for cause. Judge Bush and Respondent Fluhr have had a history of not agreeing on the disposition of cases in the past. Respondent believes that that fact is what has fueled his complaint process. If Respondent Fluhr was not able to appear in Judge Bush's court, she has informed him, either directly or by leaving messages with his court staff. She knows that she has been conscientious about doing so because it was known by other attorneys that Judge Bush had put an attorney on probation for not appearing. So, many of the attorneys that appear before him make it a point to call and inform him or his court staff if we are unable to attend.

Shortly after the date in question regarding the trial, Respondent Fluhr provided Judge Bush with a doctor's note for my absence. This would clear any confusion or assumption as to her absence. She delivered, in person and by hand, the doctor's note to Judge Bush's court. She knows that he received the correspondence that she had provided to him regarding her illness because the doctor's note indicated again that

Respondent Fluhr had Crohn's disease and Respondent was informed by a member of the court staff that Judge Bush researched Crohn's Disease to verify what it is. Shortly thereafter, Judge Bush allowed an attorney from Scott Rosenblum's office to enter on my case. In direct contradiction to the OCDC's point of contention and according to the docket sheets in Missouri Casenet, it appears that Respondent executed a formal Motion to Withdraw from this case as of July 2, 2007 and that Motion was, in fact, granted and ordered.

According to Judge Julian Bush (Judge Bush), the events that led to his filing of a complaint against Respondent Fluhr involved the second day of the Rodney Twitty trial in which Respondent Fluhr became ill and was unable to appear and continue with the trial. Judge Julian Bush was provided with a doctor's note for that particular day verifying that Respondent Fluhr was, in fact ill with an onset of a "flare up" of Crohn's Disease, which Judge Julian Bush was, or should have been, aware that Respondent Fluhr had as he had been provided with documentation to that effect on more than one occasion. Judge Bush recollection of the events is skewed and inaccurate. It appears from the transcripts of the Disciplinary Hearing that Judge Bush's explanation of the events of the Rodney Twitty representation were skewed and tailored to fit into his accusations filed in his complaint. Judge Bush, under oath, states that it took two weeks for Respondent Fluhr to provide him documentation for being ill on the second day of trial. **R-App. 1.** Judge Bush, in making a mockery of the process and, in Respondent's opinion, my chronic illness of Crohn's Disease, when he went further to say that a note from a medical doctor stated "Ms. Fluhr told me she was sick and couldn't come to

court.” **App. 43 (T. 15)** Judge Bush went further, while testifying under oath, to state that he had never been told or made aware that Respondent Fluhr has Crohn’s disease (**App. 43 (T. 15)**) when, in fact, a year prior to this occasion he was provided with extensive documentation of the fact that Respondent Fluhr would be undergoing surgery for the Crohn’s Disease. **R-App. 2-5.**

In fact, an email dated April 29, 2009 time stamped at 9:34am, was sent to Ms. Cheryl Walker from Judge Julian Bush after he testified at the hearing in front of the Disciplinary Panel. **R-App. 8.** Bush admits that after he reviewed the file of Rodney Twitty, he did, in fact, have notice that Respondent Fluhr had a health problem, specifically Crohn’s Disease, and that Respondent on, at least one prior occasion, had asked for a continuance for being ill due to Crohn’s Disease. It should be further noted that this email was not included in the OCDC’s brief of in the Appendix filed therewith. **R-App. 8.**

The Natalie Pebbles Representation

Respondent Fluhr refunded \$2500 to Natalie Peebles in full on November 7, 2009. **R-App. 6, 7.** Natalie Peebles hired Respondent Fluhr to do two things. The first was to represent her in a hearing for a Full Order of Protection. The second was to represent her in a divorce. Respondent Fluhr met with Natalie Peebles two times regarding the divorce. Respondent Fluhr completed her representation of the Order of Protection hearing successfully. Respondent Fluhr met with Natalie Peebles in her home twice and left her a packet of paperwork for her to provide the pertinent information required to draft the divorce paperwork for filing, specifically financial information. This was before

Natalie had paid Respondent Fluhr the fees to represent her. Natalie Peebles assured Respondent Fluhr that she was waiting on the money to pay Respondent Fluhr and asked if Respondent Fluhr would start working on her divorce case. Respondent Fluhr agreed and began working on her divorce paperwork for filing. At our last meeting, Respondent Fluhr asked her to provide the pertinent information so that she may include that information in the divorce paperwork. Natalie Peebles and Respondent Fluhr scheduled a meeting at which she would provide that paperwork. The meeting was to take place at her home as the previous meetings had been held. The night of the meeting, Respondent Fluhr had a scheduling conflict. If her memory serves correct, Respondent Fluhr had a trial setting in Bridgeton Municipal Court. Respondent Fluhr informed Natalie Peebles that she had a scheduling conflict and would like to reschedule. Respondent Fluhr had already started working on her divorce the weeks prior to and the meeting we had scheduled was to go over whether all the paperwork missing was available for the divorce filings. Natalie refused to reschedule and said that she wanted all of her money back. Respondent Fluhr tried to calm her down and asked her to give Respondent Fluhr a chance to make her more satisfied with the service. Respondent Fluhr went so far as to offer to pay her filing fees for her. Natalie Peebles refused and wanted a full refund. Respondent Fluhr told her that Respondent Fluhr would be willing to refund the part that was unearned. She declined and wanted a full refund. Respondent Fluhr did not have the intent to withhold the unearned fees from Natalie Peebles. Respondent Fluhr wholeheartedly expected this to be taken to a fee dispute resolution and this was discussed with Natalie Peebles' sister. Respondent Fluhr indicated to her sister that the

proper authorities would decide what amount was owed to Natalie Peebles. However, this never went to a fee dispute resolution.

In retrospect, Respondent Fluhr should have refunded all of her money to diffuse the situation. Respondent Fluhr regrets that she did not do that. Respondent Fluhr has learned that in our profession, as servants to the community, it is important to maintain satisfaction to the client.

The time that Respondent Fluhr worked on Natalie Peebles' case is not reflected by the transcript of the hearing. The meetings she had with Natalie Peebles in her home is not reflected by the hearing transcripts. The phone calls Natalie Peebles and Respondent Fluhr had are not reflected in the transcripts. The text messages included are not accurate as to date and time. This is apparent by the time stamp on the submitted exhibits. The OCDC would like this Court to believe that Ms. Peebles hired Respondent Fluhr and within 24 hours fired her. This is not true. The time and energy Respondent Fluhr spent in her attorney-client relationship with Ms. Natalie Peebles spans well over two weeks at minimum. The exhibits provided by the OCDC should be taken in context as far as content and as far as time frame. Without the time frame component, Respondent Fluhr believes they are misleading and are not an accurate depiction. What is reflected in the transcripts is that Ms. Peebles had an unrealistic expectation of the how long it should take a divorce to be filed. The record does not reflect that Respondent Fluhr picked up a pro se divorce packet from St. Louis County Courthouse for Natalie Peebles to review and went over the documents contained therein to give her an idea of what types of documents she needed to be provided to file her divorce. However,

Respondent Fluhr takes full responsibility for the mishandling of this client and the service she hired me to do.

It should also be noted by this Honorable Court that Respondent Fluhr had made contact with relatives of Natalie Peebles and informed them that they could engage in a fee dispute resolution to determine what was owed to Ms. Natalie Peebles. Respondent Fluhr did not have direct contact with Ms. Peebles, however. Prior to the hearing, Respondent Fluhr attempted to contact one of the relatives of Natalie Peebles to resolve the issue as well but this attempt was unsuccessful. It was recently that Respondent Fluhr was able to right the wrong. Consequently, Respondent Fluhr has recently refunded Ms. Natalie Peebles the \$2500 she paid her. This represents a refund in full. **R-App. 6, 7.** It was never the intention of Respondent Fluhr to not refund Natalie Peebles the unearned fees, but, rather, it was a fee dispute. However, in retrospect it is clear that the most equitable way of handling this situation and any situation in the future would be for Respondent Fluhr to err on the side of caution and make a refund of all funds collected.

The Disciplinary Process

The OCDC states that the punishment recommended by the Hearing Panel is insufficient to address the wrongs. Respondent Fluhr would like to address that. As the attorney who is facing the discipline process, Respondent Fluhr must say that the embarrassment and humiliation of going through the process is punishment in itself. A 60-days suspension is still a suspension where you have to inform your clients that you cannot appear from them because you have been disciplined. You have to inform the court that you have been disciplined and it carries a stigma that you will have to work

extra hard to rebuild to the trust and confidence in your services. Respondent Fluhr asks that this Court take into consideration she take this process very seriously, accepted responsibility by making amends, taking the necessary courses, refunded any and all fees due to clients, and that I am working to implement the tools and mechanisms that are truly necessary to run an effective and efficient law practice and that she has a practice firmly rooted in one location where she can receive any and all correspondence.

In addition, she had an attorney to represent her in this process and he did to Respondent Fluhr what she have been accused of. So now she is the client who has been wronged and she understand the client's perspective clearly. Mr. Craig Kessler received \$2000 from Respondent Fluhr's family to represent her throughout this process. When the hearing panel's decision came down, Mr. Kessler refused to send her a copy. He had made inappropriate advances towards her and she was not receptive to them. Respondent Fluhr actually declined to go out on a date with him. He asked to accept the panel's decision for her without her getting the opportunity to review the decision. She declined Mr. Kessler's request and told him she wanted to see the decision first. After three to four requests for a copy of the panel's decision, she had to contact Ms. Sara Rittman to request a copy of the decision. It was after that call made to Ms. Rittman that Mr. Kessler contacted Respondent Fluhr. He scheduled a meeting in his office on a Saturday. Respondent Fluhr asked her mother to accompany her as Mr. Kessler made Respondent Fluhr uncomfortable with his previous advances. Mr. Kessler denied her mother access to the meeting room and threw us out of his office and declined to represent Respondent Fluhr anymore. He terminated the representation. He had already

prepared her file for her to take with her and a release to be signed for the file. Respondent Fluhr was insulted and abandoned by Mr. Kessler. Mr. Kessler did not refund any unearned fees and she was left to learn how to proceed through this process with no guidance. Respondent Fluhr reported Mr. Kessler's conduct to Cheryl Walker and she indicated that she would forward the information to Mr. Alan Pratzel of the OCDC office. The next correspondence Respondent Fluhr saw from Mr. Kessler is his Motion to Withdraw from this case filed to this Honorable Court.

Delay In Seeking Representation

Respondent Fluhr sought to hire Mr. Craig Kessler prior to the date suggested by Ms. Cheryl Walker. When Respondent Fluhr went to Clayton in the days prior to meet with Mr. Kessler, they were unable to meet due to some scheduling conflicts. On the day that she retained Mr. Kessler, it was his decision to ask for a continuance not hers. It was his decision to send a letter by facsimile to the panel member and Ms. Cheryl Walker asking for more time to prepare. Respondent Fluhr had intended on representing herself and she was approached by another attorney and told that Mr. Kessler would like to try to help her in her situation because he had a lot of experience representing attorneys through this process. Respondent Fluhr was deterred from representing herself through this process and was told that she needed an attorney to help, specifically Mr. Kessler. This was not the first time she had been contacted about Mr. Kessler helping her through this process. In the months prior to the scheduling of the hearing she was approached by an attorney by phone and a message was conveyed that they knew she was "having trouble with the Bar" and that Mr. Kessler would like to help her.

POINTS RELIED ON

I.

(A) RESPONDENT FLUHR DID COMPETENTLY AND REASONABLY COMMUNICATE WITH RODNEY TWITTY IN COMPLIANCE WITH THE RULES OF PROFESSIONAL CONDUCT

(B) RESPONDENT FLUHR DID DILIGENTLY REPRESENT RODNEY TWITTY IN COMPLIANCE WITH THE RULES OF PROFESSIONAL CONDUCT

(C) RESPONDENT FLUHR DID DILIGENTLY REPRESENT NATALIE PEEBLES IN COMPLIANCE WITH THE RULES OF PROFESSIONAL CONDUCT

(D) RESPONDENT FLUHR DID RETURN UNEARNED FEES IN COMPLIANCE WITH THE RULES OF PROFESSIONAL CONDUCT

(E) RESPONDENT FLUHR DID RESPOND TO REASONABLE REQUEST FOR INFORMATION FROM THE OFFICE OF CHIEF DISCIPLINARY COUNSEL IN COMPLIANCE WITH THE RULES OF PROFESSIONAL CONDUCT

POINTS RELIED ON

II.

THIS HONORABLE COURT SHOULD REJECT THE INFORMANT OCDC'S ARGUMENT FOR MORE SEVERE SANCTIONS AND CONSIDER THE PRESENCE OF MITIGATING FACTORS WHEN DETERMINING WHAT DISCIPLINE WOULD BE APPROPRIATE

ABA Standards for Imposing Lawyer Sanctions (1991 ed.) #4.44, #9.32

ARGUMENT

I.

OCDC fails to report that Respondent Fluhr and Ms. Cheryl Walker from the OCDC had phone conversations in which Ms. Walker offered Respondent Fluhr the Diversion Program and asked Respondent Fluhr to verbally accept said offer. Fluhr did, in fact, accept the offer of the Diversion Program.

STANDARD OF REVIEW

Under Supreme Court Rule 5.06, the Office of the Chief Disciplinary Counsel is established and the Office is charged with investigating matters designated in Rule 5. Thus, the role of the OCDC is advisory and its findings of fact and conclusions of law are not binding on the Court. *State ex inf. Ashcroft v. Alexander*, 673 S.W.2d 36, 38 (Mo. banc 1984).

The disciplinary hearing panel is similar in that the findings of fact and conclusions of law of a disciplinary hearing panel are also advisory. *In re Zink*, 2009 Mo. LEXIS 40 (Mo. Mar. 31, 2009), which cited *In re Belz*, 258 S.W.3d 38, 41 (Mo. banc 2008) and, also, *In re Lim*, 210 S.W.3d 199, 201 (Mo. banc 2007). That is to say that this Honorable Court is free to reject, wholly or in part, the recommendation of the disciplinary hearing panel.

This Court reviews recommendations from the OCDC *de novo*.

**RESPONDENT FLUHR DID COMPETENTLY AND REASONABLY
COMMUNICATE WITH RODNEY TWITTY IN COMPLIANCE WITH THE RULES
OF PROFESSIONAL CONDUCT**

AND

RESPONDENT FLUHR DID DILIGENTLY REPRESENT RODNEY TWITTY IN COMPLIANCE WITH THE RULES OF PROFESSIONAL CONDUCT

Firstly, there is no evidence presented here or at the disciplinary hearing showing that Respondent Fluhr failed to competently and reasonably communicate with her client, Mr. Rodney Twitty. That allegation is unfounded, untrue, and unproven. Respondent Fluhr never said to anyone that she did not want to try the case. That statement was never made. At a time during the case, Rodney Twitty failed to appear and the judge issued a warrant for his arrest. After Respondent Fluhr asked the judge not to issue a warrant as Rodney lived in Rolla, Missouri and to afford Mr. Twitty the opportunity to appear, the judge declined her request. Respondent Fluhr asked Judge Bush in chambers with opposing counsel present if Rodney Twitty's eligibility for the Public Defender could be reinstated because Mr. Twitty did not have the resources to pay her to defend such a large amount of counts. Respondent Fluhr explained to Judge Bush that there were a substantial amount of victims and that depositions should be taken and an investigator would aid in Mr. Twitty's defense. These resources were readily available through the public defender's office and that Mr. Twitty would benefit at trial if the public defender could represent him and have those resources available for his defense.

At no point did Respondent Fluhr ever tell Judge Bush that she couldn't handle the trial or that she was not competent to try such a case. It was a question of Mr. Twitty's resources that were being addressed. Respondent Fluhr made an oral motion to withdraw and Judge Bush orally denied that motion. On the day of trial, before we began to

conduct voir dire, Judge Bush asked Respondent Fluhr and opposing counsel how long we thought the trial would last because he had a vacation scheduled that week. He indicated that if we didn't finish voir dire that day that it was likely he would have to declare a mistrial since there would not be enough days left in the week to complete the trial. During the voir dire, Judge Bush had allowed 24 of the 42 jurors to be disqualified for cause. The peremptory strikes had not been made by either side yet. Respondent Fluhr brought that fact to Judge Bush's attention at side-bar and asked why not strike the whole panel. Judge Bush response was "Watch it Ms. Fluhr!" We would not be able to proceed with this panel and it was understood that a new panel of jurors would have to be requested. The question before the court was whether there was another panel available. If Respondent Fluhr's memory serves correct, Judge Bush was told that the court would have to call the next morning for jurors and, at that time, he would be advised whether a panel was available. There was a strong likelihood that a mistrial would be declared.

That evening Respondent Fluhr returned home and became ill. She called Judge Bush's court first thing in the morning. It is her belief that she, first, left a message on the court clerk's phone. While Respondent Fluhr was calling back a second time, Judge Bush's call came on my call waiting and she informed the clerk that Judge Bush was calling her on the other line. Respondent Fluhr then clicked over to talk to Judge Bush. Respondent Fluhr informed the Judge that she had called and left a message and that she had been ill through the night and was still very ill that morning. Respondent Fluhr told him that she was calling him first and then would be calling her mother shortly thereafter as she was so ill she needed help. Judge Bush told Respondent Fluhr that he had already

declared a mistrial. It was understood that a mistrial was a strong possibility as you cannot have a jury trial without a panel of jurors. Respondent Fluhr was not surprised that he had already declared a mistrial considering the circumstances that surrounded jury selection and the lack of jurors. Judge Bush had expressed the intention of declaring a mistrial before we even started voir dire. And, that intention became more evident after a large amount of jurors had been stricken for cause.

Mr. Twitty on the day of trial did not want to proceed with the trial because he did not have the time to depose witnesses and do further investigations. It was a point that was brought to Judge Julian Bush on more than one occasion and Mr. Twitty was well aware that those resources would be available to him through the Public Defender's Office. This was communicated from Mr. Twitty to Respondent Fluhr, from Respondent Fluhr to Mr. Twitty, and from Respondent Fluhr to Judge Julian Bush. It should be noted that Respondent Fluhr represented Mr. Twitty for close to two years competently and diligently with no complaints made by Mr. Twitty or Judge Bush during that two year timeframe. In addition, I did communicate with the Twitty family regarding my illness for the second day of trial. Respondent Fluhr did competently and reasonably communicate with Rodney Twitty and the court, to include Judge Julian Bush, in compliance with the Rules of Professional Conduct.

RESPONDENT FLUHR DID DILIGENTLY REPRESENT NATALIE PEEBLES IN COMPLIANCE WITH THE RULES OF PROFESSIONAL CONDUCT

Natalie Peebles hired Respondent Fluhr to do two things. The first was to represent her in a hearing for a Full Order of Protection. The second was to represent her

in a divorce. Respondent Fluhr met with Natalie Peebles two times regarding the divorce. Respondent Fluhr completed her representation of the Order of Protection hearing successfully. Respondent Fluhr met with Natalie Peebles in her home twice and left her a packet of paperwork for her to provide the pertinent information required to draft the divorce paperwork for filing, specifically financial information. This was before Natalie had paid Respondent Fluhr the fees to represent her. Natalie Peebles assured Respondent Fluhr that she was waiting on the money to pay Respondent Fluhr and asked if Respondent Fluhr would start working on her divorce case. Respondent Fluhr agreed and began working on her divorce paperwork for filing. At our last meeting, Respondent Fluhr asked her to provide the pertinent information so that she may include that information in the divorce paperwork. Natalie Peebles and Respondent Fluhr scheduled a meeting at which she would provide that paperwork. The meeting was to take place at her home as the previous meetings had been held. The night of the meeting, Respondent Fluhr had a scheduling conflict. If her memory serves correct, Respondent Fluhr had a trial setting in Bridgeton Municipal Court. Respondent Fluhr informed Natalie Peebles that she had a scheduling conflict and would like to reschedule. Respondent Fluhr had already started working on her divorce the weeks prior to and the meeting we had scheduled was to go over whether all the paperwork missing was available for the divorce filings. Natalie refused to reschedule and said that she wanted all of her money back. Respondent Fluhr tried to calm her down and asked her to give Respondent Fluhr a chance to make her more satisfied with the service. Respondent Fluhr went so far as to offer to pay her filing fees for her. Natalie Peebles refused and wanted a full refund.

Respondent Fluhr told her that Respondent Fluhr would be willing to refund the part that was unearned. She declined and wanted a full refund. Respondent Fluhr did not have the intent to withhold the unearned fees from Natalie Peebles. Respondent Fluhr wholeheartedly expected this to be taken to a fee dispute resolution and this was discussed with Natalie Peebles' sister. Respondent Fluhr indicated to her sister that the proper authorities would decide what amount was owed to Natalie Peebles. However, this never went to a fee dispute resolution.

In retrospect, Respondent Fluhr should have refunded all of her money to diffuse the situation. Respondent Fluhr regrets that she did not do that. Respondent Fluhr has learned that in our profession, as servants to the community, it is important to maintain satisfaction to the client.

The time that Respondent Fluhr worked on Natalie Peebles' case is not reflected by the transcript of the hearing. The meetings she had with Natalie Peebles in her home is not reflected by the hearing transcripts. The phone calls Natalie Peebles and Respondent Fluhr had are not reflected in the transcripts. The text messages included are not accurate as to date and time. This is apparent by the time stamp on the submitted exhibits. The OCDC would like this Court to believe that Ms. Peebles hired Respondent Fluhr and within 24 hours fired her. This is not true. The time and energy Respondent Fluhr spent in her attorney-client relationship with Ms. Natalie Peebles spans well over two weeks at minimum. The exhibits provided by the OCDC should be taken in context as far as content and as far as time frame. Without the time frame component, Respondent Fluhr believes they are misleading and are not an accurate depiction. What

is reflected in the transcripts is that Ms. Peebles had an unrealistic expectation of the how long it should take a divorce to be filed. The record does not reflect that Respondent Fluhr picked up a pro se divorce packet from St. Louis County Courthouse for Natalie Peebles to review and went over the documents contained therein to give her an idea of what types of documents she needed to be provided to file her divorce. However, Respondent Fluhr takes full responsibility for the mishandling of this client and the service she hired me to do.

RESPONDENT FLUHR DID RETURN UNEARNED FEES IN COMPLIANCE WITH
THE RULES OF PROFESSIONAL CONDUCT

Respondent Fluhr refunded \$2,500 to Natalie Peebles in full on November 7, 2009. Natalie Peebles hired Respondent Fluhr to do two things. The first was to represent her in a hearing for a Full Order of Protection for a fee of \$500. The second was to represent her in a divorce for a fee of \$2,500. Respondent Fluhr had made contact with relatives of Natalie Peebles and informed them that they could engage in a fee dispute resolution to determine what was owed to Ms. Natalie Peebles. Respondent Fluhr did not have direct contact with Ms. Peebles, however. Prior to the hearing, Respondent Fluhr attempted to contact one of the relatives of Natalie Peebles to resolve the issue as well but this attempt was unsuccessful. It was recently that Respondent Fluhr was able to right the wrong. Consequently, Respondent Fluhr has recently refunded Ms. Natalie Peebles the \$2500 she paid her. This represents a refund in full. It was never the intention of Respondent Fluhr to not refund Natalie Peebles the unearned fees, but, rather, it was a fee dispute. However, in retrospect it is clear that the most equitable way of

handling this situation and any situation in the future would be for Respondent Fluhr to err on the side of caution and make a refund of all funds collected. Respondent Fluhr did return unearned fees in compliance with the Rules of Professional Conduct.

RESPONDENT FLUHR DID RESPOND TO REASONABLE REQUEST FOR
INFORMATION FROM THE OFFICE OF CHIEF DISCIPLINARY COUNSEL IN
COMPLIANCE WITH THE RULES OF PROFESSIONAL CONDUCT

With the exception of the mailing from Ms. Cheryl Walker and the confusion surrounding the OCDC mail being sent to Respondent Fluhr in Bryan Cave envelopes, Respondent Fluhr has been compliant in mailing and returning documents to those she has been required to do so. It was shown through Ms. Walker's exhibits (App. A112) that she used Bryan Cave envelopes to mail Respondent Fluhr documents. This created confusion as Respondent Fluhr did not expect to receive such materials in that type of law firm envelope. It is a well-known fact that the attorneys in the area of Missouri that Respondent Fluhr practices receive on a regular basis mailings from other attorneys who are running for an office or a position. The majority of these mailing come from larger firms and are in envelopes much like the one Ms. Walker used to mail the OCDC materials in. The questions presented to Respondent Fluhr and perhaps this Court is why Ms. Walker, when she did not receive a response on the certified mail, return receipt requested (**App. A112**), follow-up with a call to the same number she used to contact Respondent Fluhr when she offered Respondent Fluhr to enter into the Diversion Program. It should be noted that to date, Respondent Fluhr has not received that Diversion Program agreement reduced to writing in an OCDC envelope or Bryan Cave envelope. But yet, it is Respondent Fluhr who has the burden of proving that she did not

receive it. Regardless, it is Respondent Fluhr's responsibility to maintain a working and accessible mailing address and that is exactly what she secured when the problem of receiving Ms. Walker's mail arose. Respondent Fluhr went the extra step to ensure that there would be no mistake as to what mail was sent to her from that point forward and asked an attorney to allow her to receive mail in a stand-alone office building. However, it is Respondent Fluhr's position that she did not violate any Rules of Professional Conduct.

ARGUMENT

II.

THIS HONORABLE COURT SHOULD REJECT THE INFORMANT OCDC'S ARGUMENT FOR MORE SEVERE SANCTIONS AND CONSIDER THE PRESENCE OF MITIGATING FACTORS WHEN DETERMINING WHAT DISCIPLINE WOULD BE APPROPRIATE.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.) #4.44, #9.32

Respondent Fluhr has admitted the things she could have handled better and done more efficiently and accepted the decision of the hearing panel. While Respondent Fluhr will humbly accept whatever discipline this Court finds reasonable, it would seem that the public is best served better by allowing Fluhr to continue to practice albeit with the proper law practice management tools and mechanisms in place as taught in the classes recommended by the OCDC and already completed by Respondent Fluhr.

The ABA Standards for Imposing Lawyer Sanctions are persuasive tools to provide guidance in measuring what discipline would be appropriate in determining lawyer sanctions. The OCDC contends that the hearing panel's decision in Respondent

Fluhr's case would be inappropriate to redress harm to clients due to Respondent Fluhr's alleged lack of diligence and/or competence. The OCDC further argues that these are multiple violations. However, Respondent Fluhr argues that the findings of a lack of diligence and competence are tied to the same occurrence and should, therefore, if found to be true, not be viewed as separate or multiple violations but, rather, as two sides of the same coin. If this Court agrees with Respondent Fluhr's view, they should be considered together as a single violation, not aggregated into aggravation.

Ms. Walker contends that the OCDC's characterization of the discipline handed down by the panel was insufficient as to time because it did not serve the interest of the public for Respondent to be suspended for only 60 days. Respondent Fluhr believes the OCDC's argument is rooted in punishing the attorney rather than the interest in the public. The complaints primarily involved the failure to appropriately communicate with clients.

As noted by this Court in *In re Frank*, 885 S.W.2d 328, 333 (Mo. banc 1994): 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. Here, the attorney has not even received an admonition. The implied hierarchy of punishment has been overridden by the OCDC and the jump to sterner sanctions as a punishment to the attorney is disguised by the OCDC's transparent argument that a suspension of six months would serve the public needs. Realistically, the attorney has clients some of which have cases that are more time

sensitive than others. A suspension of that magnitude could not only not serve the client's interest but, in fact, may adversely affect their claim as one attorney's potential winning case may be another's loser. There is nothing to say that if Fluhr is suspended that there is another attorney that may serve the interests of certain clients. So is the sanction proposed by the OCDC for the public good? Respondent Fluhr thinks not. It is the OCDC's intent to punish more than promote.

The OCDC's office published an article in Precedent 2009 titled Grounds for Probation as to what would qualify a disciplined attorney to receive probation as an appropriate sanction. The article was penned by Carl Schaeperkoetter, a staff counsel for the Office of Chief Disciplinary Counsel in Jefferson City. Mr. Schaeperkoetter explains that the disciplinary sanction of probation has been historically appropriate for lawyers unlikely to harm the public during a period of probation and can be monitored or supervised and are able to perform their duties as attorneys without causing harm to the profession or the public.

The OCDC goes further to say that this is the type of sanction that is effective for those cases that are too serious to issue a reprimand by the Supreme Court but not severe enough to warrant suspension. In addition it is stated that probation, as a sanction, is a good tool that can be used by those attorneys having law practice management issues. As the final analysis in determining whether an attorney and the public would benefit from the imposition of the sanction of probation, the Court must be persuaded that the attorney has the continued ability to engage in the practice of law and be able to uphold the integrity of the profession with no injury or potential injury to the public. Precedent

Summer 2009 pg. 53,58. According to the report generated by the OCDC, in 2009, of the 168 attorneys that were disciplined in 2008, 107 were given written admonitions. Of the 21 suspended, 7 of those were stayed and those 7 attorneys were placed on probation. This report's statistics and data are current as of August 11, 2009.

Respondent Fluhr was offered Diversion and accepted. That was rescinded and the Hearing Panel recommended a 60 day suspension and probation and that was, in turn, rejected by the OCDC. Now, the OCDC asks for an indefinite suspension with leave to apply for reinstatement in 6 months. It appears that this is in direct contradiction to what the OCDC wrote in the 2009 Precedent article. It appears that theory in the OCDC does not get reduced to practice. It is Respondent Fluhr's hope that this Court will not follow the OCDC's precedent.

In addition Respondent Fluhr asks this Honorable Court to consider the mitigating factors set out in the ABA Standards for Imposing Lawyer Sanctions #9.32 including Respondent Fluhr's absence of a disciplinary record, lack of evil motive, and her candor with the OCDC, the hearing panel, and this Court. This Court has a history of acknowledging that the punishment fit the wrong. This Honorable Court has recognized that Reprimand is appropriate where an attorney's breach does not involve dishonest, fraudulent, or deceitful conduct. *In re Cupples*, 952 S.W.2d 226, 237 (Mo. banc 1997).

This Honorable Court has acknowledged that the fundamental purpose of an attorney disciplinary proceeding is to "protect the public and maintain the integrity of the legal profession." *In re Waldron*, 790 S.W.2d 456, 457 (Mo. banc 1990). Here, Respondent Fluhr asks that this Honorable Court acknowledge that she has no prior

disciplinary history, she has practice for fairly short period of time, she has acknowledge and shown remorse for her mishandling of the clients in question, made strides to improve the quality of her practice, and has not fallen in the category to warrant suspension. The Law Practice Management classes are designed to aid the attorney in the promoting public welfare by improving the quality of the attorney's practice which, in turn, improves the quality of the service the attorney can provide to the public. Respondent Fluhr requests that this Honorable Court reject the OCDC's position and impose lesser sanction to include the consideration of an admonition or a reprimand.

Under ABA Standards for Imposing Lawyer Sanctions, a Reprimand has been deemed the appropriate lawyer sanction in cases where it was found that the lawyer does not act with reasonable diligence in representing a client and cause injury or potential injury to a client. *ABA 4.43*

An Admonition has been deemed the appropriate sanction when a lawyer is negligent and does not act with reasonable diligence in representing a client and causes little to no actual or potential injury to client. *ABA 4.44*

Under ABA 9.22 the factors considered and deemed as aggravating factors are: prior disciplinary offenses, dishonest or selfish motive, pattern of misconduct, multiple offenses, bad faith obstruction of discipline proceeding by intentionally failing to comply with rules or orders of discipline agency, submission of false evidence, refusal to acknowledge wrongful nature or conduct, vulnerability of victim, substantial experience in the practice of law, indifference in making restitution, and illegal conduct including

use of controlled substance. *ABA 9.22* These do not apply to Respondent Fluhr's conduct in the issue presented before this Honorable Court.

Under ABA 9.3, the mitigating factors considered in justifying reducing the sanction in lawyer discipline are as follows: absence of prior disciplinary record, absence of dishonest or selfish motive, personal or emotional problems, timely good faith effort to make restitution or rectify misconduct consequences, full and free disclosure to the disciplinary board or cooperative attitude, and inexperience in the practice of law. *ABA Standards for Imposing Lawyer Sanctions (1991 ed.) #4.44, #9.32.*

Under Missouri Statutes, R.S.Mo. 484.190 describes the "Power to Suspend or Remove," and states that "Any attorney or counselor at law may be removed or suspended from practice in the courts of this state for any of the following reasons: (1) if he be convicted of any criminal offence involving moral turpitude; (2) if he unlawfully retained his clients money or if he is guilty of any malpractice, fraud, deceit or misdemeanor whatsoever in his professional capacity; (3) if he shall have been removed, suspended, or disbarred from the practice of law in any other state or jurisdiction and shall fail to disclose such fact in his application for license to practice law in this state."

The Office of Chief Disciplinary Counsel seeks the suspension of Respondent Fluhr's license even though she does not fit into any of the aforesaid categories nor does her conduct. The suspension of the Respondent Fluhr's license sought by the Informant is overbroad and unwarranted.

CONCLUSION

Respondent Fluhr asks the Court to go farther than the quotation of words from the ABA Standards offered by the OCDC to justify a sterner sanction than admonishment. Respondent Fluhr asks that the Court consider that her conduct did not raise to the level to which a six-month suspension should be warranted. And, according to ABA Standards for Imposing Lawyer Sanctions #4.44, Admonishment would appear to be more appropriate. Respondent Fluhr also asks the Court to consider the mitigating factors found in ABA Standards for Imposing Lawyer Sanctions #9.32 including Respondent Fluhr's absence of a disciplinary record, lack of evil motive and her candor with the OCDC, the hearing panel, and this Court. In summary, Respondent Fluhr lacked evil motive and has never had to go through the disciplinary process in her six years of engaging in the practice of law. Given that fact coupled with the absence of any prior disciplinary record, Respondent Fluhr prays that the Court will find that admonishment is appropriate when it conducts a complete review of the record.

Respectfully submitted,

By: _____

Aurora M. Fluhr, #52490
7515 Delmar Blvd.
St. Louis, MO 63130
(314) 337-1565
RESPONDENT PRO SE

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2009, two copies of RESPONDENT AURORA M. FLUHR'S BRIEF and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to: CHERYL WALKER, BRYAN CAVE LLP, ONE METROPOLITAN SQUARE, 211 NORTH BROADWAY, SUITE 3600, ST. LOUIS, MO 63102-2750

AURORA MOZELLE FLUHR

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 9,288 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. That Computer Associates Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

AURORA MOZELLE FLUHR