

**IN THE SUPREME COURT  
STATE OF MISSOURI**

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**IN RE:**

**BYRON G. STEWART,**

**Respondent.**

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**Supreme Court #SC91370**

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**INFORMANT'S BRIEF**

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## **STATEMENT OF JURISDICTION**

Jurisdiction over this attorney discipline matter is established by Article V, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law and Mo. Rev. Stat. §484.040 (1994).

## **STATEMENT OF FACTS**

On November 7, 2008, Respondent Stewart drove while intoxicated in Platte County, Missouri. Respondent, who was born in December of 1956, had previously pled guilty to driving while intoxicated on January 7, 1997, January 8, 2004, and May 1, 2006. App. 2.

Respondent petitioned the circuit court to enter a plea of guilty to the November 7, 2008, incident on October 21, 2010. Circuit Judge Owens Hull accepted the plea and entered judgment against Mr. Stewart on October 22, 2010. App. 4-10. At the time of the plea, the January 8, 2004, DWI conviction was removed from the Information for a Felony, leaving the 1997 and 2006 prior DWIs.

Judge Hull sentenced Respondent to three years' incarceration, but suspended execution of the sentence for a three year period of supervised probation. A certified copy of the order of probation is at App. 11-12.

Respondent served sixty days of shock time, from October 25, 2010 to December 24, 2010, in the Platte County Jail. App. 35.

On December 10, 2010, disciplinary counsel filed an information pursuant to Rule 5.21 (c) informing the Court about Respondent's guilty plea and sentence. Disciplinary counsel recommended that the Court sanction Respondent's license by suspending it for three years, stayed for a three year period of probation. A suggested Term and Conditions of Probation, designed to monitor Respondent's abstinence and to parallel the criminal probation, was attached to the information.

The Court thereafter, on December 16, 2010, ordered Respondent to file suggestions why he should not be suspended without probation. Respondent filed a responsive pleading, providing reasons in support of a stayed suspension. App. 13-36. On January 25, 2011, the Court activated a briefing schedule. App. 56. On the assumption that sanction is the issue of concern, disciplinary counsel will brief the issue of the propriety of a stayed suspension during probation in this Rule 5.21 driving while intoxicated case.

**POINT RELIED ON**

**I.**

**THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR THREE YEARS, STAYED FOR A THREE YEAR PERIOD OF PROBATION, IN ACCORDANCE WITH THE TERMS SUBMITTED WITH THE INFORMATION AND MOTION FOR DISCIPLINE, BECAUSE A STAYED SUSPENSION DURING A PERIOD OF PROBATION IS AN APPROPRIATE SANCTION IN THAT WHILE SUSPENSION IS THE PRESUMPTIVE SANCTION UNDER ABA STANDARDS ANALYSIS, RESPONDENT IS ELIGIBLE FOR PROBATION PER RULE 5.225, AND STAYED SUSPENSION DURING A PERIOD OF PROBATION IS CONSISTENT WITH PRIOR ORDERS OF THIS COURT IN ALCOHOL-RELATED DRIVING OFFENSE CASES.**

Oklahoma Bar Ass'n v. McBride, 2007 Ok. 91, 175 P.3d 379 (2007)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

## **ARGUMENT**

### **I.**

**THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR THREE YEARS, STAYED FOR A THREE YEAR PERIOD OF PROBATION, IN ACCORDANCE WITH THE TERMS SUBMITTED WITH THE INFORMATION AND MOTION FOR DISCIPLINE, BECAUSE A STAYED SUSPENSION DURING A PERIOD OF PROBATION IS AN APPROPRIATE SANCTION IN THAT WHILE SUSPENSION IS THE PRESUMPTIVE SANCTION UNDER ABA STANDARDS ANALYSIS, RESPONDENT IS ELIGIBLE FOR PROBATION PER RULE 5.225, AND STAYED SUSPENSION DURING A PERIOD OF PROBATION IS CONSISTENT WITH PRIOR ORDERS OF THIS COURT IN ALCOHOL-RELATED DRIVING OFFENSE CASES.**

Disciplinary counsel informed the Court, pursuant to Rule 5.21(c), that Respondent Byron G. Stewart pled guilty in October of 2010 to the class D felony of driving while intoxicated. He was sentenced to three years incarceration, but execution of the sentence was stayed for a three year period of supervised probation. A special condition of the criminal probation required Respondent to serve sixty days shock time with work release, which Respondent served in the Platte County Jail from October 25, 2010 through December 24, 2010.

The conduct that brought Mr. Stewart to disciplinary counsel's attention was his plea of guilty to the class D felony of driving while intoxicated. This brief will analyze the appropriateness of a stayed suspension under the ABA Standards for Imposing Lawyer Sanctions (1991 ed.). The ABA model anticipates examination of the duty violated, the lawyer's mental state, injury, and aggravating and mitigating factors. The brief will also look at sanctions imposed by this Court and other state supreme courts in cases involving discipline for lawyers convicted of drunk driving.

Mr. Stewart violated the duty all lawyers owe the public to maintain personal integrity. "The public expects the lawyer to be honest and to abide by the law; public confidence in the integrity of officers of the court is undermined when lawyers engage in illegal conduct." ABA Standard 5.0 -- Introduction. App. 62.

The multiplicity of Respondent's drunk driving convictions pegs his mental state at "knowing." The November 7, 2008, drunk driving incident in Platte County was not Respondent's first such infraction. Rather, the Platte County information for a felony (filed with the Rule 5.21 information as Ex. A), reflects three prior drunk driving offenses (reduced to two at the time of the plea). The two intoxication-related traffic offenses, accumulated within ten years of the 2008 offense, qualified Respondent as a felony persistent offender under Missouri statutes. See §577.010 RSMo 2000, §577.023.1(4) RSMo Cum. Supp. 2006.

Several state supreme courts have concluded that multiple drunk driving convictions reveal a lawyer's indifference to legal obligations, or an "unfortunate willingness to ignore the law." See *In re Jones*, 727 N.E. 2d. 711, 712 (Ind. 2000), *State*

*ex rel. Oklahoma Bar Ass'n v. Doris*, 991 P. 2d 1015, 1026 (Okla. 1999). Concomitantly, a felony, and even a misdemeanor, conviction for drunk driving is held to be a violation of Model Rule 8.4(b) (Missouri's Rule 4-8.4(b)) -- commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. See *In re LaFont*, 898 So. 2d 339 (La. 2005); *In re Post*, 686 N.W. 2d 529 (Minn. 2004). The fact that Respondent pled guilty to multiple instances of drunk driving substantiates that his misconduct was, at the very least, a knowing commission of a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects.

The records suggest no physical harm to others or property damage resulted from Respondent's November 7, 2008, drunk driving incident, or the ones preceding it. The injury, then, is the loss of integrity to the legal profession. As the Indiana Supreme Court put it, "The image of a drunken lawyer driving down the highway with his client's money in his pocket does little to serve the profession." *In re Coleman*, 569 N.E. 2d 631, 634 (Ind. 1991).

The final leg in Sanctions analysis necessitates consideration of aggravating and mitigating circumstances. See ABA Standard 9.22 and 9.32. App. 66-67. The following factors, it is suggested, aggravate the degree of sanction to be imposed in this case: the four instances of drunk driving recited in the original (unamended) information for a felony substantiate a pattern and a multiplicity of criminal misconduct. In mitigation, Respondent has a disciplinary history of one admonition in twenty-eight years of law practice, and he has expressed remorse.

ABA Standard Rule 5 provides sanction analysis for cases of violations of duties owed the public. App. 62-65. Standard 5.12 provides as follows:

5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

The Standard 5.11 elements include such crimes as intentional interference with the administration of justice, fraud, and murder. Given the absence of physical harm to another or property damage, or exacerbating misconduct such as leaving the scene of the accident or possession of a controlled substance at the time of the traffic stop, suspension, it is suggested, is the presumptive sanction for a lawyer guilty of being a persistent offender under Missouri's drunk driving laws.

The Court requested that Respondent file suggestions why he should not be suspended without probation. Disciplinary counsel recommended probation in this case for several reasons. Rule 5.225 provides that to be eligible for probation, the lawyer must be: 1) unlikely to harm the public during the probationary period and can be adequately supervised, 2) able to perform legal services and practice law without causing the courts or profession to fall into disrepute, and 3) has not committed acts warranting disbarment. It is submitted that Respondent is eligible for probation per Rule 5.225(a) inasmuch as he would be closely supervised throughout the period of probation by both the Missouri Department of Corrections and OCDC's probation monitor. Respondent has received one admonition in twenty-eight years of practice, suggesting that Respondent's obvious

alcohol addiction has not, yet, insinuated itself into his law practice. And, it is suggested, felony DWI, standing alone, does not generally warrant disbarment. Given Mr. Stewart's stated commitment to sobriety, as expressed in his Suggestions Regarding Suspension of License to Practice Law, coupled with the intense scrutiny to which he will be subject for the three year proposed period of probation, stayed suspension during a period of probation appeared to disciplinary authorities as an appropriate sanction.

It should be noted that had Respondent Stewart been sentenced to a substantial period of incarceration, disciplinary counsel would not have recommended stayed suspension during a period of probation. Respondent did serve approximately two months "shock time" in the Platte County Jail, but, as mentioned below, this Court has ordered stayed suspension during a period of probation in alcohol-related driving cases where the lawyer has served a short period of "shock time" incarceration.

Consistency in imposition of lawyer sanctions is a legitimate concern of the Court and disciplinary counsel. Consistency of sanctions both within and among jurisdictions was one of the goals of the ABA Standards for Imposing Lawyer Sanctions. See Preface, at p. 1. App. 57. The Standards, however, expressly leave room for "flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct." Id. The Standards present a model designed to promote thorough, rational consideration of all factors relevant to imposing a sanction in an individual case.

The Missouri Supreme Court has recognized that review of prior disciplinary decisions is of doubtful utility in lawyer discipline cases, as each disciplinary matter stands on its own facts. *In re Downs*, 363 S.W. 2d 679, 691 (Mo. banc 1963). The

Oklahoma Supreme Court discussed the tension between striving for sanction consistency and evaluating each disciplinary case on its own facts in *In re Oklahoma Bar Ass'n v. McBride*, 2007 Ok. 91, 175 P. 3d 379, 387 (2007).

Discipline imposed in cases involving alcohol-related crimes has ranged from the severe, when coupled with harm to clients, to censure, when no clients were involved. Probationary periods have often been imposed in cases of alcohol-related offenses. While alcoholism alone is not enough to mitigate discipline, the fact that an attorney recognized his or her problem, sought and cooperated in treatment and was willing to undergo supervision has convinced the Court that severe discipline need not be imposed . . . .

While discipline should be administered fairly and evenhandedly, the terms will vary since each situation must be decided case by case, each involving different offenses and different mitigating circumstances. . . . Because of these differences, the range of discipline imposed in alcohol-related disciplinary matters is quite wide.

No published Missouri cases involving predominately alcohol-related driving offenses were found, although there have, of course, been many disciplinary orders issued in the alcohol-related driving offense context. In deciding on a sanction

recommendation to be made in each lawyer discipline case submitted to the Court, disciplinary counsel takes into account past sanction dispositions ordered by the Court in similar (if never identical) cases. Recognizing that such orders are not binding precedent, disciplinary counsel does not cite to prior Court disciplinary orders (as opposed to published opinions) in making a sanction recommendation. In this brief, however, reference to relatively recent orders issued by this Court in lawyer discipline cases predicated on the lawyer's conviction of criminal drunk driving offenses is provided to give context to the sanction recommendation made in this case. Citation to other states' lawyer discipline cases involving drunk driving are also provided for the Court's consideration.

Other states' disciplinary cases arising out of alcohol-related driving convictions suggests that disbarment is rarely imposed absent additional aggravating factors. The exception is the state of New York where, by court rule, a lawyer ceases to be an attorney upon conviction of any felony (not just ones involving alcohol-related driving offenses). See *In re Perl*, 263 A.D. 2d 98, 697 N.Y.S. 2d 352 (App. Div. 1999). Disbarment was imposed by the Oklahoma Supreme Court in *State ex rel. Oklahoma Bar Ass'n v. Doris*, 1999 Ok. 94, 991 P. 2d 1015 (1999), but Mr. Doris' case included many aggravating factors. He failed to file a formal response to the disciplinary complaint and failed to attend his disciplinary hearing (which would have been deemed his consent to disbarment in Missouri per Rule 5.13). Also, the disciplinary case against Mr. Doris included multiple serious violations of rules arising out of his representation of clients as well as repeated convictions of driving under the influence.

Undersigned counsel is aware of only one Missouri order of disbarment in a DWI case. In that case, the lawyer pled guilty to a charge of aggravated offender (four prior DWIs plus the one then under consideration) and was sentenced to serve six years (actual) incarceration. Disciplinary counsel recommended disbarment in that matter in large part because the Respondent was actually incarcerated and was going to be incarcerated for many years, as well as due to the multiplicity of her felony driving convictions. The Court ordered disbarment on May 6, 2008. Had Mr. Stewart been sentenced to serve a substantial period of time in the custody of the Department of Corrections, disciplinary authorities would not have recommended a stayed suspension during a period of probation.

Examples of other states' disciplinary cases where actual suspension (not stayed or only partially stayed) was imposed follow: *In re Lafont*, 898 So. 2d 339 (La. 2005) (one misdemeanor DWI and a 1.4 (communication) violation -- ninety-day suspension); *In re Welling*, 715 N.E. 2d 377 (Ind. 1999) (two misdemeanor DWIs -- six month suspension, two months served, followed by one year probation); *People v. Van Buskirk*, 692 P. 2d 975 (Colo. 1998) (three separate instances of convictions for disorderly conduct, hit and run careless driving, and driving under the influence -- six month suspension); *People v. Madrid*, 967 P. 2d 627 (Colo. 1998) (driving while impaired and accepting cocaine in payment for legal services -- six month suspension).

This Court ordered actual suspension (not stayed during a period of probation), in a case where the Respondent pled guilty to being a persistent offender (two prior DWIs)

and was incarcerated for approximately four months, at which time he was released and placed on probation. He thereafter violated the terms of his probation by drinking and was subsequently reincarcerated. Disciplinary counsel thereafter filed an information pursuant to Rule 5.21. The Court suspended Respondent and ordered no petition for reinstatement would be entertained until Respondent could satisfy the following special conditions: release from custody of the Department of Corrections and evidence of recovery from chemical dependency demonstrated by a meaningful and sustained period of successful rehabilitation. The order in that case issued on February 4, 2005.

Out of state cases in which suspensions were entirely stayed during a period of probation include *In re Post*, 686 N.W. 2d 529 (Minn. 2004) (one felony DWI – stayed six month suspension; five year unsupervised probation), *In re Jones*, 727 N.E. 2d 711 (Ind. 2000) (per curiam) (three prior felonies DWIs – six month suspension suspended during probation to run concurrently with criminal probation).

In recent years, this Court has frequently ordered suspension, stayed during a period of probation, in alcohol-related driving cases. In an order dated November 20, 2007, the Court ordered a stayed suspension during a period of probation in a case where the Respondent was guilty of misdemeanor possession of drug paraphernalia and misdemeanor DUI, and leaving the scene of an accident. Likewise the Court, in an order dated June 29, 2009, imposed a suspension stayed during a period of probation in a case in which the Respondent pled guilty to the class C felony of second degree assault that occurred when he hit another automobile, injuring its passengers, while he was driving in an intoxicated state. In an order dated March 31, 2009, the Court ordered a suspension

stayed during a period of probation in a case where the Respondent pled guilty to three felonies (two counts of reckless battery and one count of DWI), which occurred when he injured passengers in a car that he hit while driving drunk.

Respondent Stewart professes sincere commitment to maintaining sobriety. He is being closely monitored pursuant to his criminal probation. As of the date of this writing, March 17, 2011, disciplinary authorities received verbal assurance from Respondent's probation officer that Respondent is in compliance with the criminal order of probation.

Suspension, it is submitted, is the presumptive sanction under ABA Standards analysis. Respondent is eligible for probation per Rule 5.225, and stayed suspension for a period of probation is in line with prior orders of this Court under similar, if not more egregious, circumstances.

## **CONCLUSION**

A three year suspension, stayed for a three year period of probation in accordance with the conditions submitted with the Information and Motion for Discipline, is an appropriate sanction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_ day of March, 2011, two copies of Informant's  
Brief and a disk containing the Brief in Word format have been sent via First Class  
United Mail, postage prepaid, to:

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\_\_\_\_\_  
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**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 3,378 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. That Trend Micro Anti-Virus software was used to scan the disk for viruses and that it is virus free.

\_\_\_\_\_  
Sharon K. Weedon

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