**IN THE SUPREME COURT**
**STATE OF MISSOURI**

---

| | | |
|---|---|---|
| **IN RE:** | ) | |
| | ) | |
| **ELLE SULLIVANT,** | ) | **Supreme Court #SC92386** |
| | ) | |
| **Respondent.** | ) | |

---

# INFORMANT'S REPLY BRIEF

---

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL

KEVIN J. ODROWSKI #40535
Special Representative, Region IV
4700 Belleview, Suite 215
Kansas City, MO 64112
(816) 931-4408
(816) 561-0760 (fax)
kevinodrowski@birch.net

ATTORNEY FOR CHIEF
DISCIPLINARY COUNSEL

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES



## OTHER AUTHORITIES



## RULES

## STATEMENT OF FACTS

Respondent does not provide the Court with a statement of facts. With respect to the Statement of Facts set forth on pages 9 through 64 of Informant's Brief, it is apparent that Respondent is satisfied with the content thereof. ***Cf***. Rule 84.04(f) (if the respondent is dissatisfied with the accuracy or completeness of the statement of facts, respondent may include a separate statement of facts). Accordingly, the Court should treat Informant's Statement of Facts as accurate and complete, and should thereby adopt Informant's Statement of Facts in its entirety.

## POINT RELIED ON

**I.**

**RESPONDENT SHOULD BE SUSPENDED FROM THE PRACTICE OF LAW IN MISSOURI BECAUSE HER BELATED ADMISSIONS OF MULTIPLE OFFENSES ARE INSUFFICIENT TO AVOID DISCIPLINE.**

Rule 5.225

Rule 5.225(a)

Rule 5.225(i)

## II.

## RESPONDENT SHOULD BE DISCIPLINED BECAUSE SHE KNOWINGLY ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW.

Rule 5.27(a)(2)

## III.

## RESPONDENT'S BELATED CLAIM THAT A SUSPENSION WOULD BE INVALID BECAUSE SHE WAS NOT AFFORDED DUE PROCESS SHOULD BE REJECTED.

*Stoner v. Director of Revenue*, 358 S.W.3d 514 (Mo. App. 2011)

Rule 5.245

Rule 5.27(b)

## IV.

## THE DETERMINATIONS BY THE DISCIPLINARY HEARING PANEL THAT RESPONDENT'S TESTIMONY WAS NOT CREDIBLE SHOULD NOT BE DISTURBED.

Rule 5.28(h)(2)

## V.

**RESPONDENT SHOULD BE DISCIPLINED BECAUSE SHE WILLFULLY DEFIED A COURT ORDER TO PAY A DISCOVERY SANCTION RESULTING FROM PRIOR INSTANCES OF REFUSAL TO COMPLY WITH DISCOVERY PROCEDURES AND BECAUSE SUCH CONDUCT VIOLATES MULTIPLE RULES OF PROFESSIONAL CONDUCT.**

Rule 5.245

Rule 5.11(b)

Rule 4-8.4(c)

Rule 4-8.4(d)

Rule 4-3.4(c)

Fed.R.Civ.P. 37

## VI.

## RESPONDENT'S TRUST ACCOUNT REMAINS AT RISK BECAUSE SHE HAS FAILED TO TAKE PERSONAL ACCOUNTABILITY OF THE TRUST ACCOUNT AND STILL HAS A FUNDAMENTAL MISUNDERSTANDING ABOUT THE ELEVATED IMPORTANCE OF TRUST OBLIGATIONS WHICH PROHIBIT PAYMENT OF PERSONAL AND BUSINESS EXPENSES FROM TRUST FUNDS.

*In re Coleman*, 295 S.W.3d 857 (Mo banc 2009)

*In re Ehler*, 319 S.W.3d 442, 450 (Mo. 2010)

*In re Witte*, 615 S.W.2d 421(Mo. 1981)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

Rule 4-1.15

## VII.

**RESPONDENT SHOULD BE SUSPENDED BECAUSE SHE IS UNFIT TO PRACTICE LAW IN MISSOURI, AND RESPONDENT WAS NOT UNFAIRLY SURPRISED BY EXAMINATION OF HER FITNESS OR DENIED DUE PROCESS GIVEN THE SCOPE OF ALLEGATIONS IN THE NINE-COUNT AMENDED INFORMATION AND RESPONDENT'S OWN TESTIMONY WITHOUT MERITORIOUS OBJECTION.**

*In re Randolph*, 347 S.W.2d 91, 109 (Mo. 1961)

*In the Matter of Bear*, 578 S.W.2d 928, 937 (Mo. 1979)

*In re Hardge*, 713 S.W.2d 503, 506 (Mo. 1996)

*In re McBride*, 938 S.W.2d 905, 907 (Mo. banc 1997)

Rule 4-1.1

Rule 4-8.4(d)

Rule 5.11(c)

## VIII.

## RESPONDENT'S DUE PROCESS ARGUMENTS CONCERNING THE SCOPE AND MANNER OF THE DISCIPLINARY HEARING HAVE NOT BEEN PRESERVED FOR REVIEW.

## IX.

## RESPONDENT'S MEDICAL CONDITION SHOULD BE GIVEN VERY LITTLE WEIGHT AS A MITIGATING FACTOR.

ABA Standards for Imposing Lawyer Sanctions (1992 Revised.)

## ARGUMENT

### I.

### RESPONDENT SHOULD BE SUSPENDED FROM THE PRACTICE OF LAW IN MISSOURI BECAUSE HER BELATED ADMISSIONS OF MULTIPLE OFFENSES ARE INSUFFICIENT TO AVOID DISCIPLINE.

Respondent's Brief was submitted three years after the initial disciplinary complaint was initiated by Judge Roldan in June 2009. It has taken Respondent **three years** to finally acknowledge professional misconduct. This is in sharp contrast to Respondent's position even one year ago. In June 2011, in front of the Disciplinary Hearing Panel, Respondent openly refused to admit any instance of a violation of the Rules of Professional Conduct.

In her brief, Respondent now appears to have acknowledged that she is guilty of three separate types of misconduct: (a) the unauthorized practice of law; (b) trust account misuse and commingling; and (c) failure to exercise the required level of candor to a tribunal. While better late than never, Respondent's recent admissions are neither sincere nor genuine. Respondent does not exhibit any sign that she is contrite or remorseful. To the contrary, Respondent still exhibits a strong aversion to accepting discipline from this Court.

Respondent's overall position is equivocal. Respondent admits that she engaged in professional misconduct. She admits that her conduct subjects her to discipline. However, Respondent declines to expressly accept a suspension, and otherwise declines to put forth a

level of discipline she feels is warranted, other than to argue that a three-year suspension is excessive.

It is unclear if Respondent is offering to accept an actual suspension coupled with probation. As described in Rule 5.225(a): "Probation shall be imposed for a specified period of time in conjunction with a suspension. The suspension may be stayed in whole or in part." See also Rule 5.225(i) (probation may be imposed by the Court as a condition of reinstatement after suspension). To the extent that Respondent is arguing that the three-year suspension is excessive and/or should be stayed in part, Informant believes that the term of the actual suspension should be **at least** two years, followed by a period of probation of **at least** one year.

To be clear, Informant contends that probation by itself is not warranted. A significant period of actual suspension is necessary for the protection of the public and to safeguard the integrity of the profession. The three-year actual suspension is warranted under the circumstances. Informant has accepted the recommendation of the disciplinary hearing panel in that regard. Respondent's promise of cooperation with any OCDC monitoring and supervision efforts is dubious in light of Respondent's lack of cooperation thus far and the actual obstruction of the disciplinary proceeding exhibited by Respondent thus far. In any event, Respondent utterly fails to address the standards and conditions for probation set forth in Rule 5.225. Accordingly, no consideration of probation should be made in this matter.

Nowhere in her 105-page brief does Respondent express a genuine desire to improve her practice or a sincere desire to rectify her conduct. Respondent offers no plan for restitution of the $12,500 sanction. She does not offer to attend ethics school. She makes no offer to obtain malpractice insurance. She does not offer any plan for avoiding trust account mishandling and overdrafts. Respondent does not offer to hire a CPA to handle the trust account. Respondent does not offer to remove her 80-year old mother-in-law as a signatory on the trust account. Respondent offers no plan for resolving the "viable" legal malpractice claims held by the ***Arnold*** plaintiffs. Respondent has provided no indication that she has affirmatively self-reported her misconduct to the federal courts, now that she has admitted to multiple offenses.[1] Respondent has not obtained a substitute registered agent for her law

[1] Of Respondent's belated admissions of professional misconduct, her commingling of funds has a direct nexus to federal court litigation. Approximately one-half of the $200,000 in funds commingled in the trust account from June 2009 to December 2009 was derived from attorney fees in federal court litigation. Additionally, Respondent apparently has not self-reported the DHP findings and recommendation to the federal court for an independent investigation. Even though some of the findings remain disputed by Respondent, the DHP decision raises serious issues with respect to Respondent's conduct in federal court matters that would be an appropriate subject of an investigation by federal court disciplinary authorities. While not constituting public discipline until determined by this Court such that there is a mandatory reporting obligation, nothing has prevented Respondent from providing a copy of the DHP decision to the federal court disciplinary authorities. Had Respondent

firm. Respondent is still making excuses for herself. She characterizes the trust account overdrafts as "bank error" or the errors of others, rather than accepting personal accountability for her own careless conduct. In short, Respondent's brief does not demonstrate a desire to conform her future conduct to the dictates of the Rules of Professional Conduct.

---

desired to exhibit a renewed sense of candor and cooperation, she would have contacted the federal court disciplinary authorities when this matter became public on February 27, 2012.

## II.

## RESPONDENT SHOULD BE DISCIPLINED BECAUSE SHE KNOWINGLY ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW.

On pages 12, 92 and 102 of her Brief, Respondent does admit that she did indeed engage in the unauthorized practice of law, at least with respect to certain state court matters. Much of Respondent's argument concerning the unauthorized practice of law (pages 13 to 32 of Respondent's brief) seeks to garner leniency based upon purported negligence rather than a guilty mind. The evidence shows a "knowing" *mens rea* rather than a merely negligent approach to assessing one's professional obligations in this situation. Respondent knew she was suspended. She understood the seriousness of the suspension as well as the professional consequences of the unauthorized practice of law. She was advised to conduct legal research on her activities to ensure there was no violation. She was concerned about the effect of the suspension would have on her federal license. And yet she largely chose to engage in the practice of law anyway.

Respondent's argument regarding the unauthorized practice of law is largely manufactured in hindsight. At the disciplinary hearing, Respondent was unable to produce the results of her legal research regarding the unauthorized practice of law. Respondent's testimony and evidence on this subject was not persuasive to the hearing panel. In fact, not only is Respondent's position regarding the unauthorized practice of law legally erroneous and misguided, the panel made a specific finding that her position constituted an aggravating

circumstance: "Respondent has refused to acknowledge the wrongful nature of her conduct in that Respondent refuses to accept the fact that she should not have been practicing law during the period of time her license was suspended and exhibited a very aggressive and negative attitude and demeanor during the hearing." **App**. 685.

Respondent's assertion that she locked the door to her office, returned home and waited for reinstatement is inconsistent with the depositions scheduled in Respondent's Independence, Missouri office in April 2009. **App**. 382 - 385. Moreover, the assertion provides an unsatisfactory explanation for how Wes Sechtem, a disbarred former attorney in Missouri, was able to print out documents received from Respondent, sign Respondent's name to them, and file them with a Missouri court on behalf of Respondent. Locked door or not, such activities constitute the practice of law in Missouri. In response to the suspension, Respondent did not change her letterhead to correct the statement that she was admitted to practice in Missouri. She did not withdraw from her pending cases as required by Rule 5.27(a)(2). Respondent continued to use her Missouri Bar Number and Missouri office address for all official purposes. She continued to interact with existing clients.

## III.

## RESPONDENT'S BELATED CLAIM THAT THE SUSPENSION WAS INVALID BECAUSE SHE WAS NOT AFFORDED DUE PROCESS SHOULD BE REJECTED.

Respondent marginalizes her UPL misconduct by suggesting she was not afforded due process prior to suspension, and thus the suspension should be regarded as invalid. As a preliminary matter, Respondent has waived this argument. Nothing in Respondent's Petition for Reinstatement before this Court suggests an invalid suspension due to a lack of due process. **App**. 330 - 335. Nothing in Respondent's initial written response to the disciplinary complaint asserts a concern over due process. **App**. 309 - 316. Nothing in Respondent's Answer asserts an attack on the suspension order based upon an alleged lack of due process. **App**. 60 - 114. Accordingly, the Court should not consider Respondent's belated due process complaints.

Respondent had actual knowledge of the tax delinquency in November 2008 (not to mention constructive notice sent to her official address registered with the Missouri Bar in October 2008) and had an adequate opportunity of at least ninety days to rectify the situation prior to suspension. Once Respondent began to devote her attention to the tax delinquency in early March 2009, she was able to rectify the situation in less than ninety days. Accordingly, Respondent was provided with due process before the suspension took effect. Respondent could have avoided the suspension prior to February 2009 had she acted promptly upon receiving the notice three months earlier. Respondent's chosen course of action in redressing

her tax situation with her husband instead of the Clerk of the Supreme Court and/or the Department of Revenue is not tantamount to a denial of due process. If Respondent was so convinced that there was no tax delinquency and that the Clerk's letter was wholly in error, she could have initiated a legal proceeding against the Department of Revenue and obtained the full due process of a contested legal proceeding. ***See e.g. Stoner v. Director of Revenue***, 358 S.W.3d 514 (Mo. App. 2011) (after receiving letter from Supreme Court Clerk in January 2007, attorney filed declaratory judgment action against Department of Revenue).

Respondent's references to OCDC Annual Reports are misguided for a number of reasons. First, such reports are not part of the evidence or record of this case and have been belatedly submitted without leave of Court. The reports constitute hearsay. No proper evidentiary foundation has been provided by Respondent. Judicial notice presupposes the evidence is otherwise admissible for the purpose stated. Secondly, Respondent does not claim or show she has relied upon the reports in determining that she had no duty to report the suspension to the federal court. Third, the reports are intended for this Court's informational and statistical purposes. The reports are not presented to the Court as a substantive declaration of a lawyer's obligations in the event of a suspension. The reports are not intended to be a binding position paper on the legal consequences of a suspension under Rule 5.245.

Respondent refuses to acknowledge a general duty to affirmatively disclose the suspension to anyone, notwithstanding the clear dictates of Rule 5.27(b). Respondent refuses

to acknowledge that a suspension by Order of the Missouri Supreme Court is worthy of disclosure.

## IV.

## THE DETERMINATIONS BY THE DISCIPLINARY HEARING PANEL THAT RESPONDENT'S TESTIMONY WAS NOT CREDIBLE SHOULD NOT BE DISTURBED.

With respect to Respondent's lack of candor to Judge Roldan, Respondent acknowledges that her conduct was prejudicial to the administration of justice, but denies that she knowingly made an affirmative misrepresentation. Here, the panel was able to gauge Respondent's credibility and determine her mental state at the time of the pretrial conference. The panel expressly found "knowing" conduct on Respondent's part. **App**. 675 - 676. The Court should not disturb the panel's credibility determinations. It is not credible for Respondent to have "believed" that she would be reinstated in six business days after filing a Petition For Reinstatement on May 20, 2009, particularly since (a) the OCDC staff attorney assigned to handle the reinstatement was out of the office the week of May 25th following the Memorial Day weekend; and (b) Rule 5.28(h)(2) provides for a thirty-day review period. Respondent could not have held an honest belief that she would be reinstated by Friday, May 29th in order to start trial first thing Monday morning.

The soundness of the panel's assessment of Respondent's credibility is also present in connection with the panel findings regarding the dishonesty directed towards Judge Fenner and opposing counsel in the ***Arnold*** case. Respondent's claim that she could not have reasonably anticipated receipt of $200,000 in earned attorney fees within sixty days after

telling Judge Fenner that she could not afford to pay a $12,500 sanction simply lacks credibility. The Court should not disturb the panel's credibility determination in this regard.

## V.

## RESPONDENT SHOULD BE DISCIPLINED BECAUSE SHE WILLFULLY DEFIED A COURT ORDER TO PAY A DISCOVERY SANCTION RESULTING FROM PRIOR INSTANCES OF REFUSAL TO COMPLY WITH DISCOVERY PROCEDURES AND BECAUSE SUCH CONDUCT VIOLATES MULTIPLE RULES OF PROFESSIONAL CONDUCT.

Financial distress is not a defense to professional misconduct. Informant agrees that Respondent was "swimming in debt" in 2009. That is not the misconduct. The misconduct is how Respondent chose to prioritize the debt. The bank account statements show exactly how Respondent chose to spend the $200,000 in earned attorney fees. For instance, in June 2009, Respondent paid a total of $11,000 on her cell phone account and yellow page advertising account. Respondent also paid $6,500 to her husband, allegedly because he was also a creditor. These accounts had not been reduced to judgment. These accounts do not represent a direct professional obligation. Respondent purposefully ignored a professional obligation imposed by a federal judge and instead chose to take care of other types of debt. These accounts did not arise from litigation tactics perpetrated by Respondent found to have violated Fed.R.Civ.P. 37.

A sanction for violation of Fed.R.Civ.P. 37 is necessarily predicated upon a prior violation of a court order. In this case, Respondent had violated Judge Fenner's discovery orders **twice** before he imposed the sanction upon her. **App**. 421. Subsequent defiance of

the sanction order exacerbates the situation in a profound way. It is not unfair or unjust for Respondent to face the consequences of this. Respondent should be held accountable for repeated violation of Judge Fenner's orders. Up to this point in time, Respondent has not experienced any repercussions from the circumstances underlying the sanctions order.

Respondent fails to understand that inattentiveness to judgments arising from litigation abuses and non-compliance with discovery orders can also have professional consequences impacting one's law license. Respondent's position is akin to the mistake she made in response to the letter from the Clerk of the Missouri Supreme Court in November 2008 regarding a tax problem. Respondent did not take the tax situation very seriously in November 2008 through early March 2009. Hopefully, Respondent has now learned that inattentiveness to tax issues can have professional consequences. While there is no suspension for failure to take care of a credit account, there **is** a suspension for failure to take care of tax issues. As a result of Rule 5.245, avoiding tax delinquency should be a priority for lawyers.

Comparison of the sanctions judgment with other creditors of the law firm is like comparing apples to oranges. The comparison brings to light a fundamental misunderstanding of the importance of complying with obligations that arise in a professional capacity. Simply put, Respondent's credit accounts and the federal court judgment arising from Respondent's liability for a violation of Fed.R.Civ.P. 37 do not stand on equal footing. It is a practical reality for lawyers that some financial obligations are more important than others.

The bank statements show that very little, if any, of the $200,000 in earned attorney fees went towards providing food, shelter and medical care for the family. None of the trust account checks were paid to grocery stores or medical providers. At least $125,000 was used to pay antecedent credit accounts. Respondent's credit accounts are largely irrelevant to the integrity of the profession. However, the integrity of the profession will suffer if a lawyer can avoid valid judgments arising in a professional capacity from prior violation of court orders simply because the lawyer was overextended with indebtedness arising from credit accounts. To excuse professional misconduct on the grounds that a lawyer was swimming in debt, particularly self-inflicted credit card debt, is a dangerous path to follow.

The Amended Information alleges that Respondent's failure to pay the sanction order imposed by Judge Fenner was willful. **App**. 19. The Amended Information further alleged that Respondent deliberately and intentionally hid money in the trust account to avoid payment of the sanction order. **App.** 19. These allegations, along with the other allegations set forth in Count VIII of the Amended Information, set forth the **specific acts of misconduct** charged, as is required by Rule 5.11(b). The Disciplinary Hearing Panel expressly found that "Respondent's failure to pay the sanction has been willful." **App.** 682. The panel found a violation of Rule 4-8.4(c) and (d) in connection with "Respondent's prolonged use of the Trust Account to hold personal funds" and that such conduct was "part of a deliberate and intentional effort to avoid paying the sanction."

While Rule 5.11(b) does require recitation of the **specific acts of misconduct**, the pleading standard set forth in Rule 5.11(b) does not require citation to specific sections of the

Rules of Professional Conduct. Based upon the panel's express findings and the specific acts of misconduct alleged in the Amended Information, it is appropriate for this Court to also find a violation of Rule 4-3.4(c) regarding a knowing disobedience of a court order or rules of a tribunal. Given the specific acts of misconduct charged, Respondent should not have been surprised that her conduct in willfully refusing to pay the sanction order imposed by the tribunal while secretly hiding money in the trust account would violate multiple rules of professional conduct, including the dishonest conduct prohibited by Rule 4-8.4(c), the prejudicial conduct prohibited by Rule 4-8.4(d) **AND** the disobedient conduct prohibited by Rule 4-3.4(c).

## VI.

## RESPONDENT'S TRUST ACCOUNT REMAINS AT RISK BECAUSE SHE HAS FAILED TO TAKE PERSONAL ACCOUNTABILITY OF THE TRUST ACCOUNT AND STILL HAS A FUNDAMENTAL MISUNDERSTANDING ABOUT THE ELEVATED IMPORTANCE OF TRUST OBLIGATIONS WHICH PROHIBIT PAYMENT OF PERSONAL AND BUSINESS EXPENSES FROM TRUST FUNDS.

In pages 50 to 60 of her brief, Respondent addresses commingling of funds. Here she goes to great lengths to demonstrate that, after eight years of having a trust account as a sole practitioner, she continued to have fundamental misunderstanding about the nature of a trust account and the segregation of trust funds and non-trust funds. Respondent attributes this to her own negligence, rather than having engaged in conduct known to constitute commingling and misuse of a trust account. The "knowing" mental state found to exist in ***In re Coleman***, 295 S.W.3d 857 (Mo banc 2009) is squarely on point here. Furthermore, ABA Standard 4.12 provides that suspension is appropriate when a lawyer "knows or should know" that she is dealing improperly with client property.

Respondent still misunderstands the proper use of a trust account. A pair of recent cases from this Court make it clear that the trust account should not be used for payment of personal nor even for payment of business expenses. ***See In re Ehler***, 319 S.W.3d 442, 450 (Mo. 2010) ("paying personal expenses from a client trust clearly is prohibited by Rule 4-1.15"); ***In re Coleman***, 295 S.W.3d 857 (paying business expenses, such as a check for bar

dues, is prohibited by Rule 4-1.15). Respondent continues to deny any impropriety in the two payments from the trust account to her husband. Respondent insists that the $6,000 payment to her husband should be condoned because he is a "legitimate third party creditor who was owed" a portion of the settlement proceeds. Respondent seems to think there is nothing wrong with the payment because the payment was not strictly a payment of "personal" debt. Assuming, *arguendo*, that Mr. Sullivant is an actual third party creditor of Respondent, he clearly had no right to the settlement proceeds. Respondent is fortunate to have a spouse who has provided financial support to her law practice. However, that does not elevate his claim for payment to a "third party" who should be paid directly from Ms. Dunn's settlement proceeds. Since he was not an attorney, he had no statutory or common law attorney lien on the proceeds. Since he is not a health care provider, he had no medical lien on the proceeds. Further, Respondent testified that there was no agreement with any creditor to pay them directly from the settlement proceeds.

More importantly, Ms. Dunn, the client, did not authorize a portion of her personal injury claim to be allocated to Mr. Sullivant. Respondent ignores that the only reason there was money in the trust account was because Ms. Dunn, the client, was seriously injured and sustained considerable pain and suffering. Respondent paid her husband and other creditors a total of over $100,000 **before** Ms. Dunn received a single dime derived from the serious injury and suffering sustained by the client. The account is a "**client trust account"** not a "husband and credit card trust account." Every single dime of the $100,000 Respondent paid to her creditors was from funds belonging to Ms. Dunn, and to that extent Ms. Dunn's

property was temporarily misappropriated by Respondent. That is one of the dangers of commingling, and that is why this Court has suspended, even disbarred, lawyers for commingling. ***See e.g. In re Witte***, 615 S.W.2d 421(Mo. 1981). In ***Witte***, this Court noted that a tough stance against commingling is necessary because there is (a) a probability in some cases; (b) the possibility in many cases; and (c) the danger in all cases that commingling will result in the loss of client's money.

Respondent's brief indicates that her trust account is still at risk of misuse of the account for payment of non-trust obligations. There is no way to safeguard the funds in the trust account if the interests of creditors and vendors are given equal priority and access to funds as clients. What is even scarier is Respondent's description of how the IRS and state taxing authorities had actually levied on the funds in all of Respondent's bank accounts at about the same time (March of 2009) as Respondent deposited Ms. Dunn's settlement proceeds into the trust account. **App**. 236. Arguably, a commingled account is fair game for any such levy. It is quite fortunate that there was no levy on the trust account at the time Ms. Dunn was entitled to receive the settlement proceeds.

Three years after the prohibited acts of commingling, Respondent still thinks it is acceptable to pay business creditors directly from the trust account. For the protection of the public whose property might otherwise end up in Respondent's care, Respondent should be removed from the practice of law to prevent that from happening in Missouri.

## VII.

## RESPONDENT SHOULD BE SUSPENDED BECAUSE SHE IS UNFIT TO PRACTICE LAW IN MISSOURI, AND RESPONDENT WAS NOT UNFAIRLY SURPRISED BY EXAMINATION OF HER FITNESS OR DENIED DUE PROCESS GIVEN THE SCOPE OF ALLEGATIONS IN THE NINE-COUNT AMENDED INFORMATION AND RESPONDENT'S OWN TESTIMONY WITHOUT MERITORIOUS OBJECTION.

The Disciplinary Hearing Panel expressly found Respondent lacked thoroughness and preparation necessary for representing clients and that the practice of law by Respondent under the circumstances is prejudicial to the administration of justice. In so doing, the panel sustained Count IX of the Amended Information. Count IX of the Amended Information alleged that Respondent was unfit to practice law in Missouri because the continued practice of law in Missouri by Respondent would violate Rule 4-1.1 and 4-8.4(d). The Amended Information alleges that this determination is compelled by the cumulative weight of, among other things, Respondent's financial difficulties; the medical condition cited in the motion to withdraw; prolonged absence from her physical law office; malpractice claims; repeated trust account overdrafts; prejudicial conduct arising from the failure to advise judges, clients and co-counsel of the suspension; failure to treat the suspension with a higher degree of importance and urgency; months and months of commingled funds in the trust account; findings of personal liability for discovery sanctions; cancellation of malpractice insurance

due to a volume of liability claims; and the lack of adequate safeguards and supervision in law office management.

There was specific evidence of these matters at the hearing. However, Respondent now argues that she was unfairly surprised by additional evidence at the disciplinary hearing which further demonstrates a lack of professional competence as well as the prejudicial effects of Respondent's law practice. There was no unfair surprise. It is well established that the main thrust of an attorney disciplinary proceeding is to inquire into the lawyer's fitness for continued practice of law. ***In re Randolph***, 347 S.W.2d 91, 109 (Mo. 1961); ***In the Matter of Bear***, 578 S.W.2d 928, 937 (Mo. 1979); ***In re Hardge***, 713 S.W.2d 503, 506 (Mo. 1996); ***In re McBride***, 938 S.W.2d 905, 907 (Mo. banc 1997).

The Amended Information consisted of nine counts. It was served upon Respondent in March 2010. The hearing was held in June 2011. Respondent had fifteen months to prepare a defense to the scope of the allegations. Amid allegations of professional incompetence and a law practice that repeatedly serves to prejudice the administration of justice based upon the cumulative weight of the misconduct and the chaotic and erratic nature of Respondent's law practice, Respondent should have anticipated rigorous examination going to the heart of her professional fitness.

At the conclusion of the first day of the hearing, Informant moved to amend the pleadings to conform to the evidence. **App**. 220. The motion was granted over Respondent's objection because Respondent had been present during the entire hearing. In essence, the matters were tried by Respondent's implied consent. More importantly, the pleading standard

set forth in Rule 5.11(c) did not require any amendment. An information is required to "state briefly the grounds upon which the proceedings are based." The allegations of professional incompetence and prejudice to the administration of justice in the Amended Information meet this standard. An informant is not required to plead detailed evidentiary facts showing each manifestation of professional incompetence and prejudicial conduct.

Furthermore, Respondent opened the door to much of the inquiry into the manner in which she has conducted her law practice. During the hearing Respondent was eager to tell the panel about the highlights of her legal career. "I'm looking at it like the highlights of what I've done for the last five years, because obviously if you read the Amended Information I am presented one way, and I think that after all the evidence is said and done, this my chance to present the evidence of who I think I am." **App**. 283. Counsel for the Informant had interjected "doesn't that open the door for cross-examination about events in her career, these things that she's not wanted the panel to hear about?" **App**. 283. By her testimony that her clients are by and large happy with her services, the presiding officer of the panel found that Respondent had opened the door to cross-examination about instances where clients were unhappy about her services. **App**. 285. Only **after** Respondent was allowed to testify about being an "up and coming" attorney, winning a professional award from a lawyer in Wyoming, and allowed to make other self-serving statements such as giving "100 percent plus to my clients and my caseload," did Respondent undergo cross-examination about other events of her law practice that perhaps she was not so eager to discuss.

The cross-examination was introduced as follows: "I'm not sure if this is going to be directly on point to that testimony . . . and if it's not, you'll let me know." **App**. 284. Respondent made no meritorious objections at the hearing about inquiry into the instances where she was placed in jail for contempt in Mr. Herzog's case and other examples of various clients and judges with whom she has had disputes.[2] When asked if Judge Montgomery had

[2] Respondent did object to inquiry about a malpractice lawsuit filed against her by Phenix Benton: "Q. And Phenix Benton was a client of yours that had sued you for legal malpractice? A. Now I do object for the record of everything that we've just been talking about; for having an uncharged crime; for telling this panel now that I've been sued by one of my clients for malpractice, and its extremely prejudicial." **App**. 205. The objection was correctly overruled. The malpractice lawsuit filed by Mr. Benton (as well as the malpractice lawsuit filed by Mr. Herzog) was expressly alleged in the Information by specific reference to the style of the case, the Circuit Court and the specific case number. **App**. 20. Respondent could not have been ambushed by examination regarding her representation of these two individuals. Respondent also complains that she was surprised by examination concerning her representation of Jean Dunn. Ms. Dunn's settlement is prominently referenced in connection with the commingling allegations. Rulings made in Ms. Dunn's case were prominently referenced in connection with the dishonest conduct directed towards Judge Fenner. **App**. 16 - 19. Respondent further claims she was unfairly surprised by examination concerning whether deliberately postponing a deposition until 7:30 a.m. on a Monday morning just before the scheduled trial in the *Kemper* case is an example of good

entered a sanctions order against her in Mr. Herzog's case, Respondent gave a lengthy answer to a question that solicited a simple "yes or no" answer. Halfway through the narrative, Respondent lodged an objection to her own testimony because it was "a collateral issue" but then Respondent continued the monologue of testimony without further inquiry by Informant. **App**. 285. Respondent was not ambushed by unfair examination. Respondent simply insisted on providing much longer testimony and narratives of various events than was solicited by counsel, without an effective objection. See e.g. **App**. 285 - 286 (wherein in response to a simple "yes or no" question, Respondent gave a very lengthy, detailed answer about a lawsuit that was involuntarily dismissed without prejudice when Respondent did not appear for court).

---

lawyering or incompetent lawyering. This deposition is expressly referenced in the Information. **App**. 11. A review of the Information reveals that Respondent's claims of surprise are disingenuous.

## VIII.

## RESPONDENT'S DUE PROCESS ARGUMENTS CONCERNING THE SCOPE AND MANNER OF THE DISCIPLINARY HEARING HAVE NOT BEEN PRESERVED FOR REVIEW.

As shown above, Respondent's due process arguments are without merit. Moreover, they have not been preserved for review by this Court. Although given an adequate opportunity to lodge any post-hearing arguments or objections, Respondent declined to do so. The record in this matter concluded at 1:40 p.m. on July 12, 2011 as follows:

MS. LEONARD: Okay. Either way are you going to submit a closing brief?

RESPONDENT: I am going to submit a closing brief.

MS LEONARD: How long do you need to do that?

RESPONDENT: . . . I am going to take the Virginia bar in 14 days . . .

MS. LEONARD: I don't have any objection giving you a week after you take the Virginia bar.

RESPONDENT: Excellent.

RESPONDENT: . . . And I do thank you, because obviously I would like to study for the bar and I would like to give the appropriate attention to the closing brief.

Despite requesting additional time for submission, Respondent never followed through with any post-hearing briefing or argument. The record in this case establishes that on July 12, 2011, Respondent was served with a 17-page "Informant's Post-Hearing Brief."

The brief detailed "Sixteen Reasons Respondent Should Be Suspended from the Practice of Law." The brief addressed the evidence presented during the first day of the hearing, some of which Respondent now claims was not a proper subject of inquiry in this matter. Respondent presented no response to the brief nor to the sixteen reasons why Respondent should be suspended. Respondent did not seek to strike the brief. Respondent simply chose to stand silent on the subject matter of the brief. Respondent has acquiesced to the consideration of the content of the brief by the hearing panel. The DHP decision was signed on December 15, 2011. Respondent had **five full months to raise any due process concerns** or objections about the scope of the hearing or the matters to be considered by the panel. Respondent has waived any right to complain about the due process provided to her in this matter.

## IX.

## RESPONDENT'S MEDICAL CONDITION SHOULD BE GIVEN VERY LITTLE WEIGHT AS A MITIGATING FACTOR.

The claim that a medical condition of Respondent has affected her ability to competently represent clients **has not** been abandoned. Respondent's Answer to the Amended Information states as follows:

> "50. By document filed May 1, 2009 in the *Arnold* case, Respondent claimed that a current medical condition warranted her withdrawal in the *Arnold* case. Respondent claimed to be in possession of medical records supporting her need to withdraw. Respondent claimed that the "medical condition experienced by counsel could have contributed to the alleged errors and omissions" leading to her failure to designate experts and provide discovery in a timely manner in the *Arnold* case.
>
> ANSWER: Respondent admits the allegations contained in Paragraph 50.

**App**. 83.

In light of Respondent's admission, no further proof on the subject was necessary. There was testimony at the hearing that Respondent did experience a medical condition beginning in late 2008. Since it was cited as a ground for withdrawal in May 2009, the condition must have had long-term complications. Respondent provided no evidence that the condition has been resolved. Since Respondent has failed to show that the medical condition

was at least a substantial contributing cause of the offense, it should be given very little weight as a mitigating circumstance. Commentary, **ABA Standards** 9.3 (1992 revision).

## CONCLUSION

Respondent engaged in multiple instances of professional misconduct involving lack of professional competence; failure to safeguard client property and misuse of a client trust account; dishonesty, fraud, deceit and lack of candor; willful disobedience of a court order; the unauthorized practice of law; and conduct prejudicial to the administration of justice. This misconduct and the attendant aggravating circumstances warrant a severe disciplinary sanction for the protection of the public and the preservation of the integrity of the profession. Informant respectfully requests that this Court:

(a) find that Respondent violated Rules 4-1.1; 4-1.15(c); 4-1.16(a); 4-3.3(a); 4-3.4(c); 4-5.5(b); 4-8.4(c) and (d); and 6.05(c);

(b) suspend Respondent's license to practice law for an indefinite period of time, but for no less than three years; and

(c) tax all costs in this matter to Respondent, including the $1,000 fee for suspension, pursuant to Rule 5.19(h).

Respectfully submitted,

ALAN D. PRATZEL, MO #29141
CHIEF DISCIPLINARY COUNSEL

By:_____
Kevin J. Odrowski #40535
Special Representative, Region IV
4700 Belleview, Suite 215
Kansas City, MO 64112
kevinodrowski@birch.net
(816) 931-4408
(816) 561-0760 (fax)

ATTORNEY FOR CHIEF
DISCIPLINARY COUNSEL

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29th day of June, 2012, a true and correct copy of the foregoing was served on Respondent's counsel via the electronic filing system pursuant to Rule 103.08:

Theresa L. R. Levings
Badger & Levings, L.C.
1621 Baltimore Avenue
Kansas City, MO 64108

_____
Kevin J. Odrowski

## 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(c);

3. Contains 5,793 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Trend Micro software was used to scan the document for viruses and that it is virus free.

_____

Kevin J. Odrowski