IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
RICHARD A. KOEHLER,	)	**Supreme Court #SC85511**
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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STATEMENT OF JURISDICTION

Jurisdiction over this attorney discipline matter 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 1994.

STATEMENT OF FACTS *

Respondent Richard A. Koehler was admitted to Missouri's Bar in 1974. His office is located in Butler, Missouri. Respondent has no history of discipline.

In December of 1992, Respondent was a loan officer at the Bates County National Bank. **A-31, A-420, A-427.** An individual named William Everett Grant was indebted to the bank on a series of loans, id., and the bank held a deed of trust on the building in which Mr. Grant's restaurant operated. **A-31**. Mr. Grant first met Mr. Koehler in early 1992 in his capacity as a bank loan officer. **A-31.**

On December 24, 1992, Respondent, having prepared the petition, schedules, and statement of affairs, filed a Chapter 11 bankruptcy petition for Mr. Grant in the U. S. Bankruptcy Court, Western District of Missouri. **A-410.** While Respondent knew that the bankruptcy code required it, he did not file an application to be appointed the debtor's counsel, or the affidavit that must be filed with the application attesting to the lawyer's status as a disinterested party to the bankruptcy proceeding. **A-250, A-347-48, A-350, A-410-11.** Motions were thereafter filed by the U. S. Trustee and a creditor to disqualify Respondent from representing Mr. Grant on the grounds that Respondent was not a

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***** Citations in the statement of facts are to the transcripts of the two days of testimony given in the underlying sanctions case, Judge See's June 1997 decision, the Bankruptcy Panel's October 1997 opinion, and a letter from the Office of Chief Disciplinary Counsel to Respondent, all contained in the Appendix.

disinterested party. **A-411.** On April 9, 1993, the bankruptcy court entered an order sustaining the motions to disqualify Respondent from representing Mr. Grant and ordering him to return all attorneys fees already paid. **A-411.**

Over the two years following the order of disqualification, Respondent continued to perform services for Mr. Grant in connection with the bankruptcy and other matters and billed Mr. Grant more than $8,000.00 for fees and costs. **A-84, A-166, A-183-86, A-189, A-191-92, A-258, A-411, A-429.** In March of 1995, Respondent billed Mr. Grant and demanded payment for all legal services provided by Respondent to Mr. Grant, including bankruptcy services. **A-112, A-191, A-199**. On April 26, 1995, Respondent initiated collection proceedings against Mr. Grant in the Bates County Circuit Court. **A-66, A-429.** On May 10, 1995, Mr. Grant filed, in bankruptcy court, a motion for imposition of sanctions against Respondent for violating the April 9, 1993, disqualification order. Hearings on the motion were conducted on May 25 and June 22, 1995. **A-2 through A-409**.

Respondent testified at the hearing that the bankruptcy services he performed, and for which he billed, Mr. Grant after April 9, 1993, were in the nature of paralegal services. **A-150-53**. The billing statements made no mention of the services being in the nature of paralegal work. **A-165**. Respondent testified that, among other bankruptcy-related services, he prepared the amended disclosure statement, worked with subsequent counsel on settling Mr. Grant's debts to a certain creditor, **A-187, A-192**, and prepared and filed a motion for judicial closure of the bankruptcy case. **A-199**. Respondent effected service of the pleadings he prepared for Mr. Grant. **A-167**.

On June 9, 1997, the bankruptcy court issued an order finding Respondent in contempt of the court's April 9, 1993, order and imposed sanctions in excess of $15,000.00. **A-410-25.** The U. S. Bankruptcy Appellate Panel for the Eighth Circuit affirmed the June 9, 1997, order by decision dated October 31, 1997. **A-426-37.**

Mr. Grant wrote a letter of complaint about Respondent to the Office of Chief Disciplinary Counsel in February of 1998. The file was thereafter assigned and reassigned to various staff counsel. On July 14, 2003, undersigned counsel sent Respondent a letter enclosing the information eventually filed with the Court on August 21, 2003, and offering to stipulate to a public reprimand. By letter dated July 19, Respondent acknowledged the letter and asked for more information about the sanction and the disciplinary process. Undersigned counsel responded to Mr. Koehler by letter with enclosures dated July 22, 2003. **A-438-44.** Mr. Koehler thereafter returned signed copies of the pleadings, which were filed with the Court on August 21, 2003. The Court, on September 30, 2003, ordered that the matter be briefed.

POINT RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULES 4-1.7(a), 4-3.4(c), 4-3.3(a), AND 4-8.4(d) IN THE COURSE OF HIS INVOLVEMENT WITH WILLIAM GRANT'S BANKRUPTCY CASE IN THAT HE HAD A CONFLICT OF INTEREST THAT PRECLUDED HIM FROM REPRESENTING MR. GRANT, HE CONTINUED TO BE INVOLVED IN THE CASE AFTER THE COURT ORDERED HIS DISQUALIFICATION, HE MISREPRESENTED THE NATURE OF HIS INVOLVEMENT IN THE CASE IN TESTIMONY GIVEN IN 1995, AND HIS WILLFUL VIOLATION OF A COURT ORDER AND TESTIMONIAL MISREPRESENTATIONS UNDULY PROLONGED AND EXACERBATED THE COST OF THE BANKRUPTCY CASE.

In re Carey and Danis, 89 S.W.3d 477, 498-99 (Mo. banc 2002)

In re Caranchini, 956 S.W.2d 910, 912-914 (Mo. banc 1997),

cert. denied, 524 U.S. 940

Rule 4-1.7(a)

Rule 4-3.4(c)

Rule 4-3.3(a)

Rule 4-8.4(d)

POINT RELIED ON

II.

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT BECAUSE, ALTHOUGH RESPONDENT'S CONDUCT WAS, AT A MINIMUM, KNOWING, THE SANCTION SHOULD BE MITIGATED BY RESPONDENT'S LONG EXPERIENCE AT THE BAR WITH NO RECORD OF DISCIPLINE AND DUE TO DELAY IN PROSECUTING THE DISCIPLINARY CASE

ABA's Standards for Imposing Lawyer Sanctions (1991 ed.)

ABA's Model Rules for Lawyer Disciplinary Enforcement (1993 ed.)

In re Coe, 903 S.W.2d 916, 918 (Mo. banc 1995)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULES 4-1.7(a), 4-3.4(c), 4-3.3(a), AND 4-8.4(d) IN THE COURSE OF HIS INVOLVEMENT WITH WILLIAM GRANT'S BANKRUPTCY CASE IN THAT HE HAD A CONFLICT OF INTEREST THAT PRECLUDED HIM FROM REPRESENTING MR. GRANT, HE CONTINUED TO BE INVOLVED IN THE CASE AFTER THE COURT ORDERED HIS DISQUALIFICATION, HE MISREPRESENTED THE NATURE OF HIS INVOLVEMENT IN THE CASE IN TESTIMONY GIVEN IN 1995, AND HIS WILLFUL VIOLATION OF A COURT ORDER AND TESTIMONIAL MISREPRESENTATIONS UNDULY PROLONGED AND EXACERBATED THE COST OF THE BANKRUPTCY CASE.

The facts underlying both this disciplinary case and the federal sanctions case were developed during two days of hearings conducted in May and June of 1995 on debtor Grant's motion for sanctions against Respondent. Bankruptcy Judge Karen See, U. S. Bankruptcy Court for the Western District of Missouri, Western Division, presided over the hearings. On Respondent's appeal from Judge See's decision holding Respondent in contempt and imposing sanctions, the U. S. Bankruptcy Appellate Panel for the Eighth Circuit reiterated the facts and found them to be supported by the evidence.

Mr. Koehler represented himself at both days' hearings and also had separate counsel for the second day of hearing. Citations to the transcripts of the underlying hearings appear in this brief's statement of facts, so the Court can resolve any doubt that may exist about the evidentiary basis for the facts developed by the federal courts, and upon which Informant relies.

The factual determinations made and reiterated on appeal by the federal courts are conclusive against Respondent in this disciplinary case by application of offensive non-mutual collateral estoppel. *In re Carey and Danis*, 89 S.W.3d 477, 498-99 (Mo. banc 2002); *In re Caranchini*, 956 S.W.2d 910, 912-914 (Mo. banc 1997), cert. denied, 524 U.S. 940. The four factors that must exist for nonmutual collateral estoppel to apply are present in this case: there is an identity of issues (Respondent's conduct), the prior case was on the merits, Respondent was a party to the adversarial proceeding, and Mr. Koehler not only had, but availed himself of, the opportunity to fully and fairly litigate the issues.

Of course, it remains for this Court to determine what, if any, Rules of Professional Conduct were violated by the facts developed in the federal proceedings. The factual record of Respondent's representation of the debtor, Grant, his subsequent continuing connection to the bankruptcy case in contradiction of the bankruptcy court's 1993 disqualification order, and his prevaricating testimony at the contempt hearings substantiates violations of the conflict of interest rule (4-1.7) and the proscriptions against disobeying a court order (4-3.4(c)), against testifying falsely (4-3.3(a)), and against engaging in conduct prejudicial to the administration of justice (4-8.4(d)).

Specifically, the conflict of interest rule was violated when Respondent filed the Chapter 11 bankruptcy case for Mr. Grant while he was an officer of the bank that was one of Mr. Grant's biggest creditors. Tellingly, Mr. Koehler never filed an application to be appointed the debtor's attorney or the affidavit attesting to his disinterested status in the proceeding, both of which are required to be filed by a lawyer in a bankruptcy case.

Mr. Koehler was held in contempt for violating the bankruptcy court's April 9, 1993, order disqualifying him from participating further in Mr. Grant's Chapter 11 case in that he continued performing bankruptcy-related services for Mr. Grant after the order issued and eventually sought to collect fees for his services by submitting fee statements to Mr. Grant, writing a demand letter to him, and filing a collections suit against Mr. Grant in state court. Respondent's conduct in this regard violated Rule 4-3.4(c).

Mr. Koehler ultimately billed Mr. Grant, in March of 1995, for more than $8,000.00 worth of services related to the bankruptcy. He testified that he prepared the amended plan and amended disclosure statement for Mr. Curry, the lawyer of record for Mr. Grant after Respondent was disqualified. Respondent testified that he effected service of the pleadings that he prepared. The billing statements Respondent subsequently prepared and submitted to Mr. Grant said nothing about the services being in the nature of paralegal work. Yet, Mr. Koehler attempted to explain his actions by testifying that he only performed "paralegal" type work for Mr. Grant after he was disqualified from working on the case. This testimony was in violation of Rule 4-3.3(a) and 4-8.4(d). Rule 4-8.4(d) was also violated in that Respondent's conduct necessitated

the 1995 contempt hearings and occupied much legal time and effort after the underlying bankruptcy case was completed.

The facts enunciated by the federal courts, which are preclusive against Respondent in this disciplinary case, lead to the conclusion that Respondent violated multiple Rules of Professional Conduct and should be disciplined as a consequence.

ARGUMENT

II.

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT BECAUSE, ALTHOUGH RESPONDENT'S CONDUCT WAS, AT A MINIMUM, KNOWING, THE SANCTION SHOULD BE MITIGATED BY RESPONDENT'S LONG EXPERIENCE AT THE BAR WITH NO RECORD OF DISCIPLINE AND DUE TO DELAY IN PROSECUTING THE DISCIPLINARY CASE

The Rule violations implicit in the facts derived from the bankruptcy sanctions case would, standing alone, point to a more serious sanction than the public reprimand stipulated to between Informant and Mr. Koehler. Informant posed the offer to stipulate to a public reprimand to Respondent due to the presence in this case of two compelling mitigating factors: the absence of any other disciplinary history in a twenty-nine year legal career, and the delay in initiating a disciplinary proceeding. Both are mitigating factors recognized by the ABA's Standards for Imposing Lawyer Sanctions (1991 ed.). See Rule 9.32(a)(i).

Due to the seriousness of Respondent's professional misconduct, however, the mere passage of time should only mitigate, but not foreclose, a disciplinary sanction. The facts on which Informant relies to substantiate the charges in the information filed with the Court on August 21 were established by an evidentiary

record created in 1995. Thus, there is no danger that lapsed memories, lost documents, or unavailable witnesses will prejudice the outcome of the case. Further, Mr. Koehler has stipulated to the recommended sanction and to the truth of the facts alleged in the information.

There is no statute of limitations on the initiation of lawyer disciplinary proceedings, and rightfully so. As the commentary to Rule 32 of the ABA's Model Rules for Lawyer Disciplinary Enforcement (1993 ed.), notes: "Statutes of limitation are wholly inappropriate in lawyer disciplinary proceedings. Conduct of a lawyer, no matter when it has occurred, is always relevant to the question of fitness to practice. . . . Misconduct by a lawyer, whenever it occurs reflects upon the lawyer's fitness." Disciplinary cases are primarily remedial, not punitive, in nature. *In re Coe*, 903 S.W.2d 916, 918 (Mo. banc 1995). Under the unique circumstances presented by this case, the Court should accept the stipulation of the parties and enter an order publicly reprimanding Respondent.

CONCLUSION

Respondent's violation of Rules 4-1.7(a), 4-3.4(c), 4-3.3(a), and 4-8.4(d), as established by the record from the federal bankruptcy sanctions hearing, is professional misconduct that, owing to the mitigating factors present in this case, should be sanctioned by a public reprimand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2003, two copies of Informant's Brief have been sent via First Class mail to:

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_____
Sharon K. Weedin

CERTIFICATION: SPECIAL RULE NO. 1(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 Special Rule No. 1(b);

3. Contains 2,473 words, according to Microsoft Word 2002, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

_____
Sharon K. Weedin

APPENDIX