

IN THE SUPREME COURT OF THE STATE OF MISSOURI

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

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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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 Aurora Mozelle Fluhr was admitted to Missouri's bar on September 17, 2003. **App. 4.**¹ Respondent has not been previously disciplined.

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

Judge Julian Bush, of the 22nd Judicial Circuit, submitted a disciplinary complaint against Respondent (the "Judge Bush Complaint") stating that Respondent missed court dates and docket calls on behalf of her client, Rodney Twitty, who was accused of committing a series of armed robberies against elderly people. **App. 43 (T. 15).** According to Judge Bush, Respondent "had a very poor record of appearing for court proceedings... [and] [t]here had been a number of times she didn't appear, provided no explanation of failing to appear, [and] didn't call." **App. 42 (T. 13).** Respondent informed Judge Bush that her client would be better off with a different attorney, but never sought leave to withdraw from the case. **App. 42 (T. 13).** Further, Respondent appeared for voir dire in the case, but failed to return to court the following day for the commencement of the trial. **App. 85; see also App. 42 (T. 12).** As a result, Judge Bush was forced to declare a mis-trial. **App. 85; see also App. 42 (T. 12).** Upon being contacted by Judge Bush and questioned about her absence, Respondent informed Judge Bush that she was ill and that the illness may have been prompted by stress caused by the

¹ The facts contained herein are drawn from the testimony elicited and the exhibits admitted into evidence at the hearing in this matter held on April 24, 2009. Citations to the trial testimony before the Disciplinary Hearing Panel are denoted by the appropriate Appendix page reference followed by the specific transcript page reference in parentheses, for example "**App. ___ (T. ___).**" Citations to the pleadings and trial exhibits are denoted by the appropriate Appendix page reference.

trial. **App. 85.** Respondent never filed a motion for leave to withdraw from Mr. Twitty's case. **App. 43 (T. 14).**

The Natalie Peebles Representation and Complaint (Count IV)

Natalie Peebles submitted a disciplinary complaint against Respondent (the "Peebles Complaint") which alleged she paid Respondent \$2,500.00 in advance as a flat fee for a divorce proceeding (the "Fee"). **App. 86-89; see also App. 47 (T. 31); App. 50 (T. 42).** Despite leaving several messages for her, Respondent failed to respond and communicate with Ms. Peebles concerning the status of her case. **App. 86-89; see also App. 47 (T. 31).** Ms. Peebles was forced to hire another attorney to handle the divorce. **App. 47 (T. 32).** Ms. Peebles repeatedly requested, but did not receive, a refund of the Fee since no work was performed in exchange for it. **App. 86-89; see also App. 48 (T. 36-37); App. 49 (T. 40); App. 117-125.** The Judge Bush Complaint and the Peebles Complaint are collectively referred to herein as the "Complaints".

Disciplinary Proceeding

The Office of Chief Disciplinary Counsel received the Judge Bush Complaint on June 25, 2007 and the Peebles Complaint on March 19, 2008. **App. 85-89.** The Complaints were referred to the Region XI Disciplinary Committee for investigation. On April 25, 2008, the Region XI Disciplinary Committee investigated the matters, found probable cause and voted to issue an Information against Respondent. Informant served the Information on Respondent on August 5, 2008. **App. 15.** Respondent failed to answer the Information and an Order of Disbarment was entered by this Court on October 20, 2008. **App. 16.** Thereafter, Respondent filed a Motion to Set Aside Default Disbarment with this Court on October 31, 2008. **App. 17.** This Court issued an order dated November 4, 2008 setting aside the disbarment. **App. 24.** Respondent's Answer to the Information was received on or about December 4, 2008. **App. 25-30.** The Chair of the Missouri Supreme Court Advisory Committee appointed a Disciplinary Hearing Panel in this case on January 21, 2009. **App. 31-33.** Except for a brief entry by counsel

the day before the Disciplinary Hearing Panel hearing and subsequent withdrawal soon thereafter, Respondent has represented herself throughout these proceedings. The Panel held its evidentiary hearing in this matter on April 24, 2009. **App. 39-77.**

On September 1, 2009, the Disciplinary Hearing Panel issued its Findings of Fact, Conclusions of Law and Recommendation (the "Recommendation"). **App. 126-130.** The Disciplinary Hearing Panel found that Respondent violated Rule 4-1.3 of the Rules of Professional Conduct in that Respondent failed to (a) diligently represent Mr. Twitty as described in the Bush Complaint and (b) appear for day two of Mr. Twitty's jury trial without first obtaining leave of court and (c) timely notify the court of any necessity for Respondent's absence. The Disciplinary Hearing Panel also found that Respondent violated Rules 4-1.3 and 4-1.16(d) with respect to the Peebles Complaint in that Respondent received \$2,500.00 from Ms. Peebles, failed to perform any legal services in exchange for the payment and refused to return any of the payment following Ms. Peebles' request.

The Panel found the following as aggravating factors:

- multiple complaints being filed against Respondent despite the relatively short period of time she has been licensed to practice law;
- Respondent's failure to adequately explain her alleged failure to receive various pieces of correspondence from the Special Representative for the Region XI Disciplinary Committee seeking information about the pending Complaints;
- Respondent's alleged failure to timely respond to various communications from the Office of the Chief Disciplinary Counsel, or Respondent's alleged failure to meet with the Chief Disciplinary Counsel pursuant to the Frequent Complaint Recipient policy of the Office of the Chief Disciplinary Counsel;

- Respondent waited until late in the afternoon on the day before the Disciplinary Hearing to engage legal counsel, despite receiving at least thirty (30) days advance notice of the Disciplinary Hearing from the Presiding Officer.

Based on the foregoing findings and conclusions, the Disciplinary Hearing Panel recommended that Respondent (a) be suspended from the practice of law in the State of Missouri for a period of eight (8) months, (b) that the suspension be stayed for six (6) months, (c) Respondent be placed on probation for a period of one year, (d) Respondent make full restitution to Natalie Peebles in the amount of \$2,500.00 within Respondent's period of probation, (e) Respondent take any and all necessary or appropriate actions to prevent any existing clients from suffering any harm, damage, or prejudice whatsoever, including referring clients to other legal counsel, (f) Respondent keep the Missouri Bar fully and timely advised of Respondent's actual mailing address, (g) Respondent continue to maintain full compliance with all continuing legal education requirements, and (h) Respondent not violate any Rule of Professional Conduct. **App. 129.**

By letter dated September 30, 2009 to the Missouri Supreme Court Advisory Committee, the Informant rejected the written decision and recommendation of the Disciplinary Hearing Panel because it recommended imposition of a 60 day suspension on Respondent. **App. 131.** Respondent accepted the Panel's decision on September 23, 2009 by filing her Response to Disciplinary Hearing Panel Decision with the Presiding Officer of the Disciplinary Hearing Panel. Informant filed the record in this matter with the Court on November 5, 2009.

POINTS RELIED ON

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY FAILING TO

(A) COMPETENTLY AND REASONABLY COMMUNICATE WITH RODNEY TWITTY IN VIOLATION OF RULES 4-1.1 AND 4-1.4 OF THE RULES OF PROFESSIONAL CONDUCT;

(B) DILIGENTLY REPRESENT RODNEY TWITTY AND NATALIE PEEBLES IN VIOLATION OF RULE 4-1.3 OF THE RULES OF PROFESSIONAL CONDUCT;

(C) RETURN UNEARNED FEES IN VIOLATION OF RULE 4-1.16(d) OF THE RULES OF PROFESSIONAL CONDUCT; AND

(D) RESPOND TO REASONABLE REQUESTS FOR INFORMATION FROM THE OFFICE OF CHIEF DISCIPLINARY COUNSEL REGARDING THE COMPLAINTS IN VIOLATION OF RULE 4-8.1 OF THE RULES OF PROFESSIONAL CONDUCT.

Rule 4-1.1

Rule 4-1.3

Rule 4-1.4

Rule 4-8.1

POINTS RELIED ON

II.

THIS COURT SHOULD SUSPEND RESPONDENT'S LICENSE INDEFINITELY, WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR AT LEAST SIX MONTHS BECAUSE SUSPENSION FOR LESS THAN SIX MONTHS IS CONTRARY TO THE RULES OF DISCIPLINARY PROCEDURE AND THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS; ANY SHORTER SUSPENSION FAILS TO PROTECT CLIENTS.

A.B.A. Standards for Imposing Lawyer Sanctions (1991 ed.)

Rule 5.28(e)

ARGUMENT

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY FAILING TO

(A) COMPETENTLY AND REASONABLY COMMUNICATE WITH RODNEY TWITTY IN VIOLATION OF RULES 4-1.1 AND 4-1.4 OF THE RULES OF PROFESSIONAL CONDUCT;

(B) DILIGENTLY REPRESENT RODNEY TWITTY AND NATALIE PEEBLES IN VIOLATION OF RULE 4-1.3 OF THE RULES OF PROFESSIONAL CONDUCT;

(C) RETURN UNEARNED FEES IN VIOLATION OF RULE 4-1.16(d) OF THE RULES OF PROFESSIONAL CONDUCT; AND

(D) RESPOND TO REASONABLE REQUESTS FOR INFORMATION FROM THE OFFICE OF CHIEF DISCIPLINARY COUNSEL REGARDING THE COMPLAINTS IN VIOLATION OF RULE 4-8.1 OF THE RULES OF PROFESSIONAL CONDUCT.

Standard of Review of Disciplinary Hearing Panel Decision

It is well-settled that a Disciplinary Hearing Panel's recommendations are advisory in nature. *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). In a disciplinary proceeding, this Court reviews the evidence *de novo*, independently determining all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. *Id.* Discipline will not be imposed unless professional misconduct is proven by a preponderance of the evidence. *Id.* Where misconduct is proven by a preponderance of the evidence, violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004).

Failure to Competently Represent and Reasonably Communicate With Rodney Twitty as
Described in the Judge Bush Complaint

In its Information, Informant charged that Respondent violated Rules 4-1.1, 4-1.3 and 4-1.4 of the Rules of Professional Conduct by failing to provide competent representation to Mr. Twitty and by failing to reasonably communicate with him. The Disciplinary Hearing Panel failed to make a specific finding regarding Rules 4-1.1 and 4-1.4, finding only that Respondent failed to diligently represent Mr. Twitty in violation of Rule 4-1.3. However, the uncontroverted evidence before the Disciplinary Hearing Panel establishes that Respondent violated Rules 4-1.1 and 4-1.4.

Violation of Rule 4-1.1.

Respondent told Judge Bush “several times she did not want to try the case, she did not have the resources to try the case, [and] [Mr. Twitty] needed a different lawyer.” **App. 42 (T. 11-12)**. However, Respondent never filed a motion seeking leave to withdraw from the case. **App. 43 (T. 14)**. If Respondent lacked the necessary resources to try Mr. Twitty’s case, her conduct in accepting the representation and/or not withdrawing from the case prior to trial establishes her violation of Rule 4-1.1 since she was incapable of providing competent representation. Also, appearance at a client’s trial is a lawyer’s fundamental obligation. Intentional failure to appear shows a complete lack of “thoroughness and preparation” as described in Rule 4-1.1.

Violation of Rule 4-1.4.

In addition, Respondent violated Rule 4-1.4 by failing to reasonably communicate with Mr. Twitty. Specifically, Judge Bush testified as follows:

“On the second day of trial, second day of voir dire, [Respondent] never appeared, she never called. We had no word from her at all. The second day of trial we were in jury selection, everybody appeared, the jurors were there, the prosecutor was there, we were all there, and we waited, and we waited and we waited. She never called and she never arrived.” **App. 42 (T. 11-12)**.

Respondent failed to communicate with her client or Judge Bush regarding her decision not to appear in Court on the second day of trial. Respondent's failure to appear for the second day of trial was not the only time she failed to appear on Mr. Twitty's behalf without communicating her absence with him. According to Judge Bush, "she had a very poor record of appearing for court proceedings in the past [and] [t]here had been a number of times when she didn't appear, provided no explanation of failing to appear, didn't call" and otherwise missed court dates and docket calls for Mr. Twitty. **App. 42 (T. 13)**; *see also* **App. 39-77; App. 85**. As a result of Respondent's conduct, Judge Bush was forced to declare a mis-trial. **App. 42 (T. 11)**; *see also* **App. 42 (T. 12); App. 85**.

Based upon the foregoing, Respondent violated (a) Rule 4-1.1 by failing to possess the preparation, thoroughness and knowledge necessary to adequately represent Mr. Twitty, and (b) Rule 4-1.4 by failing to communicate with Mr. Twitty regarding her decision not to appear on his behalf on the second day of trial.

Failure to Diligently Represent Rodney Twitty and Natalie Peebles as Described in the
Complaints

The Rodney Twitty Representation and Judge Julian Bush Complaint

Respondent missed court dates and docket calls on behalf of her client, Rodney Twitty, who was accused of a series of armed robberies against elderly people. **App. 39-77; App. 85**. As discussed above, according to Judge Bush, Respondent "had a very poor record of appearing for court proceedings... [and] [t]here had been a number of times she didn't appear, provided no explanation of failing to appear, [and] didn't call." **App. 42 (T. 13)**. Further, Respondent appeared for voir dire in the case, but failed to return to court the following day for the commencement of the trial. **App. 85**; *see also* **App. 42 (T. 12)**. As a result, Judge Bush was forced to declare a mis-trial. **App. 85**; *see also* **App. 42 (T. 12)**.

The Natalie Peebles Representation and Complaint

Natalie Peebles paid the Fee to Respondent in advance as a flat fee for a divorce proceeding. **App. 86-89**; *see also* **App. 47 (T. 31)**; **App. 50 (T. 42)**. Despite leaving several messages for her, Respondent failed to respond and communicate with Ms. Peebles concerning the status of her case. **App. 86-89**; *see also* **App. 47 (T. 31)**. No work was ever performed by Respondent in exchange for the Fee. **App. 47 (T. 31)**; **App. 86-89**. As a result of Respondent's lack of diligence, Ms. Peebles was forced to hire another attorney to handle the divorce and was required to expend an additional \$2,500.00 for the second attorney. **App. 47 (T. 32)**.

Based upon the foregoing, the Disciplinary Hearing Panel properly found that Respondent violated Rule 4-1.3 of the Rules of Professional Conduct by failing to diligently represent Mr. Twitty and Ms. Peebles.

Failure to Return Unearned Fees

Ms. Peebles delivered the Fee to Respondent on or before September 25, 2007. **App. 86-89**; *see also* **App. 47 (T. 31)**. No services were ever performed for the Fee. **App. 86-89**; *see also* **App. 48 (T. 36-37)**; **App. 49 (T. 40)**; **App. 117-125**. Ms. Peebles repeatedly requested, but did not receive, a refund of the Fee. **App. 86-89**; *see also* **App. 48 (T. 36-37)**; **App. 49 (T. 40)**; **App. 117-125**. Consequently, Respondent violated Rule 4-1.16(d) by failing to return the Fee.

Failure to Respond to Disciplinary Proceedings

The Informant sent the Judge Bush Complaint and the Peebles Complaint to Respondent on March 17, 2008 and April 9, 2008, respectively, and directed Respondent to provide written responses thereto. **App. 78-79**; **App. 81-82**. Respondent did not respond to the Complaints until she filed her answer to the Information, which she was allowed to do only after this Court reinstated her following her default disbarment for having failed to respond to the Information.

Accordingly, Respondent has engaged in professional misconduct as a result of violating Rule 4-8.1(c) due to her failure to respond to the disciplinary authority's

reasonable directives that she respond to the Judge Bush Complaint and the Peebles Complaint.

ARGUMENT

II.

THIS COURT SHOULD SUSPEND RESPONDENT'S LICENSE INDEFINITELY, WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR AT LEAST SIX MONTHS BECAUSE SUSPENSION FOR LESS THAN SIX MONTHS IS CONTRARY TO THE RULES OF DISCIPLINARY PROCEDURE AND THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS; ANY SHORTER SUSPENSION FAILS TO PROTECT CLIENTS.

Disciplinary Hearing Panel's Error

By recommending the imposition of an eight month suspension and then recommending staying six of the eight months, the Disciplinary Hearing Panel effectively recommended that Respondent receive a 60 day suspension. Such a short suspension is contrary to this Court's Rules governing complaints and proceedings and the American Bar Association's *Standards for Imposing Lawyer Sanctions (1991 Edition)* (the "ABA Standards"). Furthermore, such a short suspension is not in the best interests of the public.

Suspension for Less than Six Months is Contrary to Rules and the Public Interest

This Court's Rules do not contemplate a suspension of less than six months duration in that Rule 5.28(e)(1) provides that "[e]xcept for good cause shown, no application for reinstatement for a person who is: (1) [s]uspended ... shall be considered until after six months of the date discipline is imposed unless the Court provides by order for a longer time ..." Rule 5.28(e)(1). Good cause does not exist in the instant case, nor was good cause cited as a basis for the 60 day suspension in the Disciplinary Hearing Panel's Recommendation.

Moreover, this Court has relied on the ABA Standards to determine the appropriate discipline to be imposed in attorney discipline cases. *See, e.g., In re Crews,*

159 S.W.3d 355, 360-61 (Mo. banc 2005); *In re Warren*, 888 S.W.2d 334 (Mo. banc 1994); *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994); *In re Oberhellman*, 873 S.W.2d 851 (Mo. banc 1994). Therefore, the suspension guidelines included within the ABA Standards are instructive. Those Standards provide that “suspension should be for a period of time equal to or greater than six months.” Rule 2.3, ABA Standards. Consequently, the Recommendation, to the extent that it provides for a sixty (60) day suspension, is not consistent with the ABA Standards upon which this Court has relied.

In addition to the foregoing, imposing a sixty (60) day suspension on Respondent will result in delays in the administration of justice given the risk that Respondent will merely continue existing cases, rather than refer them to alternate counsel. The result would be to unnecessarily delay any such clients’ matters without any corresponding benefit to the impacted clients. An indefinite suspension with leave to apply for reinstatement after six months will force the Respondent to comply with the Rules and make arrangements for others to address the needs of each client during this period of time, thus protecting the interests of those clients and the public at large. The Comment to Rule 4-1.3 notes that no professional shortcoming is more widely resented by the public than procrastination, noting that unreasonable delay can cause the client needless anxiety and undermine the client’s confidence in the lawyer’s trustworthiness. Rule 4-1.3. A sixty (60) day suspension would cause the angst Rule 4-1.3 seeks to prevent.

Indefinite Suspension

With Leave to Apply for Reinstatement After 6 Months is the Appropriate Sanction

An indefinite suspension with leave to apply for reinstatement after six months is the appropriate sanction in this case. It is established that when an attorney fails to act with “reasonable diligence and promptness in representing a client” suspension is appropriate when the attorney knowingly fails to perform and/or engages in a pattern of neglect that causes injury or has the potential to cause injury. Rule 4.42, ABA Standards. In this case, the Disciplinary Hearing Panel found that Respondent violated this Court’s

rule regarding an attorney's duty of diligence to his or her clients in violation of Rule 4-1.3. **App. 126-130.** The Panel reached this decision having concluded that the testimony of Judge Bush and Ms. Peebles was uncontroverted. **App. 126-130.** Their testimony demonstrated that the Respondent acted negligently and was not diligent with respect to the matters described in the Complaints. As a result, suspension is appropriate.

When deciding upon the appropriate penalty for misconduct, the Court considers "the duty violated, the lawyer's mental state, the actual or potential injury caused by the lawyer's conduct, and the existence of aggravating or mitigating factors." See, Rule 3.0, ABA Standards, see also, *In re Wiles*, 107 S.W. 3d 228, 229 (Mo. banc 2003) (the Court considers the gravity of the attorney's misconduct, as well as any mitigating or aggravating factors).

While the disciplinary investigation produced no evidence from which to infer any mental state for Respondent's misconduct other than negligence, the Disciplinary Hearing Panel found several aggravating factors. According to Rule 9.21 of ABA Standards, aggravating factors are any considerations or factors that may justify an increase in the degree of discipline to be imposed. Rule 9.21, ABA Standards. Among the aggravating factors which may be considered are a pattern of misconduct; multiple offenses; and bad faith obstruction of a disciplinary proceeding. See, Rule 9.22(c), (d) and (e), ABA Standards. The aggravating factors identified by the Disciplinary Hearing Panel and previously described herein fall within those categories as follows:

- Multiple complaints being filed against Respondent despite the relatively short period of time she has been licensed to practice law (ABA Standards, Rule 9.22(c)(d)). In fact there were 4 complaints filed against Respondent between June 20, 2007 and March 19, 2008. **App. 4-15.**
- Respondent's failure to adequately explain her alleged failure to receive various pieces of correspondence from the Special Representative for the Region XI Disciplinary Committee (ABA Standards, Rule 9.22(e)).

- Respondent's failure to timely respond to various communications from the Office of the Chief Disciplinary Counsel (ABA Standards, Rule 9.22(e)).
- Respondent waited until late in the afternoon on the day before the Disciplinary Hearing to engage legal counsel, despite receiving at least thirty (30) days advance notice of the Disciplinary Hearing from the Presiding Officer (ABA Standards, Rule 9.22(e)).
- Although not described as an aggravating factor by the Panel, it is significant that Respondent has not repaid her client's \$2,500.00 unearned fee. Indifference to making restitution is an aggravating circumstance described in the ABA Sanction Guidelines; (ABA Standards, Rule 9.22(j)).

Employing the sanction analysis recommended by the ABA Standards and previously utilized by this Court, and upon consideration of the aggravating factors found by the Disciplinary Hearing Panel, an indefinite suspension with leave to apply for reinstatement after six months is the most applicable and appropriate sanction for Respondent's violations.

CONCLUSION

Respondent committed professional misconduct by (a) violating Rules 4-1.1, 4-1.3, 4-1.4 and 4-1.16 by failing to (i) diligently represent Mr. Twitty as described in the Bush Complaint, (ii) appear for day two of Mr. Twitty's jury trial without first obtaining leave of court, (iii) timely notify her client and the court of any necessity for Respondent's absence and (b) failing to perform any legal services in exchange for payment and refusing to return any of the \$2,500.00 payment following Ms. Peebles' request for a refund. The presence of significant aggravating circumstances supports the imposition of discipline. Informant respectfully requests that this Court indefinitely suspend Respondent from the practice of law with leave to apply for reinstatement after six months.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2009, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via

First Class mail to:
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Alan D. Pratzel

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 4,256 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. That AVG 8.5 Anti-Virus software was used to scan the disk for viruses and that it is virus free.

Alan D. Pratzel

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