

IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:

ROGER J. DADE,

Respondent.

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)

Supreme Court #SC92970

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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STATEMENT OF JURISDICTION

This action is one in which the Chief Disciplinary Counsel is seeking to discipline an attorney licensed in the State of Missouri for violations of the Missouri Rules of Professional Conduct. Jurisdiction over attorney discipline matters is established by this Court's inherent authority to regulate the practice of law, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Roger John Dade ("Respondent") was licensed as an attorney in Missouri on September 11, 2003. App. 23. Respondent's license is currently in good standing and he has been in good standing at all times pertinent to this proceeding. App. 23.

By letter dated August 11, 2005, Respondent accepted a written admonition regarding the unauthorized practice of law in Kansas, a violation of Missouri Supreme Court Rule 4-5.5(a). App. 30 - 31. In particular, the admonition noted that Respondent had maintained a private law office in Prairie Village, Kansas without holding a license to practice law in Kansas, and stated that the unauthorized practice of law in Kansas violates 4-5.5. App. 30 - 31. The admonition warned Respondent, "Please ensure that you do not continue to engage in the unauthorized practice of law in Kansas." App. 31.

Respondent has never held a license to practice law in Kansas. App. 23. However, Respondent has been admitted to appear in Kansas federal court matters, including proceedings in the Kansas bankruptcy court. App. 23. Respondent has been issued a bar number of "KS Fed #78151" for use exclusively in Kansas federal court matters. App. 23.

At the relevant times in 2010, Respondent was an employee of a group of affiliated companies, including Sunshine Energy LLC, Sunshine Fuel LLC and Florida Sunshine Investments I, Inc. (collectively "Sunshine"). App. 23. The headquarters of Sunshine was located in Overland Park, Johnson County, Kansas.

App. 24. Respondent served as “in-house” general counsel for Sunshine. App. 24. At the relevant times in 2010, Respondent’s duties as general counsel for Sunshine were performed primarily in Overland Park, Johnson County, Kansas. App. 24.

On February 22, 2010, a civil action was filed against Florida Sunshine Investments I, Inc. (“Florida Sunshine”) in the District Court of Johnson County, Kansas, captioned as *M & I Equipment Finance Company v. Florida Sunshine Investments I, Inc.*, Case No. 10CV0175, the Hon. David Hauber presiding. App. 24. The lawsuit involved personal property and business equipment, valued at \$300,000, located in Overland Park, Kansas. App. 24. The plaintiff sought possession of the equipment by way of replevin, among other forms of relief and causes of action. App. 24 - 25.

The lawsuit was served upon Florida Sunshine on Friday, February 26, 2010. App. 25. Florida Sunshine had utilized Kansas counsel in the past to handle litigation in Johnson County, Kansas. App. 25. A replevin hearing was scheduled for Thursday, March 4, 2010 (less than one week after service of process of the replevin petition) in Johnson County, Kansas district court. App. 25. Instead of immediately arranging for Kansas counsel to handle the replevin hearing, on March 4, 2010, Respondent appeared in the District Court of Johnson County, Kansas on behalf of the defendant, Florida Sunshine, regarding the request for replevin. App. 25. When Judge Hauber requested counsel to enter their appearances, Respondent affirmatively spoke up and identified himself as “Roger

Dade for Sunshine Investments, Your Honor.” App. 25. Respondent did not appear with local counsel, and did not seek *pro hac vice* admission for the case. App. 25. Respondent did not provide any indication to the judge or opposing counsel that he was not licensed to practice law in Kansas. App. 25.

After the plaintiff’s attorney gave a detailed factual explanation regarding the nature of the dispute and the relief requested, Respondent offered to stipulate to most of the facts presented. App. 25. However, Respondent also requested that the matter be continued. App. 25. Respondent advised Judge Hauber: “I’d like to have the opportunity to formulate a defense and present that defense to the Court.” App. 25. The Court declined to continue the matter and entered a replevin order. App. 26. However, based upon Respondent’s request for some additional time to allow the parties to work out their dispute, the judge gave Florida Sunshine eleven days (until 5:00 p.m. March 15, 2010) to comply with the replevin order. App. 26.

On March 15, 2010, Respondent filed a Notice of Appeal with the district court. App. 26. The Notice of Appeal contained contact information (mailing address and phone numbers) for Sunshine’s headquarters located in Overland Park, Kansas. App. 26. The Notice of Appeal was prepared by Respondent, but was signed by Respondent using the name of another Kansas attorney, Anne Alon. App. 26. Ms. Alon is Respondent’s sister. App. 26. Ms. Alon had never represented Sunshine, and she had not given Respondent prior consent to have a Notice of Appeal filed under her name and Kansas bar number in the matter. App.

26. Respondent did not promptly notify Ms. Alon that he had signed her name to a pleading filed in the district court. App. 26.

Since Judge Hauber did not recognize the attorney who purported to have filed the Notice of Appeal on behalf of Florida Sunshine, the judge instructed his judicial assistant to contact Respondent for further information. App. 26. In the course of that telephone conversation, the judicial assistant asked Respondent for his Kansas bar number. App. 26. Respondent replied: "78151." App. 26. Upon later inquiry, Judge Hauber realized that "78151" was not a valid Kansas bar number and that Respondent was not a licensed Kansas attorney. App. 26. Several weeks later, an authorized Kansas attorney did finally enter his appearance in the matter. App. 26.

Following the March 4, 2010 hearing, Respondent continued to negotiate a resolution of the matter on behalf of Sunshine with counsel for the plaintiff. App. 26 – 27. Eventually the replevin dispute was resolved as a result of the negotiations between counsel. App. 27. The lawsuit was dismissed in June 2010, and no appeal was ever docketed with the appellate court. App. 27.

Respondent has admitted that he engaged in the unauthorized practice of law in violation of the regulation of the legal profession in Kansas in connection with the replevin dispute. App. 27. In so doing, Respondent acknowledges that he violated Missouri Supreme Court Rule 4-5.5(a). App. 27. Respondent also admits and acknowledges that his conduct in submitting the Notice of Appeal under the name and bar number of another Kansas attorney without prior consent, and his

response to the judicial assistant regarding his Kansas bar number, is conduct prejudicial to the administration of justice, in violation of Missouri Supreme Court Rule 4-8.4(d). App. 27.

In the Information, Respondent was also charged with a violation of Missouri Supreme Court Rule 4-8.4(c) to the extent that this same conduct also involved dishonesty, deceit or misrepresentation. App. 6 – 7. The disciplinary hearing panel made no specific finding as to this allegation, but it did adopt the stipulation that such conduct was a violation of Rule 4-8.4(d). App. 42.

In their Stipulation, the parties considered the aggravating factors set forth in ABA Standards for Imposing Lawyer Sanctions as set forth in ABA Standard 9.22. App. 27. The parties stipulated that there are no compelling aggravating factors other than the content of the prior admonition accepted by Respondent. App. 27.

The parties also considered the following mitigating factors identified in ABA Standard 9.32:

The parties stipulated that the following constitute mitigating factors:

- (a) Respondent has exhibited a cooperative attitude towards this proceeding as evidenced in part by Respondent's stipulation and written acknowledgement of misconduct;
- (b) Absence of dishonest or selfish motive; and

(c) Respondent is remorseful with respect to the professional misconduct identified above. App. 28.

In addition to the mitigating factors set forth in the Stipulation, Respondent and OCDC also reached an informal agreement that Respondent would attend the next Missouri Bar law practice management course, e.g. "ethics school." Respondent attended the program on November 30, 2012, and fully and satisfactorily participated in the course, earning 8.4 hours of ethics credit. App. 44.

On October 3, 2012, Informant and Respondent jointly stipulated that the most appropriate sanction in this case would be a reprimand. App. 28. On October 9, 2012, the disciplinary hearing panel adopted this recommendation. App. 42. On November 6, 2012, the Office of Chief Disciplinary Counsel accepted the DHP's recommendation. App. 43. On December 18, 2012, this Court activated a briefing schedule in this matter.

POINTS RELIED ON

I.

**RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE HE
VIOLATED RULE 4-5.5(a) AND 4-8.4(d).**

State ex rel. Stephans v. Williams, 246 Kan. 681, 689, 793 P.2d 234 (1990)

II.

RESPONDENT SHOULD BE REPRIMANDED FOR HIS
MISCONDUCT BECAUSE A REPRIMAND IS THE MOST
APPROPRIATE SANCTION.

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

ARGUMENT

I.

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE HE VIOLATED RULES 4-5.5(a) AND 4-8.4(d).

The facts demonstrate, and Respondent has admitted and acknowledged, three separate instances of professional misconduct. First, Respondent improperly appeared in a Kansas district court matter on behalf of a client without holding a license to practice law in Kansas. This is a violation of Missouri Supreme Court Rule 4-5.5(a) which prohibits a Missouri lawyer from practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. Making a court appearance in a Kansas district court on behalf a client is considered to constitute the practice of law in Kansas. *State ex rel. Stephans v. Williams*, 246 Kan. 681, 689, 793 P.2d 234 (1990). Since Respondent is not licensed to practice law in Kansas, Respondent's conduct was in violation of the Kansas Supreme Court's authority to regulate the legal profession in Kansas. Although Respondent does not dispute this violation, it does appear that the urgent nature of a replevin hearing gave Respondent very little time (less than five business days) to obtain Kansas counsel to cover the court appearance.

Second, Respondent prejudiced the judicial proceeding by creating an appearance that a notice of appeal had been filed by a Kansas attorney, when in fact no Kansas attorney was associated with the appeal. In essence, Respondent filed a pleading with an unauthorized signature. Respondent admits these actions

constitute a violation of Rule 4-8.4(d). The conduct arguably could be viewed to constitute a violation of Rule 4-8.4(c). However, Respondent and Informant both stipulated that the conduct was more appropriately categorized as being prejudicial rather than dishonest. There is no evidence of a selfish motive. Respondent could have held a belief that his sister, a licensed Kansas attorney, would ratify the notice of appeal despite the previously unauthorized signature.

Rule 4-3.3(a) (1) prohibits a lawyer from knowingly making a false statement of material fact to a tribunal. Respondent's conduct in submitting a notice of appeal by means of an unauthorized signature was cured and corrected (a) by having authorized Kansas counsel enter an appearance in the case a few weeks after the notice of appeal was filed; and (b) by not seeking to perfect the appeal through formal docketing of the appeal with the Kansas Court of Appeals, so as to essentially allow the appeal to lapse. Instead of pursuing the appeal, the entire underlying civil replevin action was resolved by an agreement between the parties within just a few months after the action was filed. No court nor any party took any action in reliance upon, or in furtherance of, the notice of appeal. Informant is satisfied that Respondent took adequate corrective action to avoid a Rule 4-3.3(a) (1) violation.

Finally, Respondent also was responsible for creating a false impression with Judge Hauber's assistant as to Respondent's status as a Kansas attorney. When he was asked for his bar number, Respondent replied by giving the judicial assistant his *Kansas federal court* bar number instead of a *Kansas Supreme Court*

bar number (which, of course, Respondent did not have). Respondent admits these actions constitute a violation of Rule 4-8.4(d). The conduct arguably could be viewed to constitute a violation of Rule 4-8.4(c). However, Respondent and Informant both stipulated that the conduct was more appropriately categorized as being prejudicial rather than dishonest.

II.

RESPONDENT SHOULD BE REPRIMANDED FOR HIS MISCONDUCT BECAUSE A REPRIMAND IS THE MOST APPROPRIATE SANCTION.

The evidence suggests that Respondent negligently gave the judicial assistant the wrong Kansas bar number. A reprimand is generally appropriate when a lawyer is negligent in his communications with individuals in the legal system or when he is negligent in determining whether statements are false. See *Standards for Imposing Lawyer Sanctions* 6.33 and 6.13 (1991 ed).

A reprimand is also generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession, such as the unauthorized practice of law. See *Standards for Imposing Lawyer Sanctions* 7.3 (1991 ed). See also *In re Shelhorse*, 147 S.W.3d 79 (Mo. banc 2004) (failure to comply with CLE requirements warranted public reprimand). Of course, this conduct is the very conduct Respondent was warned about in the admonition. Another admonition would not sufficiently address the misconduct. On the other hand, the exigent nature of the replevin hearing was a factor in Respondent's decision to handle the court appearance in Kansas by himself.

The submission of a notice of appeal with an unauthorized signature is the most troubling conduct present in this proceeding. On the one hand, under *Standards for Imposing Lawyer Sanctions* 6.13 (1991 ed), where a lawyer makes untrue statements in a court document but is not motivated by self-benefit and

where no harm actually occurs, a reprimand is appropriate. On the other hand, suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court AND takes no remedial action AND causes an adverse or potentially adverse effect on the legal proceeding. *Standards for Imposing Lawyer Sanctions* 6.12 (1991 ed). As addressed above, Informant is satisfied that the unauthorized notice of appeal did not have an adverse effect on the proceeding because the appeal was never perfected. Additionally, the underlying action was resolved by amicable agreement within a few months after the replevin petition was filed. Accordingly, the parties' Stipulation reflects that greater weight was placed upon ABA Standard 6.13.

This recommendation of a reprimand as the most appropriate sanction is also supported by further consideration of the aggravating and mitigating circumstances. To mitigate the misconduct, Respondent has exhibited a cooperative attitude towards this proceeding. Rather than asserting denials as to the circumstances of the misconduct, Respondent's Answer admits every single factual allegation. App. 19 - 20. In the Stipulation, Respondent candidly admits and acknowledges the three instances of misconduct described above. Respondent is remorseful with respect to the professional misconduct identified above. Finally, the evidence demonstrates the absence of a dishonest or selfish motive.

The only aggravating factor is the prior discipline, i.e. the subject matter of the admonition issued to Respondent in 2005 which found a violation of Rule 4-5.5(a) and warned Respondent not to engage in the unauthorized practice of law in

Kansas. Under the system of progressive discipline, the reprimand is an appropriate sanction for a repeat violation of Rule 4-5.5(a). Another admonition for the same misconduct would have been insufficient.

At the time of the underlying replevin action, Respondent had been an attorney for approximately 6 ½ years. This period is not so lengthy as to be deemed "substantial experience" in the practice of law, but also is not so short as to create a mitigating circumstance for "inexperience in the practice of law." See Standards for Imposing Lawyer Sanctions 9.32 and 9.22.

In addition to the mitigating factors set forth in the Stipulation, Respondent and OCDC also reached an informal agreement that Respondent would attend the next Missouri Bar law practice management course. At the time of the Stipulation, Missouri Supreme Court Rule 5.16(d) (1) (authorizing a reprimand to include additional requirements to improve the lawyer's practice) had been promulgated but it was not to become effective until January 1, 2013. The arrangement for Respondent to attend ethics school was intended to achieve the same result as Rule 5.16(d) (1), even though the revision to Rule 5.16 had not yet taken effect when the Stipulation was submitted to the disciplinary hearing panel in October 2012. Respondent voluntarily attended the program on November 30, 2012, approximately one month after the DHP's recommendation in this matter. Respondent fully and satisfactorily participated in the course. The parties view Respondent's participation in the law practice management course as a voluntary

action in the spirit of good faith and cooperation in further mitigation of the misconduct and/or as further documenting the actual discipline imposed.

CONCLUSION

For the reasons set forth above, the Chief Disciplinary Counsel respectfully requests this Court:

- (a) to find that Respondent violated Rules 4-5.5(a) and 4-8.4(d);
- (b) to reprimand Respondent with credit for having already satisfied a requirement under Rule 5.16(d)(1) to improve the lawyer's practice; and
- (c) to tax all costs in this matter to Respondent, including the \$750 fee pursuant to Rule 5.19(h).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 2013, the Informant's Brief was sent through the Missouri Supreme Court e-filing system to:

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Kevin J Odrowski

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(b);
3. Contains 3,138 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Kevin J Odrowski

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