

IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:)
)
MICHAEL KOENIG) Supreme Court #SC91685
)
Respondent)

RESPONDENT’S BRIEF

KEMPTON AND RUSSELL

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STATEMENT OF JURISDICTION

Respondent accepts the Statement of Jurisdiction submitted by Informant.

STATEMENT OF FACTS

Respondent accepts the Statement of Facts submitted by Informant.

POINT RELIED ON

THIS COURT SHOULD ISSUE A STAYED SUSPENSION WITH PROBATION AGAINST MR. KOENIG'S LICENSE BECAUSE ABA SANCTIONING STANDARDS, CASE LAW AND COURT RULES SUPPORT THIS LEVEL OF DISCIPLINE IN THAT MR. KOENIG'S ETHICAL VIOLATIONS RESULTED FROM HIS SEVERE DEPRESSION, MR. KOENIG HAS SHOWN A SUSTAINED PERIOD OF RECOVERY AND THE PROPOSED PROBATION TERMS PROVIDE A WAY FOR INFORMANT TO CLOSELY MONITOR MR. KOENIG'S CONDITION AND ACTIONS.

Basler v. Delassus, 690 S.W. 2d 791, 796 (Mo. banc 1985)

Croker v. Consolidated Service Car, 365 S.W. 2d 524, 532 (Mo. 1963)

Matter of Cupples, 952 S.W. 2d 226, 233 (Mo. banc 1997)

In re Donaho, 98 S.W. 3d 871, 873 (Mo. banc 2003)

In re Mills, 539 S.W. 2d 447, 450 (Mo. banc 1976)

State v. Reese, 457 S.W. 2d 713, 717 (Mo. banc 1970)

ARGUMENT

THIS COURT SHOULD ISSUE A STAYED SUSPENSION WITH PROBATION AGAINST MR. KOENIG'S LICENSE BECAUSE ABA SANCTIONING STANDARDS, CASE LAW AND COURT RULES SUPPORT THIS LEVEL OF DISCIPLINE IN THAT MR. KOENIG'S ETHICAL VIOLATIONS RESULTED FROM HIS SEVERE DEPRESSION, MR. KOENIG HAS SHOWN A SUSTAINED PERIOD OF RECOVERY AND THE PROPOSED PROBATION TERMS PROVIDE A WAY FOR INFORMANT TO CLOSELY MONITOR MR. KOENIG'S CONDITION AND ACTIONS.

Respondent accepts and supports the argument of Informant that the appropriate discipline in this case is a stayed suspension with probation.

While not stated in the argument of counsel for Informant it is implicit that the OCDC has the ability to adequately supervise and monitor probation if it is granted. In addition to the resources of the Office of Chief Disciplinary Counsel the condition of probation calls for Respondent to have a mentoring attorney. That attorney is Dana Macoubrie, a highly respected attorney from Chillicothe whose father David Macoubrie is a long time member of the Advisory Committee.

Respondent also has, and has had since this matter was referred to the OCDC, the assistance of his brother, attorney Rick Koenig of Sedalia, Missouri. Rick Koenig has provided invaluable counsel and assistance to Respondent and has agreed to continue to do so. The arrangement between Respondent and his brother is that any bodily injury or

workers compensation cases for clients of Respondent will be handled by Rick Koenig and Respondent jointly. The handling of client funds will be solely through the trust account of Rick Koenig, thereby minimizing any future trust account issues.

This case came to the Disciplinary Hearing Panel on a stipulated set of facts, stipulated conclusions of law and a stipulation for recommended discipline. The case now comes to this Court on the same stipulations but with the additional approval of the Disciplinary Hearing Panel. The Disciplinary Hearing Panel in this case consisted of two experienced, highly regarded attorneys, Ken Garten and Susan Ford Robertson, and a PhD psychologist, Leslie T. Dunn. Given Respondent's problems with depression this panel was well qualified to assess Respondent's past, present and future mental and emotional status and to determine if the proposed sanctions made sense and were valid.

The Disciplinary Hearing Panel did not merely accept this stipulation for recommended discipline but held a hearing at which the panel chair interrogated Respondent and asked searching questions of counsel for the Informant and counsel for the Respondent. At the hearing Susan Ford Robertson expressed her concern and the concern of the Disciplinary Hearing Panel about how we got to the recommendation of stayed suspension and probation given the conduct of Respondent. After hearing all of the evidence she indicated her concerns had been alleviated. **T. 40.**

The Disciplinary Hearing Panel unanimously approved the recommended discipline of a 24 month stayed suspension with conditions of probation for 36 months. The conditions of probation are significant and provide a good structure for Respondent's success for completion. The conditions are designed to prevent any further problems and

certainly the conditions provide protection for the public. If Respondent breaches his probation conditions in any respect it is specifically provided that his probation may be terminated.

No citation is necessary for the proposition that this Court has the inherent authority and duty to determine the fitness of the members of the Missouri Bar. Nor is citation necessary for the proposition that this Court is not bound by the findings of the Disciplinary Hearing Panel but is free to make its own determination of the facts, the law and the appropriate discipline. In the experience of counsel for Respondent it is clear that this Court seeks consistency in its attorney discipline cases.

Recognizing the role of the Disciplinary Hearing Panel this Court has properly held that considerable weight should be given to the findings and recommended discipline of the Disciplinary Hearing Panel. *In re Donaho*, 98 SW3d 871, 873 (Mo. banc 2003). Certainly given the composition, experience, expertise and the interest shown by this Disciplinary Hearing Panel considerable weight should be given to the DHP's recommendation in this case.

Counsel for Respondent suggests to the Court that in this case the Court should also give substantial weight to the fact that the parties have stipulated to the facts, the conclusions of law and recommended discipline. By so doing the parties had hoped to save time, expense, uncertainty and to minimize the expenditure of this Court's time and Disciplinary Hearing Panel time. Counsel for Informant and Respondent framed a recommendation that protects the public and recognizes and addresses the mental health issues of Respondent. By signing off on the agreement, counsel for the Informant and

counsel for Respondent have represented to this Court pursuant to Supreme Court Rule 55.03(c) that stayed suspension and probation are warranted by existing law as set forth in the argument portion of the Brief of Informant.

By reaching a stipulation the parties have in effect brought a settlement to the Disciplinary Hearing Panel and to this Court for approval. The law favors compromise and settlement except in criminal cases. *State v. Reese*, 457 SW2d 713, 717 (Mo. banc 1970). An attorney disciplinary proceeding is not a criminal prosecution. *In re Mills*, 539 SW2d 447, 450 (Mo. banc 1976); *In the Matter of Cupples* 952 SW2d, 226, 233 (Mo. banc 1997). This Court has held that an attorney disciplinary hearing is sui generis. A disciplinary hearing is an examination into the fitness of a member of the bar. This Court should follow the policy of favoring compromise and settlement in civil cases. *Basler v. Delassus*, 690 S.W. 2d 791, 796 (Mo. banc 1985); *Croker v. Consolidated Service Car*, 365 S.W. 2d 524, 532 (Mo. 1963).

If stipulations entered into between the Office of Chief Disciplinary Counsel and Respondents are to remain a tool for the proper resolution of attorney discipline matters then this Court should give weight to the fact that the parties have reached an agreement. That agreement was reached after considering the Rules of Professional Conduct, the ABA Standards, the reported case law of Missouri and the dispositions of unrecorded cases.

This Court appoints the Chief Disciplinary Counsel. The current Chief Disciplinary Counsel has a wealth of experience and knowledge of our attorney discipline system. When attorneys who are involved in discipline cases reach stipulations with the

Chief Disciplinary Counsel those stipulations should be given considerable weight just as the decisions of Masters and Disciplinary Hearing Panels. To do otherwise would cast doubt on the process and impair the ability of the Chief Disciplinary Counsel to resolve cases on agreed facts and recommendations.

Counsel for Respondent, the Office of Chief Disciplinary Counsel and the three members of the Disciplinary Hearing Panel all believe and have represented to this Court that Respondent is a proper subject for probation. The conditions of probation are stringent and protect the public. They also provide the Chief Disciplinary Counsel with the ability to act should Respondent have any indication of a relapse.

CONCLUSION

For the reasons setforth above Respondent respectfully requests that this Court:

- a. Accept the Stipulation and the Findings and Recommendation of the Disciplinary Hearing Panel.
- b. Suspend Respondent's license for two (2) years with the suspension stayed for 36 months on the stipulated terms and conditions of probation.
- c. Tax all costs in this matter to Respondent including \$1,000.00 fee pursuant to Rule 5.19(h).

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of August, 2011, one copy of Respondent's Brief and a CD containing the brief in Microsoft Word format have been sent via First Class mail to: Nancy Ripperger, Chief Disciplinary Counsel, 3335 American Avenue, Jefferson City, MO 65109.

Robert G. Russell

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 1,707 words and 235 lines, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. That the diskette has been scanned for viruses and that it is virus free.

Robert G. Russell