IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	Supreme Court # SC88720
WILLIAM R. MERRYMAN	)	
	)	
Respondent.	)	

BRIEF OF RESPONDENT

MARTIN, LEIGH, LAWS & FRITZLEN, P.C.

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STATEMENT OF FACTS

Respondent concurs, in general, with the statement of facts set forth in Informant's brief. In addition Respondent submits the following corrections and additions.

The decision of the panel, at page A169 [reference to informant's Appendix], indicates that "Pursuant to the Stipulation, the Respondent admitted a violation of Rule 1.15(b) in his representation of Vincent D. Coker by failing to provide sufficient files to subsequent counsel for Mr. Coker to conclude representation of Mr. Coker without prejudice to Mr. Coker." In fact, Informant stipulated that Respondent "did provide sufficient files to counsel for Mr. Coker to conclude the matter without prejudice to Mr. Coker." Exhibit 1, A6 (emphasis added).

The panel found with respect to the rules violations related to clients Merritt and Mort that "this did cause severe detriment and emotional distress to each of these individuals [Merritt and Mort]". A181. However, neither Mort nor Merritt testified, and the record is devoid of any evidence of emotional stress or severe detriment. The record reflects the opposite. See, for example, A69 to A70 [wherein Respondent's objection to questions to Respondent about vulnerability were sustained]. Though there was no evidence to support the finding, the panel considered the vulnerability of Mort and Merritt as aggravating factors in its imposition of discipline. A180-A181.

With respect to Respondent's CLE compliance, Respondent does not dispute that his name was on the list of attorneys who were noncompliant, or that this was a violation of ethical rules. However, the panel received in evidence Exhibit 15, the

March 3, 2005 letter from Christopher Janku, director of programs for the Missouri Bar, indicating that Respondent had submitted reports and was in compliance for the years 1998 to 2004. [Respondent's Appendix "RA" at page 10].

With respect to mitigating factors, the panel received in evidence the testimonial letter from the Honorable Vernon Scoville, Jackson County Circuit Court, as Exhibit 11. RA at page 3.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE HAS ADMITTED TO RULES VIOLATIONS.

II.

THE SUPREME COURT SHOULD REPRIMAND RESPONDENT, OR ALTERNATIVELY, SUSPEND RESPONDENT'S LICENSE IN CONJUNCTION WITH PROBATION, IN THAT CONSIDERATION OF ALL THE FACTORS SUPPORTS SUCH DISCIPLINE.

The Florida Bar v. Golden, 401 So.2d 1340 (Fla.1981)

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

In re Donahue, 77 A. D. 2d 112, 432 N. Y. S. 2d 498 (1980)

Supreme Court Rule 5.225

ARGUMENT

I. THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE HAS ADMITTED TO RULE VIOLATIONS.

Respondent does not suggest that he should not be disciplined. However, the discipline should be based on the evidence received by the panel, and the appropriate aggravating and mitigating factors.

II. THE SUPREME COURT SHOULD REPRIMAND RESPONDENT, OR ALTERNATIVELY, SUSPEND RESPONDENT'S LICENSE IN CONJUNCTION WITH PROBATION, IN THAT CONSIDERATION OF ALL THE FACTORS SUPPORTS SUCH DISCIPLINE.

The information, as amended by stipulation of the parties, sets forth allegations of professional misconduct in Respondent's representation of Vincent Coker in a workers compensation case: specifically, the failure to act with diligence and promptness under Rule 4-1.3, and failure to promptly return Mr. Coker's file under Rule 1.15. Respondent admitted his failure, and accepts responsibility for his actions. Mr. Coker's case was resolved without prejudice to Mr. Coker as a result of Respondent's actions.

With respect to the complaint of Susan Merritt, the information alleges that Respondent failed to action with diligence as required by Rule 4-1.3, and failed to respond to inquiries in violation of Rule 4-1.4. Respondent admits his failure to file a bankruptcy on behalf of Ms. Merritt, and accepts responsibility for his actions. On

December 28, 2004 [prior to the information in this case], Respondent made a full refund of the $750.00 retainer she advanced.

With respect to the complaint of Dale Mort, the information alleges that Respondent failed to file a bankruptcy for Mr. Mort, and violated Rule 4-1.4 (failure to keep informed), Rule 4-1.3 (diligence), and Rule 4-1.16(d) (failure to promptly return the retainer). Respondent admits his failure to file the bankruptcy, and accepts responsibility for his actions. Respondent made a complete refund of Mr. Mort's money, with interest.

With respect to the information concerning compliance with CLE requirements, Respondent does not dispute that his name appeared on the list of attorneys that were not in compliance with CLE requirements for the reporting years July 1, 2000 through June 30, 2004. However, the panel received in evidence the letter of The Missouri Bar Director of Programs, Christopher C. Janku dated March 3, 2005, acknowledging that Respondent had submitted Annual Reports of Compliance and satisfied his MCLE reporting requirements for the reporting periods 1998 through 2004. Exhibit 15.

Rule 15 now in effect provides that a lawyer who is reported is automatically suspended from the practice of law. See Rule 15.06 (f)(effective date of amendment, July 1, 2005). During the time period relevant to Respondent, there was no automatic suspension, and Respondent was back in good standing prior to the date the Information was filed, November 28, 2005.

With respect to the information concerning Debbie Tipler, the panel found no violation. It is important to note, as a mitigating factor, that though Respondent

disputed any violation with respect to Ms. Tipler, he nonetheless refunded her the sum of $500.00 to Ms. Tipler as a sign of good faith.

Each of the violations must be viewed in connection with mitigating factors, the most significant of which are his cancer, and Respondent's disease of alcoholism. Respondent has taken sincere and drastic measures to address his disease, including placing himself in an inpatient facility for a period of one year. During that time, Respondent did not attend to his practice, resulting in the complaints now before the Court. Respondent has now dealt with his disease, and is receiving continuing treatment through Alcoholic's Anonymous counseling.

The evidence was that Respondent's actions were the result of his negligent failure to attend to his responsibilities during the time in which he was receiving treatment. Respondent otherwise has not damaged any client, stolen any funds, or in any way acted is a dishonest fashion. He sincerely regrets his actions, and has done everything possible to atone, including making full refunds of retainers. By his stipulation, Respondent has accepted responsibility, and has acted with honesty and forthrightness in these proceedings.

Respondent otherwise has a good reputation, and has addressed his problems, as supported by the testimony of Judge Thomas Clark, and the letter from Judge Vernon Scoville, both of the Jackson County Circuit Court.

The only issue before the Court is the appropriate level of discipline.

Negligence in Dealing with Client Property

According to the ABA standards for imposing lawyer sanctions, standard 4.13,

reprimand is generally appropriate when a lawyer is negligent with dealing with client property and causes injury or potential injury to a client.

The commentary to the standard states that "reprimand should be reserved for lawyers who are merely negligent in dealing with client property, and who cause injury or potential injury to a client. For example, "Lawyers who are grossly negligent in failing to establish proper accounting procedure should be suspended; reprimand is appropriate for lawyers who simply fail to follow their established procedures. Reprimand is also appropriate when a lawyer negligent in training or supervising his or her office staff concerning proper procedures in handling client funds. According to the commentary, reprimand is typically imposed in cases where lawyers fail to maintain adequate trust accounting procedures or neglect to return the clients property promptly, such as the case before this committee.

There is no contention or basis to find that Respondent failed to return the property; only that he failed to return it promptly. In The Florida Bar v. Golden, 401 So.2d 1340 (Fla. 1981), a public reprimand was imposed on a lawyer who failed to repay a loan made to him by a client for two years and who failed to keep adequate records of his trust accounting procedures. Likewise a reprimand was imposed in Carter v. Gallucci, 457 A.2d 269 (R.I. 1983).

CLE compliance

Missouri cases addressing the failure to comply with CLE requirements hold that a public reprimand is appropriate. In re Shelhorse, 147 S.W.3d 79 (Mo. 2004)(where

the lawyer had failed to comply with CLE requirement for four years—essentially identical to the case of Respondent).

Lack of Diligence

According to the ABA Standards involving the failure to act with reasonable diligence and promptness with representing a client, reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client and causes injury or potential injury to a client. See § 4.43. The standards further provide that suspension is generally appropriate when:

a. A lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or

b. A lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

According to the comments to the ABA Standards for imposing lawyer sanctions § 4.43, most courts impose a reprimand when the lawyer is negligent. In Re Logan, 70 N. J. 222, 358 A. 2d 787 (1976), a lawyer who neglected a client matter was reprimanded when, knowing that a motion for reduction of alimony was dependent on the court's examination of the client's tax return, he failed to file a copy of the tax return with the court. Likewise, when a lawyer's neglect did not result in financial loss to the client, reprimand was also appropriate. See In Re Donahue, 77 A. D. 2d 112, 432 N.Y.S. 2d 498 (1980). Though there was a delay with certain refunds, no evidence suggests a financial loss to any clients due to Respondent's actions.

This Court also holds that reprimand is appropriate where the attorney's breach is an isolated act and does not involve dishonest, fraudulent or deceitful conduct. See In re Littleton, 719 S.W.2d 772 (Mo. 1986). When an attorney has attempted to deceive the disciplinary authorities, suspension is warranted. In re Donaho, 98 S.W.3d 871 (Mo. banc 2003). Suspension is also appropriate when a reprimand is insufficient to protect the public. Though there are several complaints here, they all relate to Respondent' failure to attend to his clients during his year long treatment for alcoholism. This should be considered as one continuous occurrence. Under these circumstances, a public reprimand is justified.

Aggravation and Mitigation

According to the ABA Standards, after misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what discipline to impose. The aggravating factors are set forth in § 9.22 of the ABA Standards. At most, the only aggravating factors applicable to Respondent's case are i) his substantial experience in the practice of law; and ii) prior written admonitions. There is absolutely no evidence of any dishonest or selfish motive, bad faith obstruction of the disciplinary proceeding, nor intentional failure to comply with rules of the disciplinary agency.

Respondent has not engaged in the submission of false evidence or other deceptive practices and has not refused to acknowledge the wrongful nature of his conduct. In fact, Respondent has admitted his responsibility, in the form of his stipulation and candor before the panel.

ABA Standard § 9.32 sets forth mitigating factors. Many of these factors are present in this case. These include: b). absence of dishonest or selfish motive. There is no dishonesty involved in the case. In fact, genesis for the complaints before this court center around Respondent's inability to attend to business as he received critical treatment for the disease of alcoholism. While alcoholism is not an excuse, it is properly a mitigating factor.

Informant suggests that relapses in 2005 and 2006 suggest there is no evidence of a meaningful and sustained period of rehabilitation. However, Respondent's year long in-patient treatment at Welcome House, and his continuing Alcoholic's Anonymous ("AA") visits do suggest a meaningful and sustained period of successful rehabilitation.

As described in the testimony of Dennis Mays, Respondent's sponsor at AA, there is no guarantee with the disease of alcoholism that any person will stay sober. It is a disease that is never "cured". Mr. Mays' testimony does show that Respondent has turned the corner and is a different person that he was before.

Another mitigating factor is the personal problems that Respondent has experienced. He has undergone treatment for cancer which has impaired his ability to practice law. This Court has recognized that personal problems are extenuating circumstances for lack of diligence (where public admonition was appropriate). In re Kopf, 767 S.W.2d 20 (Mo. banc 1989).

ABA Standard § 9.32(d) provides that a mitigating factor is "timely good faith effort to make restitution or to rectify consequences of misconduct." In each of the matters before this Court, Respondent has returned the unearned fees, and with respect

to Ms. Tipler, though he disputes any misconduct, he has nonetheless refunded the fees advanced as a show of a good faith effort to rectify the consequences of even potential misconduct.

ABA Standard § 9.32(e) provides as a mitigating factor the "full and free disclosure to disciplinary board or cooperative attitude towards proceedings".

Respondent's candor is exemplary, and is shown by his stipulation and cooperative attitude in these proceedings. He has not failed or refused to be forth coming in any of these matters.

ABA Standard § 9.32(g) provides that character or reputation of a respondent is a factor which should be considered. According to the testimony of the Honorable Thomas C. Clark, Respondent is a man of character and carries a good reputation.

ABA Standard § 9.32(i) includes as a mitigating factor the delay in disciplinary proceedings. At least with respect to Ms. Tipler, the allegations complained of occurred in the year 2001, some six years ago (and four years prior to the information). While some of the delays in bringing this matter admittedly involved delay due to Respondent's treatment for cancer, and recovery from surgery, this delay is also a factor that should be considered.

ABA Standard § 9.32(j) provides that interim rehabilitation is a mitigating factor. While Respondent's alcoholism and subsequent treatment is not an excuse for his conduct, it is a mitigating factor. See In Re Driskol, 423 N. E. 2d 873 (1981). See also Howard v. State Bar of California, 793 P. 2d 62 (1990). Respondent availed himself of MOLAP; he checked himself into Welcome House for an entire year. Surely this

accounts for interim rehabilitation. As set forth in Exhibit 10, RA page 2, Respondent is one of the "success stories" of Welcome House.

Restitution which is made upon the lawyer's own initiative should be considered as mitigating. The restitution was made by Respondent, along with heartfelt, written apologies, prior to the information. See Exhibits 12, 13 and 14. RA at pages 4-9.

ABA Standard § 9.32(l) concerns the respondent's remorse. Respondent's remorse is shown by his apologies and restitution.

Finally, ABA Standard § 9.32(m) includes as a mitigating factor the remoteness of prior offenses. The complainant has offered letters of admonition. With respect to complainant Charlie Williard, File No. 93-156-16, the admonition occurred in 1994. With respect to the complainant Cheri Clark, File No. 96-0546-16, the admonition occurred in 1997. With respect to File No. 99-0558-IV, the letter of admonition occurred in 1999. With respect to complainant Molly Livingston, the admonition occurred in July of 2000. With respect to the complaints of Tony Lewis and Darlene Beck, the admonitions were made in 2001, and involved conduct dating back to 1998 and 1999. Under these circumstances, the prior admonitions are so remote as to be neither an aggravating or a mitigating factor.

Reprimand

Based upon the foregoing, the appropriate level of discipline in this case would be a public reprimand. This would serve the interest of the public by disclosing to the public and to the bar the nature of the offenses and the discipline imposed. The purposes of the disciplinary process will have been served. At most, Respondent should be

considered for probation in connection with a fully stayed suspension. As a practical matter, Respondent been nearly completely unable to practice law due to his health problems for the last two years and no purpose would be served by suspending him from practice at this time. He is only now beginning to recover to the point that he would be able to practice and therefore if the Court deems that suspension is appropriate, it should be stayed in connection with probation. The public will be protected by such reprimand.

Probation

Rule 5.225 provides that a lawyer is eligible for probation if he "(1). Is unlikely to harm the public during the period of probation and can be adequately supervised; (2). Is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; and (3). Has not committed acts warranting disbarment. Probation shall be imposed for a specific period of time in conjunction with a suspension. The suspension may be stayed in whole or in part."

As set forth in the foregoing, Respondent is a candidate for probation in conjunction with a stayed suspension. The acts giving rise to the violations in this case are unlikely to be repeated given that Respondent has received treatment for alcoholism. He is able to perform legal services without causing the courts or the profession to fall into disrepute, and has clearly not committed acts warranting disbarment.

The panel's conditions [for reinstatement, not probation], as modified in the suggestions below, are appropriate conditions of probation:

1. Respondent must successfully complete an alcohol treatment program

and continue to attend regularly scheduled meetings of Alcoholic's Anonymous.

2. Respondent must maintain sobriety. This could be monitored and tested.

3. Respondent must successfully complete his probation arising from his 2006 conviction for driving while intoxicated.

4. Respondent must obtain and maintain malpractice insurance in an amount not less than $250,000 per occurrence, and $500,000 in the aggregate.

Respondent's failure to meet any of these conditions should result in probation being revoked, and suspension entered.

Therefore, even if the Court believes that reprimand is not warranted, a fully stayed suspension, with significant monitoring, will best serve Respondent, the public, and the bar.

The cases relied upon by Informant in support of suspension are inapposite. The case of In Re Frank, 885 S.W.2d 328 (Mo. 1994) involves a clearly distinguishable fact situation. There, the Court noted that Frank failed to cooperate with disciplinary authorities, failed to attend the hearing, engaged in bad faith obstruction of the process, and refused to acknowledge the wrongful nature of his conduct. No such factors exist in this case.

Respondent has been cooperative, and has shown remorse. He has acknowledged his mistakes. Under these circumstances, the Respondent should be

treated differently than the respondent in Frank, provided that the public is protected. The strict terms for probation will provide that protection.

Likewise, the Informant's reliance on In Re Tessler, 783 S.W.2d 906 (Mo. Banc 1990) is off the mark. Tessler also involved counsel that refused to cooperate in the disciplinary proceedings. He failed to provide a written response to the investigator, and refused to make a refund. In this case, Respondent has made a full refund, even with respect to the case in which the panel found no violation. There is no question that there was a delay in the refund. However, despite his personal health problems with cancer, addiction to alcohol, and personal bankruptcy [due to astronomical medical bills], it is important to note that Respondent made the bulk of the refunds prior to the filing of the information.

CONCLUSION

For all of the foregoing reasons, Respondent prays that the Court reprimand Respondent, or alternatively, place him on suspension coupled with probation, and for such other and further relief as the Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2007, two copies of the foregoing, along with a diskette containing the brief in Microsoft Word format were mailed, postage prepaid to:

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CERTIFICATE OF COMPLIANCE

The undersigned attorney for Respondent, pursuant to Mo. R. Civ. P. 84.06 certifies that to the best of his knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that:

1. the claims, legal contentions and arguments are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

2. the claims, legal contentions and arguments are warranted by existing law;

3. the allegations and factual contentions have evidentiary support;

4. the denials of factual contentions are warranted on the evidence or if so identified, are reasonably based on a lack of information or belief;

5. the brief complies with the limitations contained in Rule 84.06 (b);

6. based on the word count of the processing system used to prepare the brief, the brief contains 3,912 words; and

7. the disk accompanying this brief complies with the requirements of Rule 84.06(g) governing size, labeling, format and virus scanning.

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