IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
RITA KAY SANDERS,	)	**Supreme Court No. SC96078**
30223 S. Kimbrough Avenue	)	
Springfield, MO 65807	)	
	)	
Missouri Bar No. 51565	)	
	)	
Respondent.	)	

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Background

Respondent, Rita Kay Sanders, was licensed to practice in 2000. Her Missouri Bar Number is 51565. Respondent's license is in good standing. She practices in Southwest Missouri, with her primary office in Springfield. Her only discipline is an admonition accepted in 2012 for failing to act diligently and communicate adequately with her client. **App. 294.**

This discipline case involves two unrelated matters, charged in two counts. Count I involves Respondent's participation in an arrest and search of a woman who was found in a locked motel room during a bond agent's effort to recover a fugitive. Count II involves trust accounting concerns. Respondent repeatedly commingled client and personal funds after two previous overdrafts, and after twice being cautioned to study and comply with Rule 4-1.15, Supreme Court Advisory Committee Formal Opinion 128, and the Missouri Trust Accounting Manual on Trust Accounting; she also attended two Continuing Legal Education courses focused on trust accounting.

The Disciplinary Hearing Panel conducted a hearing on August 11, 2016. **App. 51.** After the Disciplinary Hearing Panel (DHP) hearing, Informant asked the panel to suspend Respondent's license for at least one year. **App. 594.** Respondent sought a reprimand with requirements for trust account monitoring. **App. 613-623.** The Panel accepted Respondent's suggested sanction. **App. 613-623.** Soon after, both parties accepted the Panel's recommendation for a reprimand with requirements. **App. 624-625.**

Per Rule 5.19, this court reviewed the DHP decision. By order, the court invited the parties to show cause as to why a stayed suspension with probation would not be an appropriate sanction. **App. 661.** Informant agreed that a stayed suspension would fit the misconduct and protect the public. **App. 680.** Respondent argued against probation; instead, she reiterated her request for a reprimand with requirements. **App. 662.** The court then ordered the full record be supplied, and initiated a briefing schedule. **App. 686.**

Facts Related to Count I

Respondent practices law in Southwest Missouri. In 2012, her primary office was in Springfield (Greene County), and she used a satellite office in Forsythe (Taney County). Her practice was primarily traffic and criminal defense. Before law school, Respondent had served as a police officer for many years in Fort Worth, Texas, and Bolivar, Missouri, as a deputy sheriff in Christian County, Missouri, and as a private investigator in Springfield, **App. 123-131.** Respondent was neither a law enforcement officer nor a bail bonding agent in 2012.

Her Forsythe satellite office sat in the same building as the bail bond office of her good friend, Myra Cox. **App. 140-141; 362-363.** Because they were friends and because Ms. Cox "was not very big" and was legally blind, Respondent occasionally helped her when Ms. Cox's customers (criminal defendants) absconded. **App. 140-141, 175, 363.** Respondent sometimes represented criminal defendants who were out of jail thanks to a bond posted by Ms. Cox. **App. 258.** According to Ms. Cox, Respondent had helped her recover absconders who were Respondent's clients. **App. 259.** On Facebook, Respondent

described her role in assisting Ms. Cox. By example, Respondent described an upcoming trip to Alabama and California this way:

> We are going to hunt this one down and drive to California and grab two more. I'll be gone a little over a week. MAKING MEMORIES haha. I've got my baton, pepper spray, handcuffs, a 38 snubnose, a .40-caliber automatic and duct tape. We are loaded to barrel. Thelma and Louise.

App. 473-474.

> Hey girl! I was just thinking about you when I saw this! You will be not shocked to learn that I am on the way to Alabama to get a bail jumper with Myra the lady bondsman that I office share with. We are gonna hunt this one down then drive to California and grab two more. I'll be gone little over a week, MAKING MEMORIES hahaha. I got my baton, pepper spray, handcuffs, a .38 snub nose, a 40. Cal automatic and duck tape. We're loaded to baral Thelma and Louise!....well minus the robbing killing and dying stuff! LOL!!!

App. 473-474.

After the trip to California, Respondent posted on Facebook that she assisted Ms. Cox on their trip back to Missouri by chaining the captured absconder to a bathroom sink when the three of them shared a motel room. **App. 267; 444.** Respondent admitted posting those notes on Facebook, but both Respondent and Ms. Cox described the posts as jokes; they said that Respondent simply drove her vehicle on the trip to California to retrieve the absconder and had no other involvement. **App. 444-445; 195-197.** Ms. Cox understood

that Respondent was not allowed to participate in recovering fugitives. She said that she had made that clear to Respondent. **App. 239-240.**

On May 25, 2012, Ms. Cox asked Respondent to go with her on a local trip to capture an absconder, Tommy Darnell, because Ms. Cox would have to forfeit $7,500.00 bond if she couldn't produce him in court, **App. 447**. A warrant had also been issued for Darnell because he had failed to appear for a felony charge. Respondent believed the law allowed her to assist Ms. Cox for protection, **App. 140-142.** The events of that night are the subject of Count I.

In light of Ms. Cox's vision problems, Respondent insisted on driving and taking her car. **App. 143.** Ms. Cox had information that Darnell was armed and dangerous, and that he would not allow himself to be taken back to jail alive. **App. 147.** She received information that night about his specific location. She first heard he was in Branson, then in Branson West. They were not able to find him in those towns. **App. 189-191.** Ms. Cox and Respondent then received a tip (from the same source) that Darnell was in a specific motel room in Reeds Spring, Missouri, in nearby Stone County. **App. 143-144.**

While driving to Reeds Spring, Ms. Cox notified local law enforcement that she would be attempting to capture Darnell. **App. 145.** Ms. Cox later said they didn't need help from local law enforcement, but she wanted to comply with her obligation to call ahead. **App. 232-233.** Stone County deputies were busy, so they forwarded the call to Arin Hart, Chief of Police for Reeds Spring. **App. 145-146.** Chief Hart initially met Respondent and Ms. Cox at Reeds Spring City Hall, where they discussed their respective

roles; Ms. Cox provided documentation as to the warrant and to her bonding authority. **App. 145.**

Chief Hart testified that he believed both Cox and Respondent were bonding agents **App. 399-400**; both Respondent and Cox insist that they both told Chief Hart that Respondent had no bail bonding authority, and no current law enforcement authority, but that she was an attorney. **App. 148.** Chief Hart provided inconsistent testimony on those points, but said he would not have allowed Respondent to participate in the attempted capture if he had known she was not a bonding agent. **App. 400.**

In Respondent's "Supplemental Report", provided later to Chief Hart, Respondent repeatedly described the key actors as both Ms. Cox and herself. She said, for example, "…we noted a group of 4 or 5 people…; and "We were unable to tell if one of the persons was Mr. Darnell"; and "we pulled down the road and called the police dispatcher", and "We also asked if they had a deputy or Reeds Spring officer that could come to our location"; and "We began to ask [M.O] where Tommy was" **App. 355.**

After meeting at the City Hall, Respondent, Ms. Cox, and Chief Hart drove to the motel where Darnell had been reported to be staying. **App. 245.** Arriving at the motel, Respondent, Ms. Cox, and Chief Hart knocked on the door of the room where Darnell had been spotted. **App. 151.** Although no one in the room responded, people from nearby rooms told them that a man and a woman had recently been in the room; they weren't sure whether the man was still present. **App. 150-152.** They said that they believed a woman was still inside, because they had recently seen her outside the room - apparently intoxicated and wearing only a bra. **App. 150-152.**

Ms. Cox then obtained a key to the room from the motel manager. Ms. Cox, Respondent, and Chief Hart unlocked the room. Chief Hart and Respondent went in with their guns drawn, **App. 375**. All three saw that the room was small and that an apparently naked woman was in bed alone, but mostly covered by sheets, **App. 368, 375-376**. Respondent and both Chief Hart yelled at the woman, later identified as M.O., to remove her hands from under the covers, until she did, **App. 161-162.** Respondent testified that Chief Hart headed to the bathroom to look for Darnell, because, "I had [M.O.] covered in the bed", **App. 375.** She said she kept yelling at M.O. to "put her hands where I could see them. **App. 368**. After M.O removed her hands from the covers and Chief Hart inspected and "cleared" the bathroom, both Chief Hart and Respondent holstered their weapons. **App. 169-170.** They also immediately understood the threat was over and the fugitive was gone. **App. 284-285.**

Ms. Cox (the bail bondsman) understood that she had no authority to stay in the room because her bonding authority required her to leave the premises if the fugitive absconder was not there. **App. 260.** But, Ms. Cox and Respondent stayed and interrogated M.O. about Darnell's whereabouts. **App. 260-261.** M.O. reported that her cell phone might have Darnell's contact information. In her testimony to the DHP, Respondent explained the next events this way: Ms. Cox began to hand the purse to M.O., but Respondent stopped her and said to M.O.: "If you don't mind, I'll get the phone out of the purse." She explained that she was still in "police mode". **App. 163-164.** Respondent said that M.O. responded by saying: "Whatever." **App. 163-164.** Earlier, in her "Supplemental Report" to the Police Chief, and her previous testimony in a hearing on M.O.'s Motion to Suppress

Evidence, Respondent did not mention that she sought permission to search M.O.'s purse. **App. 369-370.** Instead, she testified: "And Myra [Cox] asked me if I would look in the purse for the phone and I didn't feel comfortable with her [M.O.] grabbing the purse, because I didn't know what was in it. And she did appear to be intoxicated or high on something and she wouldn't show us her hands and so I wanted to make sure there wasn't any weapons in the purse before you know, she had any contact with the purse. So I went over and began to look through the purse, I found the phone." **App. 369-370.**

Respondent said, "I remember pulling a lot of stuff out" …" and then kind of filtering thorough everything". **App. 380.** No weapon was in the purse, and the only phone in M.O.'s purse appeared broken. Respondent and Ms. Cox continued demanding information from M. O. about Darnell. **App. 163.**

When Respondent dumped out the purse, Respondent also saw a black pouch fall out. Although Respondent explained she did not believe the black pouch contained a weapon, her law enforcement experience led her to believe the pouch might contain drugs. **App. 381.** Respondent opened the black pouch, revealing methamphetamine and related drug paraphernalia. **App. 361.** She gave the drugs to Chief Hart, who arrested M.O. Respondent explained that Chief Hart did not participate in the search. **App. 361**. She testified to being in "police officer's mentality". "In that room that night I was acting as his backup, which was as a former police officer." **App. 183.** Respondent told the DHP that she opened the black pouch because she was looking for a second phone. **App. 186-187.** Previously, at M.O.'s Motion to Suppress hearing, Respondent was asked about searching the items within M.O.'s purse; Respondent explained: "I saw the black pouch

and I assumed what was in the black pouch, I opened it up and it was drugs." **App. 381.** Respondent testified that it was her own independent decision to open the black pouch. **App. 381.** When asked whether a weapon might have been in the black pouch, Respondent said: "No, I didn't figure there was a weapon in there. I thought there might be a phone number, or papers…" **App. 384.** In that early testimony, she did not assert that she was looking into the pouch for a phone, only a phone number. **App. 384.**

Respondent continued her search through M.O.'s papers and wallet. She testified, "I went through every paper in her purse." **App. 384.** She further explained, "We were looking for anything and everything that might lead us to this man that we knew was extremely dangerous." **App. 384.** According to Respondent, she and Ms. Cox stayed in the motel room for a "quite some time" after Chief Hart left with M.O. **App. 356**. They continued looking through M.O.'s belongings for information on finding the fugitive, Tommy Darnell. **App. 384.**

Respondent acknowledged that after Chief Hart had cleared the room and bathroom, and before she began searching M.O.'s purse, that there was no longer reason to cover his back. **App. 284.**

Respondent's "supplemental report" did not mention that Chief Hart had either asked or ordered her to cover his back. She simply wrote this: "Upon meeting with Chief Hart, it was decided that we would go to the motel and knock on the door to see if Mr. Darnell was there." **App. 355**. And, in her testimony in response to M.O.'s Motion to Suppress evidence of her search, Respondent did not testify that the Chief asked for cover or insisted on her participation. In that hearing, Respondent simply reported: "We had been

told that he was armed and that he had made comments that he would not be taken without a shootout. And so I was armed and Myra [Cox] was not and the Chief said, well, let's go over and let's see if he's at that room. So we went over to the motel." **App. 366**.

In that testimony, which she explicitly admitted giving with a goal to support Chief Hart and the prosecution, she described his sole role as protection for her and for Ms. Cox. **App. 183-184**. In that hearing, Respondent swore that Chief Hart had no role in the search and was only there to "assist and afford protection for Ms. Cox and myself." **App. 213-214.**

Respondent later reported that she was only present in the room because Chief Hart demanded that she leave the safety of her car, violate Ms. Cox's concern that an unlicensed person should not assist in the recovery of a fugitive, bring her loaded weapon, and cover his back as he attempted to arrest a wanted man. **App. 218; 221.** Respondent admits that it was only after she was charged with a crime for her role in the search, that her explanation began to include assertions that she reluctantly agreed to back up Chief Hart when he learned that she had police experience and a handgun. **App. 182-183; 219-220**. In her later testimony, she said she thought she had no choice but to help him, based on her understanding of Texas law. **App. 167-168.**

Since the time she was charged, Respondent has explained that the earlier testimony and report was truthful, but given in a way to "minimize" Chief Hart's role, **App. 182-183; 214** and to "help the prosecutor" **App. 189-190**, and help the State ("but not by lying"). She testified: "I tried to lessen his role." **App. 184**. Respondent's more recent testimony (not given in the Motion to Suppress hearing and not included in her supplemental report

to Chief Hart) is that her authority to be in the motel room was based on Chief Hart's demands to "back me up" and "cover my back." **App. 149; 219; 221; 245-246; 254; 257; 277; 290.** She now says she would have stayed in her car if Chief Hart had not asked her to back him up. Respondent says she testified truthfully in the Motion to Suppress hearing. **App. 182-183.** She testified that testimony was "not lying." **App. 182-183**.

Respondent admits that she had no authority to stay in the motel room after Chief Hart left with M.O. **App. 218.** Her explanation for staying was that Ms. Cox still wanted to wait "because she thought Tommy might come back." **App. 218**. As noted, Ms. Cox recognized at the time that she was required to leave, once it was obvious that her absconder was not present. **App. 264.** Respondent's friend, Ms. Cox, described Respondent's conduct at the motel as "acting like a police officer." **App. 262.**

Chief Hart, in his testimony at the Motion to Suppress hearing, did not describe Respondent's role as covering his back; he denied that he had either deputized Respondent or ordered her to assist. He did acknowledge asking her, as he entered the motel room, to make sure he didn't get shot in the back. **App. 220.**

For her part in the events of the Reeds Spring motels, Ms. Cox was fined by the Department of Insurance, the regulators for bail bonding agents. The fine was issued because she allowed Respondent to participate in the attempted capture of a fugitive; Ms. Cox accepted the penalty. **App. 258-259.**

The State charged Respondent with kidnapping, armed criminal action, unlawful use of a weapon, and fugitive recovery, but she and the Attorney General eventually agreed to a guilty plea to a Peace Disturbance charge. **App. 153.**

On Count I, the DHP decided that Respondent violated Rules 4-8.4(b), 4-8.4(c), and 4-8.4(d).

COUNT II

In 2010, the court adopted an overdraft notification clause in Rule 4-1.15; the clause requires lawyers to maintain trust accounts only at banks agreeing to notify the Office of Chief Disciplinary Counsel (OCDC) if an overdraft occurs in the lawyer's trust account.

In both March 2012 and October 2012, the OCDC received notifications of overdrafts in Respondent's trust account. After the first notice, the OCDC investigated and found an accounting error but no violation. The OCDC cautioned Respondent to "avoid further risk to your clients' funds and additional disciplinary investigations." **App. 307.** The OCDC letter also suggested Respondent study the Missouri Bar/IOLTA Trust Accounting Manual and to read Formal Opinion 128 as it pertains to "proper handling of advance fees." The OCDC also suggested that Respondent attend an upcoming CLE course focused on trust accounting. When Respondent missed that CLE, the OCDC corresponded, again advising her to participate in the CLE. **App. 307-309.**

Respondent's bank issued another overdraft notification in October 2012. In its second caution letter to Respondent, the OCDC pointed out to Respondent that her explanation and supporting documentation indicated no violation but poor recordkeeping and failure to supervise her staff. The OCDC also warned against that "the deposit of advance client costs and fines to the operating account for transfer to the client trust account at a later date…" **App. 310.** Again, the OCDC advised Respondent to study Rule 4-1.15, Formal Opinion 128, and the Missouri Bar/IOLTA Trust Account Manual. Finally, the

OCDC advised Respondent to again attend a CLE entitled "Fundamentals of Trust Accounting." As with the March 2012 cautionary letter, Respondent was again advised that the letters were not discipline but "may be considered if we receive similar complaints in the future." **App. 310-311.**

Respondent's trust accounting practices led to another overdraft notification on August 22, 2014. **App. 312.** The OCDC's attempts to investigate the overdraft were frustrated by Respondent's refusal to provide records in support of her explanations. **App. 81-87; 309-330.** In addition to initially refusing to provide records, Respondent complained to the Clerk of this Court about the OCDC's use of a subpoena to obtain records that she did not produce. **App. 326.**

Eventually, the OCDC investigation was completed with an OCDC finding that no misappropriation had occurred, but that Respondent: (a) kept inadequate records of her clients' funds; (b) commingled client and personal funds by depositing client fines and costs into her operating account; (c) commingled client and personal funds by depositing unearned advance fees into her operating account; and (d) made numerous undocumented transfers in even amounts from her trust account to her operating account. **App. 98-101; 104.**

In explaining her 2014 overdraft, Respondent said the overdraft occurred when a staff member had mistakenly caused a $750.00 refund from her trust account instead of a deposit. **App. 316-319; 134-138.** Respondent initially told the OCDC that a bank error contributed to her overdraft; she disavowed that claim in a later report. **App. 316-318; 134-136.**

The DHP concluded Respondent did not violate Rule 4-1.15(c) but did violate Rule 4-1.15(a). The Panel found that Respondent operated a high volume traffic practice, receiving most payments by cash, check, and credit card. Further findings were that in August 2014, she wrote the $2,415.00 check from the trust account on a Friday. She believed no other disbursements were being made from the trust, but that same week, her assistant had accidentally refunded $750.00 from the trust account to the client instead of depositing it. **App. 616.** Like many other trust account disbursements, Respondent's check to herself for $2,415.00 was not documented with references to specific fees earned by particular clients.

Respondent's recordkeeping made reconciliation difficult for Respondent, and also for the OCDC. **App. 100.** For example, the OCDC investigation reported that when Respondent made draws on the trust account for her earned fees, "there was no specific breakdown as to how much was for each client." **App. 99.** Also, Respondent had difficulty explaining the cause of her 2014 overdraft. **App. 136-138; 316-318.**

POINT RELIED ON

I.

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE:

(A) SHE VIOLATED RULE 4-8.4(c) BY MISREPRESENTING HERSELF AS HAVING AUTHORITY TO SEARCH A WOMAN AND SEIZE HER PROPERTY; AND

(B) SHE VIOLATED RULE 4-8.4(d) BY ENGAGING IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE BY IMPROPERLY ASSERTING AUTHORITY TO SEARCH A WOMAN AND SEIZE HER PROPERTY.

State of Missouri v. Goodman, 449 SW2d 656, Mo. Supreme Court (1970)

State v. Johnson, 245 SW2d 43, (Mo. 1951)

In re Hunsaker, 217 P.3d 962 (Kan. 2009)

People v. Hunsaker, 2008 WL162169 (Col. S. Ct., Jan. 15, 2009)

Supreme Court Rule 4-8.4

Black's Law Dictionary

POINT RELIED ON

II.

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE:

(A) SHE VIOLATED RULE 4-1.15(a) BY DISBURSING FUNDS FROM HER TRUST ACCOUNT WITHOUT WAITING TO ASSURE THAT RECENTLY DEPOSITED FUNDS HAD BECOME AVAILABLE AND BY FAILING TO MAINTAIN ADEQUATE RECORDS OF CLIENT RECORDS;

(B) SHE VIOLATED RULE 4-1.15(c) BY COMMINGLING CLIENT FUNDS WITH HER PERSONAL FUNDS IN THAT SHE ROUTINELY DEPOSITED INTO HER PERSONAL OPERATING ACCOUNT FUNDS GIVEN BY HER CLIENTS TO BE PAID OUT AS FINES AND COURT COSTS AND NOT YET EARNED FEES.

Supreme Court Rule 4-1.15

POINT RELIED ON

III.

RESPONDENT'S LICENSE SHOULD BE INDEFINITELY SUSPENDED. A STAYED SUSPENSION, WITH PROBATION, IS WITHIN THE RANGE OF APPROPRIATE SANCTIONS, UPON APPLICATION OF ABA SANCTION STANDARDS AND PREVIOUS SANCTION ANALYSIS BY THE COURT.

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

In re Farris, 472 S.W.3d 549, 560-561 (Mo. banc 2015)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.),
Standard Rule 4.12
Standard Rule 4.13
Standard Rule 7.2
Standard Rule 9.22(e)
Standard Rule 9.32(b)

ABA Annotated Standards Standards for Imposing Lawyer Sanctions (2015)

Supreme Court Rule 4-1.15

Supreme Court Rule 4-8.4

ARGUMENT

I.

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE:

(A) SHE VIOLATED RULE 4-8.4(c) BY MISREPRESENTING HERSELF AS HAVING AUTHORITY TO SEARCH A WOMAN AND SEIZE HER PROPERTY; AND

(B) SHE VIOLATED RULE 4-8.4(d) BY ENGAGING IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE BY IMPROPERLY ASSERTING AUTHORITY TO SEARCH A WOMAN AND SEIZE HER PROPERTY.

The Panel decided that Respondent's behavior on the night of May 25-26, 2012, constituted violations of Rules 4-8.4(b), 4-8.4(c), and 4-8.4(d). Although each of those subsections of Rule 4-8.4 were charged, and might be supported, this brief will focus on subsections 4-8.4(c) (dishonesty, fraud, deceit, and misrepresentation) and 4-8.4(d) (conduct prejudicial to the administration of justice).

As noted in her Supplemental Report and in her initial testimony about these facts and issues, Respondent explained that she and Ms. Cox acted on their own authority, calling Chief Hart only because the law required Ms. Cox to call him and for their protection. After being charged with crimes and these violations, she raised the concept of

posse comitatus and altered her story to suggest that she only went in the Reeds Spring motel room because Chief Hart asked for her support. Factually, her reliance on posse comitatus as a defense is countered by her first two explanations of the events.

For a perspective on the legal applicability of posse comitatus to Respondent's action, Informant here adopts portions of the trial brief submitted to the DHP, authored by Informant's co-counsel: Posse Comitatus (Latin) literally means "the power or force of the *county*". Black's Law Dictionary. A posse comitatus is "those called to attend the Sheriff" *State of Missouri v. Goodman*, 449 SW2d 656, (Mo. 1970). At common law, posse comitatus is limited to those called by the *Sheriff* of a county to assist in making a felony arrest; it does not apply to the chief of police of a municipality.

The *Goodman* case further sets forth the status of a person summoned by the sheriff: A person as summoned is neither an officer nor a mere private person, but occupies the legal position of a posse comitatus and while cooperating with the sheriff and acting under his orders is just as much clothed with the protection of the law as the sheriff himself. *State v. Goodman*, 449 SW2d at 661.

In her trial brief, the Respondent relied on *State v. Parker*, 199 SW2d 338 (Mo. 1947) and *State v. Goodman*, 449 SW2d 656 (Mo. 1970) to establish the common law theory of posse comitatus. Both of these cases involve sheriffs, not city officers.

The *Johnson* case cited in Respondent's trial brief does contain two sentences of dicta referring to an officer making a warrantless arrest and the officer's right to ask a civilian to help him take the arrestee and property into custody. This court did not expressly hold that a municipal officer could call a posse. *State v. Johnson*, 245 SW2d 43, (Mo.

1951). Under the definition of posse comitatus and common law, only the sheriff has the right to seek assistance.

Assuming for the sake of argument that Chief Hart did have the authority to summon someone for assistance, the issues then become (a) whether Chief Hart actually summoned the Respondent and for what purpose or purposes, and (b) when does the posse authority terminate? His testimony at the Preliminary Hearing is that he thought the Respondent was a bond agent and he was assisting a fugitive recovery. **App. 497.**

Chief Hart did ask the Respondent to "make sure I didn't get shot in the back". **App. 500.** He further testified: he viewed his role as "security, protection" **App. 499;** he never asked her (the Respondent) to help him **App. 500;** he never made any suggestions about what the Respondent might do **App. 502;** that he was not in charge **App. 502;** he did not ask the Respondent to "back him up" **App. 502.**

Likewise, Respondent testified at M.O.'s Motion to Suppress hearing about Chief Hart's conduct after he had cleared the room: "the Chief was standing at the foot of the bed, he had not searched anything, he was just standing there, basically, for our protection, I think". **App. 370-371.** "He just stood there, he didn't do anything. He didn't question her, he didn't search anything, he just – I think he was just there, basically, for our protection". **App. 371.** And in her Supplemental Report, Respondent wrote "it should be noted that Chief Hart did not participate in the search, he was only there to assist and afford protection". **App. 356.**

Assuming for the sake of argument that the Respondent did have status as posse comitatus when she "covered" Chief Hart's back, the mission was accomplished when it

was obvious the fugitive was not in the room. At this point, the three involved in the attempted fugitive recovery were required to leave. The *Goodman* case states "the action of a posse comitatus constitutes governmental action so as to render applicable the protections of the Fourth Amendment." *State of Missouri v. Goodman*, 449 SW2d 656, Mo. Supreme Court (1970).

By her own admissions, when Respondent was searching M.O.'s purse, the Respondent was no longer cooperating with or taking orders from Chief Hart, she no longer had the status of posse comitatus. She searched M.O.'s purse on her "independent decision."

No matter what excuse Respondent asserts for her actions, nothing justifies remaining in the hotel room after it was obvious the fugitive was not there. Nothing justifies the invasion of privacy and seizure of M.O.'s purse and its contents.

Rule 4-8.4(c)

Rule 4-8.4(c) (Misrepresentation) prohibits misrepresentation, deceit, and dishonesty. Respondent presented herself as if she was cloaked with authority to enter uninvited into a motel room with her gun drawn, then to yell at and hold an unknown person at gunpoint. Respondent misrepresented herself as having continued authority by insisting on taking M.O.'s purse and searching its contents. Even after Respondent knew no weapons were inside a small black pouch, she continued "acting like a police officer." She searched that pouch and delivered its contents to Chief Hart. After that show of force and apparent authority, but also after any authority she may have had ended, she behaved in "police mode," as if her authority continued. She searched and seized papers, a wallet, and

the contents of a small pouch inside the purse, expecting it to contain drugs, but also explaining that she was searching for information about the absconder, Tommy Darnell.

Even if the Court accepts Respondent's claim that she was authorized by Chief Hart to cover his back as he attempted to arrest the fugitive, she violated Rule 4-8.4(c) by continuing her search and seizure as if she still had authority. Her authority, she and Ms. Cox partly acknowledge, ended when she and Chief Hart knew Darnell was not in the motel room.

Going a step further, assuming Respondent's status as a member of a duly appointed posse continued until the area was secure, the application of Rule 4-8.4(c) continues. After she knew that Ms. Cox had to leave, and after she knew Chief Hart was safe, Respondent didn't stop "acting like a police officer".

Absent official authority, of course, Respondent's actions in the motel at Reeds Spring lack justification. She claims she had official authority but seemed to recognize, as the DHP did, that it ended when she knew Tommy Darnell was not in the room. And, if not then, her posse comitatus authority ended seconds later, when the room was secure.

Misrepresenting official or bail bond agent authority to demand property from an intoxicated woman in a locked motel room, in the middle of the night, is not only outrageous, but also dishonest. Her conduct violates Rule 4-8.4(c).

Rule 4-8.4(d)

Respondent's conduct also violates Rule 4-8.4(d) because it was prejudicial to the administration of justice. With no bail bonding authority and no law enforcement authority, Respondent attempted to assist Ms. Cox with the capture of a fugitive. She

testified to her key role at a hearing on M.O.'s Motion to Suppress Evidence, saying repeatedly that Chief Hart was present only to protect Ms. Cox and herself. Respondent admits that her testimony (at that point) was intended to mitigate the chief's role and to support the police and prosecutor, but she also insisted that testimony was truthful. Only later, after confronted with charges for her own conduct, Respondent's explanation changed to include a different claim. In her later explanation, she describes her role as back up to the chief, only done because he ordered her to carry her gun to the motel.

If the court believes her initial explanation, her role in Reeds Spring was much more than simply serving as M.O.'s driver. Instead, her actions were more like her own Facebook description of an earlier fugitive hunt, where she not only drove a fugitive from California to Missouri, but chained him to a motel room sink. And, her initial story is akin to her other Facebook posts, where she brags about taking two guns, pepper mace, handcuffs, and a baton from Missouri to Alabama to California and back, all in support of M.O.'s effort to capture her bonded fugitives. Her initial explanation for going with Ms. Cox that night was this : "Like I said, we office share and we're good friends and so whenever she goes looking for fugitive, she's not very big, I don't like her going by herself. And so I said, well let's ride over there together so we went over to the apartment complex [at the first stop in Branson]. The informant had told us that Tommy was there with two women and so when we got there, we found the apartment complex and set up on it." **App. 363.**

Respondent entered a locked motel room with her gun drawn. She pointed her gun at the bed where a woman was lying. She screamed at the woman. She questioned the

woman. She insisted on taking the woman's purse and dumping its contents on another bed. Then she searched the woman's purse and its contents, including the contents of a small black pouch, despite believing it did not contain a weapon, and admittedly recognizing that it probably contained illegal drugs. The probability of finding drugs or a phone number was the reason Respondent initially gave for searching the black pouch. Much later, after being charged, she added that she was still looking for M.O.'s phone.

Although Respondent eventually claimed that she asked M.O. for permission to search her purse, that claim was added after Respondent was charged with crimes. In her earlier "Supplemental Report" and testimony at M.O.'s Motion to Suppress, Respondent explained her actions this way: "…And she did appear to be intoxicated or high on something and she wouldn't show us her hands and so I wanted to make sure there wasn't any weapons in the purse before you know, she had any contact with the purse. So I went over and began to look through the purse, I found the phone." **App. 370.**

Respondent argued to the Panel that she couldn't violate Rule 4-8.4(d) except within a pending legal matter. To the contrary, this court and others have found Rule 4-8.4(d) violations for misconduct in settings beyond those in which lawyers were representing parties. In 2013, for instance, this court recognized "the rule is not explicitly limited to those times where an attorney is acting in a representative capacity." *In re Hess*, 406 S.W.3d 37, 45-46 (Mo. 2013). In the *Hess* case, the respondent attorney's misconduct was as a party in a lawsuit. He did not serve in a representative capacity.

More relevant to the instant case, the Colorado and Kansas Supreme Courts applied Rule 4-8.4(d) when a lawyer was suspended in both states for giving financial assistance

to his son, who was evading felony arrest in Mexico. *In re Hunsaker*, 217 P.3d 962 (Kan. 2009); *People v. Hunsaker*, 2008 WL162169 (Col. S. Ct., Jan. 15, 2009).

In any event, Respondent's conduct was indeed closely tied to legal matters, including the outstanding warrant against Tommy Darnell. She acted as if she had the force of law, and, in fact, claims she had the force of law. Respondent's search of M.O.'s purse created the basis for criminal drug possession charges against M.O. Also, Respondent's behavior was the subject of a Motion to Suppress Evidence in M.O.'s criminal possession case. In that case, the court analyzed whether Respondent's search, and her participation with the police chief, constituted a breach of the Fourth Amendment prohibition on unreasonable search and seizure. At that point in M.O.'s case, Respondent "supported" the prosecutor's case, which included a theory that the evidence should not be suppressed because there was no state action in that Respondent was not acting under Chief Hart's authority.

By assuming authority and by demanding (in a manner asserting authority) that M.O. deliver her purse, and then by searching the contents, Respondent engaged in conduct that was prejudicial to the administration of justice, in violation of Rule 4-8.4(d).

ARGUMENT

II.

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE:

(A) SHE VIOLATED RULE 4-1.15(a) BY DISBURSING FUNDS FROM HER TRUST ACCOUNT WITHOUT WAITING TO ASSURE THAT RECENTLY DEPOSITED FUNDS HAD BECOME AVAILABLE AND BY FAILING TO MAINTAIN ADEQUATE RECORDS OF CLIENT RECORDS;

(B) SHE VIOLATED RULE 4-1.15(c) BY COMMINGLING CLIENT FUNDS WITH HER PERSONAL FUNDS IN THAT SHE ROUTINELY DEPOSITED INTO HER PERSONAL OPERATING ACCOUNT FUNDS GIVEN BY HER CLIENTS TO BE PAID OUT AS FINES AND COURT COSTS AND NOT YET EARNED FEES.

In August 2014, Respondent's bank reported an overdraft in her trust account to the OCDC. The investigation into Respondent's trust accounting practices revealed numerous instances of Respondent's failure to use her client trust account and commingling client funds in her operating account. **App. 94-95.**

Respondent had a high volume traffic law practice. Clients gave her money that often included funds owed for fines and for court costs, as well as either earned or unearned fees. Respondent deposited the clients' entire payment (including fines, court costs, earned fees, and unearned fees) into her operating account. By that method, Respondent necessarily put clients' money into her personal account. The Panel found that practice violated Rules 4-1.15(a), but not Rule 4-1.15(c). The evidence supports conclusions that Respondent violated both rules.

As the Panel determined, she violated Rule 4-1.15(a)(6) by failing to wait for an anticipated deposit (inadvertently refunded instead of deposited) to become good funds before writing a check on that account. **App. 622.**

The Panel's conclusions appear to focus on the facts immediately connected to Respondent's overdraft. **App. 622.** However, as in many cases initiated by an overdraft, the OCDC examination of the account revealed (and the Information charged) misconduct beyond that incident. The evidence established that in 2014, Respondent deposited client court costs and fines into her operating account. That conduct, as well as Respondent's practice of depositing unearned fees in her trust account, constitutes a violation of Rule 4-1.15(c) in that she failed to hold client funds separate from her own. Respondent also violated Rule 4-1.15(a) by failing to maintain adequate records of client funds.

ARGUMENT

III.

RESPONDENT'S LICENSE SHOULD BE INDEFINITELY SUSPENDED. A STAYED SUSPENSION, WITH PROBATION, IS WITHIN THE RANGE OF APPROPRIATE SANCTIONS, UPON APPLICATION OF ABA SANCTION STANDARDS AND PREVIOUS SANCTION ANALYSIS BY THE COURT.

Sanction analysis for Count I, as discussed in Point I in the brief here, should be founded on Respondent's misuse and expansion of authority she may have believed she was given by Chief Hart. Even if the court accepts her assertion of official authority granted by Chief Hart, (which she didn't raise until confronted with her own behavior), she continued to "act like a police officer" after Ms. Cox, the bonding agent, had lost authority to be in the room, and after any need for her to "cover" Chief Hart had expired. Lawyers who engage in misconduct counter to the administration of justice should be suspended if the conduct is knowing. ABA Standards for Imposing Lawyer Sanctions, Standard 7.2.

In 1997, this court determined that a lawyer who had taken matters into his own hands and shot his tenants' trespassers should be reprimanded. *In re McBride*, 938 S.W.2d 905 (Mo. 1997). Respondent McBride had gone to the rescue of a neighboring tenant who was frightened by three men in her yard. After confronting them, McBride shot one. He was found guilty by a jury of second degree assault. The jury rejected his claims of self-

defense and defense of others. A 4-3 majority of the court decided to reprimand McBride. Judges Covington and Benton, and Chief Justice Holstein dissented as to sanction. They would have suspended him. *In re McBride*, 938 S.W.2d at 909-910. It is significant that at the time of the *McBride* decision, stayed suspension and probation were not sanction options listed in Rule 5. The rule authorizing probation was adopted five years after *McBride* in 2002, effective January 1, 2003. **Rule 5.225**.

As to the sanction for Count II, Respondent's trust account practice does not reveal misappropriation. The examination of her account does indicate a cavalier approach to handling other peoples' money. By 2014, Respondent had practiced long enough to know better. More importantly, in this case, the evidence is that she was given more reminders and information about trust accounting than most other lawyers.

Two years before the problematic practices uncovered following her 2014 overdraft, Respondent had twice overdrawn her trust account. On both occasions, the OCDC advised her to study the trust accounting rules and read the Missouri Bar/IOLTA Lawyers Trust Accounting Manual; she was twice given copies of Formal Opinion 128. Rule 4-1.15 and Formal Opinion 128 clarify any confusion about proper handling of advance fees: Lawyers must not keep unearned fees in their operating account.

This case is not just about proper accounting for minor advance fees in a high volume traffic law practice. In addition to unearned fees, Respondent used her operating account to hold funds her clients had entrusted with her to pay their court costs and fines.

The court recently held that lawyers are required to know the rules of professional conduct relating to trust accounting. Further, that knowledge can be imputed to them. And,

when lawyers fail to exercise care to assure that adequate records are maintained to protect client funds, they can be presumed to know what good records would reveal. *In re Farris*, 472 S.W.3d 549, 560-561 (Mo. banc 2015).

Clearly, Respondent's misconduct is not comparable to that of Mr. Farris. But, the *Farris* decision is important here because when it comes to dealing with other peoples' money, carelessness doesn't offer a refuge from responsibility. Respondent's carelessness is hardly based on ignorance, unless she confesses to adamantly refusing to learn from the materials and CLEs twice provided to her in 2012.

The DHP considered ABA Standards 4.13 in deciding that a reprimand with requirements would best fit Respondent's misconduct. The Panel noted Standard 4.13 supports a reprimand if a trust accounting violation is merely negligent. Informant's position is that, in light of the repeated warnings and retraining opportunities, Respondent's improper trust accounting practices were neither merely negligent nor merely careless. On the other hand, no evidence supports a finding that Respondent intentionally or selfishly misused client funds.

Respondent's continued methods, after two warnings, establishes she knew or should have known how to better protect client funds. In many courts, knowledge is not required for a suspension: "Lawyers who do not have knowledge that they are dealing improperly with clients' property may nonetheless face suspension if proven that they should have known they are doing so and the client suffers injury or potential injury." ABA Annotated Standards for Imposing Lawyer Sanctions, p. 142, (referring to ABA Standard 4.12) 2015. Under that analysis, suspension was the sanction imposed for: lawyers who

instructed staff to transfer funds from the trust account despite knowing of repeated overdrafts; *In re Bailey*, 821 A 2d 851 (Del. 2003); inadequate staff supervision, *Florida Bar v. Wiess*, 586 So. 2d 1051 (Fla. 1991); failure to set up procedures to prevent a secretary from disbursing a $10,000.00 check from a trust account, when those funds were intended to be held for payment to a third party, *Kentucky Bar Association v. Lococo*, 199 S.W.3d 182 (Ky. 2006).

In short, Respondent's trust accounting violations were not selfish, but she failed to take heed of guidance from the OCDC that should have led to improved practices. A stayed suspension with probation would be an appropriate sanction even if her trust accounting practices were the only violations at issue.

In mitigation, it is evident that Respondent was motivated by neither selfishness nor dishonesty. (ABA Standard 9.32(b)).

Respondent's repeated resistance to providing trust accounting records should be considered an aggravating factor, even if not a violation. (ABA Standard 9.22(e)).

CONCLUSION

In Count I, Respondent violated Rule 4-8.4(c) and (d) by misrepresenting authority to search and seize a woman's property during her participation in attempted fugitive recovery. In Count II, Respondent violated Rule 4-1.15(a) and (c) by commingling client and personal funds after being twice cautioned and educated about keeping those funds separate. Informant believes that a stayed suspension with probation is an appropriate sanction to protect the public and maintain the integrity of the profession.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2017, the Informant's Brief was sent to Respondent and Respondent's counsel via the Missouri Supreme Court e-filing system to:

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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 7,919 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

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