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Fact-Check of Respondent's Brief

Respondent's Brief contains claims that are unsupported by and inconsistent with the evidentiary record in this case. Informant will reply herein to only a few factual misstatements.

1. Informant's offer of diversion to Respondent was withdrawn as a result of the receipt of additional complaints against Respondent.

Respondent claims that Informant rescinded its offer of diversion in contradiction to a prior agreement between the parties. **Respondent's Brief at 5.** This statement is not true. Instead, the record evidence establishes that Informant withdrew its offer of diversion and so notified Respondent in writing prior to the Disciplinary Hearing Panel hearing in this matter due to the fact that additional complaints had been received against Respondent. **App. 58 (T. 74-77); Informant's Exhibit 3.** Informant concluded that diversion was no longer appropriate under Rule 5.105 given the seriousness of the additional complaints and the belief that Respondent's professional misconduct was likely to result in the imposition of discipline by this Court.

2. Respondent failed to provide the Clerk of the Court and the disciplinary authority with accurate contact information. The Record contains evidence that all pleadings and correspondence were sent to Respondent's address.

In her brief, Respondent claims that there was a breakdown in communication between herself and counsel for the Informant. Throughout these proceedings, Respondent has sought to blame the disciplinary authority for failing to provide her with various notices and communications, claiming that she never received written

communications from either the OCDC or counsel for the Informant. **Respondent's Brief at 5; App. 58 (T76).**

Any breakdown in communication between the parties resulted from Respondent's failure to update her contact information with the Clerk of the Court as required by Supreme Court Rule 6.01. Under that rule, lawyers are required to furnish the Clerk with the lawyer's current mailing address and email address and to notify the Clerk of any change in that contact information. As is its custom and practice, Informant sent all communications to Respondent's address of record that she provided to the Clerk of the Court. Respondent, however, moved from that address and failed to update her contact information with the Clerk as required by the rule.¹

3. Respondent's Brief misrepresents the chronology of events in these disciplinary proceedings.

In her brief, Respondent notes that she met with Chief Disciplinary Counsel ("CDC") Alan Pratzel and claims that the recommendation as to discipline taken by Informant before the Disciplinary Hearing Panel was inconsistent with discussions held during her meeting with CDC Pratzel. This assertion is false and confuses the chronology of events in these disciplinary proceedings.

¹ In her Brief, Respondent seems to acknowledge the Informant's repeated problem in communicating with her by noting that she now has a permanent law office address.

Respondent's Brief at 7.

CDC Pratzel met with Respondent on June 12, 2009 pursuant to the Frequent Complaint Recipient (“FCR”) policy established by the Office of Chief Disciplinary Counsel.² The FCR policy is intended to identify and address issues for those lawyers who are repeatedly the subject of disciplinary complaints from their clients and others. The policy and the meeting with CDC Pratzel focuses on law practice management issues and attempts to address remedial action that the subject lawyer might consider taking. Respondent’s meeting with CDC Pratzel occurred after the April 24, 2009 hearing before the Disciplinary Hearing Panel (“DHP”). It was not intended to address the disciplinary issues then pending before the DHP or the possible discipline that might result therefrom, particularly since the meeting occurred at a time after the DHP hearing had already occurred and when the formal charges were under submission with the DHP. The DHP decision was issued on or about September 8, 2009.

Respondent asserts that her meeting with CDC Pratzel was merely a “tool used to gather information for investigative purposes.” **Respondent Brief at 6.** This claim is temporally impossible since the DHP hearing had already been completed and the case was under submission with the DHP. Equally important, Respondent’s claim is particularly troublesome because it misrepresents the timing, purpose and tenor of the meeting with CDC Pratzel and attempts to confuse this Court as to the substance and results of that meeting.

² Respondent Fluhr failed to attend the initial FCR meeting with CDC Pratzel scheduled in April 2008.

4. Respondent's argument with regard to her Twitty representation and the complaint by Judge Julian Bush is unsupported in the record.

Respondent makes various assertions relative to her Crohn's Disease and how it allegedly affected her representation of Rodney Twitty and her handling of the trial before Judge Julian Bush. These arguments are unsupported in the record. For example, Respondent describes her surgery and alleged complications resulting therefrom. The record evidence establishes that her surgery occurred in March 2006. **App. 60 (T. 82).** Respondent's own documents, which she attached to her brief but are not part of the record, establish that she was recovering from surgery only until April 12, 2006. **R. App. 4.** The trial before Judge Bush took place over a year later, in June 2007. **App. 45 (T. 23-24).** If, in fact, Respondent was not physically able to represent her client at the June 2007 trial before Judge Bush, Informant questions how Respondent was able to competently represent her clients in the months between her surgery and the trial. In addition, that claim now raised by Respondent in her brief was not presented to the DHP in this matter.

5. Respondent's dealings and interactions with her attorney are not relevant to these proceedings.

Respondent's Brief includes a lengthy description of alleged misconduct by her attorney, Craig Kessler. **Respondent's Brief at 17-18.** Counsel for Informant previously advised Respondent that she should file a complaint with the Office of Chief Disciplinary Counsel ("OCDC") with regard to that conduct if she desired the OCDC to

review and investigate the matter. To date, Respondent has chosen not to file such a complaint with the OCDC.

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.

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

In re Staab, 785 S.W.2d 551 (Mo. banc 1990)

In re Donaho, 98 S.W.2d 87 (Mo. banc 2003)

Rule 5.225

ABA Standards for Imposing Lawyer Sanctions (1992)

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.

The Court is directed to Informant's initial brief for an analysis of why a suspension is the best sanction. **Informant's Brief pp. 17-21.** This portion of Informant's Reply Brief will address the question of probation.

A stayed suspension with Supreme Court probation under Rule 5.225 is not the best remedy in this case. Clearly, certain attorney misconduct can be addressed by training, monitoring and support. If this respondent's misconduct consisted of merely failing to adequately communicate with her clients, or failing to establish office systems to assure she did not miss court dates, then re-training during a period of probation would make sense. But, some of Respondent's misconduct, and certain aggravating circumstances, cannot easily be addressed by training, support, and monitoring. Her behavior requires a temporary removal from the practice to assure that Respondent understands the seriousness of her obligations to her clients, her profession, and the courts.

A recurrent problem of failing to appear in court without explanation, as described by Judge Bush, calls for an actual suspension so that Respondent can reconsider the importance of her role in the justice system.

Appearance at a client's trial is fundamental to representing that client. Respondent's failure to appear on the second day of Rodney Twitty's felony trial was not a calendaring problem; instead, it was Respondent's decision that she was not essential to either the proceeding or her client's needs. This Court should reject any mitigating circumstances based on either Respondent's physical ailments or on evidence not contained in the record.

Respondent's failure to provide up-to-date addresses to the Court and Bar reflects a failure to appreciate her professional obligations. Law practice management assistance will not address that concern. Respondent's unsubstantiated assertions about failing to receive disciplinary mail that she claims to have known to have arrived in a Bryan Cave envelope instead of an OCDC envelope makes no sense. The claim appears to be an attempt to bootstrap herself into a position of benefiting from her own failures. She cannot now be permitted to benefit from her own failure to provide current and accurate contact information.

Respondent's default on the initial disciplinary charges, which she justified by her unsubstantiated claim that she did not open her mail, indicates a lack of appreciation for the Court's authority. "A lawyer should regard a letter from the Office of Chief Disciplinary Counsel with the respect accorded with communications from the Internal Revenue Service." *In re Shelhorse*, 147 S.W.3d 79 (Mo. banc 2004). (Senior Judge

Blackmar concurring in part and dissenting in part). The Court has shown its concern with lawyers who are unable to respond to disciplinary investigations by suspending them: “Respondent’s explanation for his lack of cooperation is that he suffered severe panic attacks whenever he saw mail from the bar Committee and Court. ...Because of his panic he did not open the mail, and therefore was not aware of the nature and extent of the Bar Committee’s request. He offers this explanation as evidence that his failure to comply was not willful. These factors do not overcome the manifest showing in the evidence nor do they mitigate the seriousness of the offense, but, demonstrate the tragedy involved.” *In re Staab*, 785 S.W.2d 551 (Mo. banc 1990).

Respondent’s pro se Brief contains numerous claims of fact not supported by any record, offered for the first time in the brief, and often rebutted by the record. That approach to the practice of law is not readily addressed by probation, monitoring and practice management programs. Instead, an actual suspension is necessary: “[Lawyers] who knowingly seek to mislead those committees, and in so doing interfere with their work, do so at their peril. . .” *In re Donaho*, 98 S.W.3d 87 (Mo. banc 2003). As the Court also noted in the *Donaho* decision: “...leniency might be appropriate were it not for the remaining charges, all of which involve intentional deception of the very committee charged with ensuring that those licensed to serve as members of the bar act with the moral fortitude befitting the profession. . . .This Court regards dishonesty before a disciplinary committee to be especially egregious.” *Id.*

Additionally, the Court often refers to sanction guidelines established by the American Bar Association, ABA Standards for Imposing Lawyer Sanctions (1992).

Those standards establish the following as *aggravating factors* in determining appropriate discipline:

- “intentionally failing to comply with rules and orders of the disciplinary agency”; 9.22(e)
- “submission of false evidence, false statements or other deceptive practices during the disciplinary process”; 9.22(e).

Standard 2.7 Commentary, as amended in 1992, indicates that “probation is appropriate for conduct which may be corrected.” Intentionally ignoring the second day of a felony trial is not one of the listed examples of correctable behavior. Likewise, submission of unsupported and deceptive claims in a disciplinary case is not included in the list of conduct appropriate for probation. ABA Standard For Imposing Lawyer Sanctions (1992).

CONCLUSION

Respondent committed professional misconduct by failing to diligently and competently represent Rodney Twitty as described in the Bush Complaint, by failing to appear for day two of Mr. Twitty's jury trial without first obtaining leave of court, by failing to timely notify the court of any necessity for Respondent's absence and by failing to perform any legal services in exchange for payment and refusing to timely return any of the \$2,500 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, that costs in this matter be taxed against Respondent, and that a \$1,000 disciplinary fee be assessed against Respondent pursuant to Rule 5.19(h).

Respectfully submitted,

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

By: _____

Sam S. Phillips #30458
Deputy Chief Disciplinary Counsel
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400 – Phone
(573) 635-2240 – Fax
Sam.Phillips@courts.mo.gov

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2010, two copies of Informant's Reply Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

Aurora Mozelle Fluhr
7515 Delmar Blvd.
St. Louis, MO 63130

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 2,334 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. That Trend Micro Security Agent anti-virus software was used to scan the disk for viruses and that it is virus free.

Sam S. Phillips