

IN THE SUPREME COURT OF THE
STATE OF MISSOURI

In re

MARY L. LEMP,
Attorney-Respondent.

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Supreme Court Case SC97285

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3

JURISDICTIONAL STATEMENT5

CASE SUMMARY6

STATEMENT OF FACTS.....7

Background.....7

Law practice7

Absence of prior discipline.....7

Medical issues from automobile accident.8

The *Bramer v. Abston* appeal.9

Improper copying and pasting of unnecessary notary blocks on appellate filings. 10

Opposing counsel challenges the improper notary blocks11

Explanation of improper filings.....11

Disciplinary complaints and investigation12

Information, Answer and notice of Rule 5.285 defense.....12

Testimony from witnesses regarding Ms. Lemp’s mental condition after 2014
 automobile accident.....12

Testimony of good character17

Hearing Panel recommends indefinite suspension17

POINTS RELIED UPON18

ARGUMENT19

Preliminary statement.....19

Standard of review..... 19

Standard for imposition of discipline 19

POINT RELIED #1: Evidence of Ms. Lemp’s Mental Condition in April 2016 should be considered as mitigation under or notwithstanding Rule 5.28520

 Ms. Lemp’s mental condition at the time of the misconduct clearly should be a mitigating factor22

 Ms. Lemp satisfied the requirements of Rule 5.285 for mental health to serve as a mitigating factor22

 Imposition of more significant hurdles to consider mental disorder would be constitute an undue burden and be contrary to the purposes of the lawyer discipline system24

 Ms. Lemp’s mental health as of April 2016 should defeat the scienter required to impose an active suspension.....27

 Ms. Lemp has fully recovered from her mental impairment.....28

POINT RELIED #2: Even Without Consideration of Ms. Lemp’s Mental Health Injuries as of April 2016, Discipline of Ms. Lemp Should Not Exceed a Stayed Suspension.....28

 Circumstances Giving Rise to Sanction29

 Precedent Supports a Stayed Suspension30

CONCLUSION 32

CERTIFICATE OF SERVICE..... 33

CERTIFICATE OF COMPLIANCE34

TABLE OF AUTHORITIES

CASES

In re Coleman, 295 S.W.3d 857 (Mo. 2009)..... 19, 24

In re Eisenstein, 485 S.W.3d 759 (Mo. 2016)..... 19

In re Hess, 406 S.W.3d 37 (Mo. 2013) 18, 31

In re Krigel, 480 S.W.3d 294 (Mo. 2016)..... 18, 30, 31

In re Madison, 282 S.W.3d 850 (Mo. 2009) 19

In re Marshall, 762 A.2d 530 (D.C. 2000).....26

In re Milloy, 571 N.W.2d 39 (Minn. 1997)26

In re Wiles, 107 S.W.3d 228 (Mo. 2003) 19

State Bar Association v. Busch, 919 P.2d 1114 (Okla. 1996)26

The Florida Bar v. Clement, 662 So. 2d 690 (Fla. 1995).....26

STATUTES

Missouri Revised Statute § 484.0405

CONSTITUTIONAL PROVISIONS

Article V, Section 5 of the Missouri Constitution5

RULES

Missouri Supreme Court Rule 55

Missouri Supreme Court Rule 5.285passim

Missouri Supreme Court Rule 55.0334

Missouri Supreme Court Rule 84.047

Missouri Supreme Court Rule 84.0634

OTHER AUTHORITIES

ABA For Law Students, *Mental Health Resources* (last visited October 3, 2018).....27

ABA Standards for Imposing Lawyer Sanctions 6.1327

ABA Standards for Imposing Lawyer Sanctions 6.1427

ABA Standard for Imposing Lawyer Sanctions 9.120

ABA Standard for Imposing Lawyer Sanctions 9.3225, 26, 32

Jolly-Ryan, Jennifer, *The Last Taboo: Breaking Law Students with Mental Illness and Disabilities Out of the Stigma Straightjacket*, 79 U.M.K.C. Law Review 123 (2010) .27

Lovelace, Ryan, *ABA ‘Furiously Working’ to Craft Proposal on Lawyers’ Mental Health*, The National Law Journal (May 21, 2018).....26

Port, Dina Roth, *Lawyers Weigh In: Why is there a depression epidemic in the legal profession*, ABA Journal (May 11, 2018).....26

JURISDICTIONAL STATEMENT

Respondent Mary L. Lemp does not contest this Court's jurisdiction. This is a lawyer discipline case. Therefore, as stated in Informant's Brief, this Court has jurisdiction over this case pursuant to Article V, Section 5 of the Missouri Constitution; Missouri Supreme Court Rule 5; Missouri common law; and Missouri Revised Statute § 484.040. In addition, this Court has jurisdiction under its inherent authority to regulate the Missouri Bar.

CASE SUMMARY

The facts of this case are not disputed. After suffering very serious injuries in a 2014 automobile accident, and while on potent prescription drugs treating those injuries, attorney Mary Lemp copied and pasted a signed notary block from another document onto a pleading – a motion for additional time to file record on appeal – that did not require notarization. Ms. Lemp filed this pleading twice, obviously and improperly modifying the notary block the second time, and then inadvertently filed an incorrect version of a response that attempted to explain away this misconduct when directed by the appellate court to explain her prior improper actions. This is the misconduct alleged and admitted by Ms. Lemp.

The sole dispute is what discipline Ms. Lemp should receive. In particular, this appeal challenges (a) the Hearing Panel’s decision to refuse to consider Ms. Lemp’s evidence of mental disorder as a mitigating factor under Rule 5.285, and (b) the discipline Ms. Lemp should receive for her limited, non-material and quickly discovered misrepresentations if Ms. Lemp’s evidence of mental disorder are not considered as a mitigating factor.

STATEMENT OF FACTS

Consistent with Missouri Supreme Court Rule 84.04(c) and (f), Ms. Lemp offers the following Statement of Facts.

Background. Mary Lemp graduated from the University of Missouri – Columbia with a B.S. in Psychology and minor in Sociology and Business. As an undergraduate student at Mizzou, Ms. Lemp served as a research assistant in the Truman School conducting research on the Autism Project. Ms. Lemp then earned her Juris Doctorate from Saint Louis University School of Law, graduating in 2010. (App. 32, 374)

Law practice. After being admitted to the Missouri Bar, Ms. Lemp began her legal career working for three years at a civil litigation insurance defense firm Boggs, Avellino, Lach & Boggs. (App. 374) Ms. Lemp then joined Stange Law Firm, PC, practicing primarily family law for a short period. (App. 374) In 2014, Ms. Lemp joined her uncle’s law firm, Lemp & Murphy. (App. 375) While working for Lemp & Murphy, Ms. Lemp acted more as a paralegal than an attorney, mostly handling workers compensation hearings when called upon as an attorney. (App. 376) Throughout her early law practice, Ms. Lemp had little practice stability and little ability to call upon a mentor for guidance. (App. 376)

On Christmas 2014, Ms. Lemp suffered serious injuries in an automobile accident, as discussed below. Subsequent to that injury, Ms. Lemp primarily worked at her husband’s law firm, assisting her husband (a 2013 law school graduate) as best she could. Ms. Lemp was working for her husband’s firm when the misconduct at issue occurred. Ms. Lemp currently works as an estates and trust lawyer at a different firm. (App. 389)

Absence of prior discipline. Ms. Lemp has no prior discipline history. (App. 33)

Medical issues from automobile accident. On Christmas 2014, Ms. Lemp was involved in a serious automobile accident. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

The Bramer v. Abston appeal. In early October 2015, less than one year the serious automobile accident and while still prescribed and taking [REDACTED], Ms. Lemp filed a notice of appeal for the appellate case *Bramer v. Abston*, SD34162, while working for her husband. (App. 34)

On or about February 2, 2016, the Missouri Court of Appeals for the Southern District dismissed *Bramer v. Abston* and on or about February 18, 2016, issued its mandate, after Ms. Lemp’s client the appellant failed to timely file the record on appeal. (App. 34)

On or about March 1, 2016, Ms. Lemp filed a Motion to Recall Mandate, explaining that she had misunderstood the effect the filing of an unlawful detainer action – *Bramer v. Abston*, Case Number 15PH-CV01704 (Phelps County, Missouri) – had on the *Bramer v. Abston* appeal. (App. 34)

On the same day, March 1, 2016, the Missouri Court of Appeals for the Southern District granted the Motion to Recall Mandate, and the appeal of Ms. Lemp's client was reinstated. (App. 35)

Improper copying and pasting of unnecessary notary blocks on appellate filings.

On or about April 20, 2016, apparently at approximately midnight,¹ Ms. Lemp filed a pleading titled Motion for Extension (the "First Motion for Extension"), requesting additional time to file her appellate record and transcript. (App. 35) A motion for extension does not require notarization, but Ms. Lemp included a notarization on the signature page of the First Motion for Extension. The notary block had been copied and pasted from another pleading, and indicated that the First Motion for Extension was purportedly notarized by notary A. Gilbers in July 2015, approximately nine months before the pleading was filed. (App. 35-36, 381)

Shortly thereafter, apparently less than thirty minutes later at approximately 12:27 AM on April 20, 2016, Ms. Lemp filed a second motion for extension (the "Second Motion for Extension"). This Second Motion for Extension still bore the unnecessary, copied and pasted notary block, which purported to be notarized by Ms. Gilbers. But on this second filing, Ms. Lemp had admitted that she had altered the date on the notary block – in an obvious fashion – while attempting to correct the date to April 2016. (App. 35, 385) The result was a largely illegible date on the Second Motion for Extension. (App. 35)

¹ These times of filing are based upon file-stamp information provided by CaseNet.

Opposing counsel challenges the improper notary blocks. Again on the very same day, on April 20, 2016, Ms. Lemp’s opposing counsel Tyce Smith filed a Notice of Irregular Documents with the Court of Appeals, notifying the court of the (rather obvious) improper notary blocks. Mr. Smith also filed an opposition to the requested extension. CaseNet indicates Mr. Smith submitted both these pleadings at approximately 3:30 PM on April 20, 2016, the same day as Ms. Lemp’s filing.

Two days later, on Friday, April 22, 2016, the Court of Appeals ordered Ms. Lemp to respond on or before the following Monday, April 25, 2016, to Mr. Smith’s filing regarding the improper notary block. (App. 36, 386)

On Monday, April 25, 2016, Ms. Lemp filed a response that claimed – inaccurately – that Ms. Gilbers had notarized the First Motion for Extension and the Second Motion for Extension. Ms. Lemp also attached a purported statement of Ms. Gilbers wherein Ms. Gilbers purported to acknowledge notarizing both documents. (App. 36)

On April 26, 2016, the Court of Appeals dismissed the appeal. Approximately one month later, on May 24, 2016, Ms. Lemp’s (former) client filed a *pro se* motion to set aside the dismissal of the appeal, but the Court of Appeals denied the client’s request.

Explanation of improper filings. When questioned in 2018 about her improper filings from April 2016, Ms. Lemp admitted that she had filed the First and Second Motions for Extension with the improper notary blocks. (App. 35-36, 380) Ms. Lemp also explained that she intended to file a truthful response that owned up to her mistakes, but inadvertently submitted an earlier draft that did not admit her prior errors. (App. 422) Ms. Lemp had intended to file a fully honest and candid response that disclosed all information, realizing

her initial response – prepared in a moment of embarrassment – was not even coherent. (App. 36, 386-87, 420)

Disciplinary complaints and investigation. The Court of Appeals and opposing counsel Mr. Smith reported Ms. Lemp’s apparent misconduct. In May and June 2016, the Office of Chief Disciplinary Counsel forwarded two copies of each complaint to Ms. Lemp (four letters in total), seeking a response. Ms. Lemp did not respond to any of these letters. (App. 346, 372) Ms. Lemp later testified that, due to her state of mind from the prescription medications she was taking, she felt she was not in a good place and was lacking the clarity necessary to properly respond to the ethics complaints. (App. 388)

Information, Answer and notice of Rule 5.285 defense. In December 2017, Informant filed and served an Information upon Ms. Lemp. Ms. Lemp timely – after an unopposed extension – answered the Information in February 2018. In her answer, Ms. Lemp admitted that she had filed pleadings with improper notary blocks. (App. 30-32) Ms. Lemp’s Answer included four references – two in response to allegations in the Information and two in separate affirmative defenses – expressly invoking Ms. Lemp’s assertion of a Rule 5.285 affirmative defense, that her mental condition as of April 2016 should serve as a mitigating factor to any discipline that may be imposed. (App. 39-40)

At no time did Informant make any inquiry or request regarding any independent medical examination of Ms. Lemp relating to Ms. Lemp’s invocation of Rule 5.285 for mitigation due to mental condition. (App. 393-94, 414-15)

Testimony from witnesses regarding Ms. Lemp’s mental condition after 2014 automobile accident. A Hearing was heard in this matter on April 24, 2018. During the

Hearing, as Ms. Lemp had done in her Answer to the Information, Ms. Lemp admitted that she had pasted the improper notary blocks to the two Motions for Extension, improperly modified the second notary block, and filed a pleading that provided an inaccurate explanation for the two improper notary blocks.

During the hearing, Ms. Lemp also had her testimony relating to mental injuries and effects of the prescription medications she was taking in 2015 supported by the testimony of John Douglas McAllister, M.D., a Professor in the Department of Anesthesiology at Washington University School of Medicine, Clinical Director for the division of Pediatric Anesthesiology at Washington University, and Ms. Lemp’s father-in-law. (App. 391)

Dr. McAllister testified *inter alia* that about the mental effects of serious accidents on people and the drastic changes between Ms. Lemp during her recovery from the accident in 2015-2016 and her condition at the time of the hearing, in 2018. [REDACTED]

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Several of Ms. Lemp's family members also testified regarding Ms. Lemp's mental and life conditions in and about April 2016 and at the time of the hearing. This testimony unanimously supported Ms. Lemp's extreme, depressed, zombie-like condition after the

December 2014 accident, through the period that included April 2016, until Ms. Lemp stopped taking the powerful prescription drugs in 2017.

Testimony from Ms. Lemp's family members as to her condition after the accident all echoed a similar theme that Ms. Lemp was not herself in April 2016. Ms. Lemp's husband Jonathan McAllister and cousin Katherine Keefe – both attorneys – stated that Ms. Lemp's condition after the accident was like a “zombie.” (App. 230-31, 248) Mr. McAllister recalled times after the accident when Ms. Lemp would be wandering around the house at night, then having no memory of doing so. (App. 231) Ms. Keefe compared Ms. Lemp's behavior to that of someone who had undergone a lobotomy, referencing a character from “One Flew Over the Cuckoo's Nest.” (App. 246, 248)

Other family members testified that Ms. Lemp acted uncharacteristically quiet in the time after the accident, with Ms. Lemp choosing to keep to herself in a dark house. (App. 214, 225, 412) Ms. Lemp's mother and aunt noted that before the accident Ms. Lemp would speak with her mother Polly Lemp many times throughout the day, but after the accident Ms. Lemp stopped answering her parents' phone calls. (App. 220-21, 224-25)

The noticeable turnaround in Ms. Lemp's behavior and recovery came when she gave birth to her daughter Alice McAllister in February 2017. Ms. Lemp's family members believed the “old Mary” was back, that Ms. Lemp was a completely different person than the one they experienced after the accident. (App. 221, 225, 231, 247) Two of Ms. Lemp's relatives praised Ms. Lemp's problem-solving attitude and determination after the birth of her daughter, noting a time when Ms. Lemp searched online about a surfer who lost her

arm to a shark in order to learn how to perform daily activities with only one arm. (App. 221, 224)

Prior to the birth of their daughter, while Ms. Lemp was recovering from the accident, Mr. McAllister said that he would discuss cases with Ms. Lemp but case-related information seemed to be “going in one ear and out the other.” (App. 230) Now, Mr. McAllister believes Ms. Lemp is in a structured work environment doing exactly what she needs to be doing in the many cases assigned to her. (App. 238)

Testimony of good character. Ms. Lemp’s witnesses also provided substantial testimony regarding Ms. Lemp’s good character. Leona McAllister, Ms. Lemp’s mother-in-law, provided testimony that she has always known Ms. Lemp to be very truthful, very authentic, and very genuine. (App. 212) Ms. Lemp’s aunt, Missouri attorney Ann Lemp, provided testimony of Ms. Lemp being a wonderful person, honest, and an extremely hard worker. (App. 217) Attorney Ann Lemp also testified that Ms. Lemp had experienced a tremendous amount of hardship with the accident, but nevertheless worked her way through such a difficult time. (App. 217)

Hearing Panel recommends indefinite suspension. On May 8, 2018, the Hearing Panel issued a decision recommending an indefinite suspension with no leave to apply for reinstatement for six months. (App. 348) Ms. Lemp rejected this recommendation on June 14, 2018, resulting in this proceeding. (App. 350)

POINTS RELIED UPON

1. EVIDENCE OF MS. LEMP'S MENTAL CONDITION IN APRIL 2016 SHOULD BE CONSIDERED AS MITIGATION UNDER OR NOTWITHSTANDING RULE 5.285.

Missouri Supreme Court Rule 5.285

2. EVEN WITHOUT CONSIDERATION OF MS. LEMP'S MENTAL CONDITION, DISCIPLINE OF MS. LEMP SHOULD NOT EXCEED A STAYED SUSPENSION.

In re Hess, 406 S.W.3d 37 (Mo. 2013)

In re Krigel, 480 S.W.3d 294 (Mo. 2016)

ARGUMENT

Preliminary statement. Ms. Lemp has stipulated that she improperly copied and pasted notary blocks to two motions for extension filed in the Court of Appeals, and then filed a pleading that misrepresented how the improper notary blocks were attached.

Therefore, the only real question before this Court is what sanction it should impose upon Ms. Lemp. As set forth below, proper consideration of Ms. Lemp's mental condition in April 2016 as well as prior precedent support imposition of no more than a stayed suspension in this case against Ms. Lemp, a young lawyer who has no prior discipline.

Standard of review. In matters of professional misconduct, this Court reviews the record of the disciplinary hearing and the evidence *de novo*. *In re Wiles*, 107 S.W.3d 228, 228 (Mo. 2003). This Court then "decides the facts *de novo*, independently determining all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law." *In re Eisenstein*, 485 S.W.3d 759, 762 (Mo. 2016). A Hearing Panel's "findings of fact, conclusions of law, and recommendation are advisory, and this Court may reject any or all of [the Hearing Panel's] recommendation." *Id.*

Standard for imposition of discipline. The twin aims of the Missouri lawyer discipline system are "to protect the public and maintain the integrity of the legal profession," not to punish the lawyer. *In re Coleman*, 295 S.W.3d 857, 869 (Mo. 2009). In assessing the proper sanction, this Court has recognized that ABA Standards for Imposing Lawyer Sanctions (the "ABA Standards") provide useful guidance for appropriate discipline. *In re Madison*, 282 S.W.3d 850, 860 (Mo. 2009). Consideration is given to the

nature of the conduct at issue, as well as any evidence in aggravation or mitigation. ABA Standard 9.1.

POINT RELIED #1: Evidence of Ms. Lemp's Mental Condition in April 2016 should be considered as mitigation under or notwithstanding Rule 5.285.

As noted above, when Ms. Lemp filed her Answer to the Information, Ms. Lemp made clear her intent to claim mitigation due to mental disorder, the effect of the pain she was suffering and prescription drugs she was taking to treat that pain related the serious injuries Ms. Lemp had suffered in December 2014. Ms. Lemp expressly invoked Rule 5.285 in four separate sections of her Answer to the Information, including the two of her four affirmative defenses as follows:

Affirmative Defense #2. Ms. Lemp admits to cutting and pasting notary information from a prior document onto the First Motion for Extension and Second Motion for Extension; in filing an inaccurate April 25 Response with the Missouri Court of Appeals for the Southern District; and in apparently not serving or otherwise mishandling her responses to Informant's letters in May and June 2016 seeking a response regarding the Reports that Ms. Lemp had filed improper, cut-and-pasted notary information on the First and Second Motions for Extension. *Ms. Lemp was suffering from an episode of major depressive order and experiencing side effects from medication taken after suffering nerve damage to and the loss of use of her right (dominant) arm in an automobile accident on Christmas 2014. Ms. Lemp therefore invokes the procedure provided in Missouri Rule 5.285 for an attorney suffering from a mental disorder.*

Affirmative Defense #3. *Missouri Rule 5.285 allows for consideration of mental disorder as a mitigating factor in determining appropriate discipline. Ms. Lemp asks that her major depressive episode experienced including during April 2016 be*

considered when determining any appropriate discipline that may be taken against her. As of today, Ms. Lemp believes that her depression is under control. Ms. Lemp has been able to successfully work as an attorney, without incident, since summer of 2016.

Answer, App. 39-40, Affirmative Defenses 2 & 3 (Emphasis added).

Despite receiving this express notice, Informant's counsel never contacted Ms. Lemp or her counsel to arrange an independent medical examination ("IME") or to otherwise discuss the admission of Ms. Lemp's evidence of a mental disorder. (App. 393-94)

At the Hearing, Informant objected to the introduction of evidence of Ms. Lemp's mental disorder, arguing that under Rule 5.285 Ms. Lemp should have secured assessment by an independent medical examiner. (App. 393) Rule 5.285 in part states:

(b) A mental disorder, including, but not limited to, substance abuse or dependency, is not a defense to allegations of professional misconduct but may be considered as a mitigating factor in determining appropriate discipline. A person claiming a mental disorder as a mitigating factor shall identify the mental disorder and how it relates to the alleged professional misconduct no later than in the answer or amended answer. For good cause shown, the time for claiming the mitigating factor may be extended.

(c) A mental disorder is not a mitigating factor in a disciplinary proceeding unless an independent, licensed mental health professional provides evidence that the mental disorder caused or had a direct and substantial relationship to the professional misconduct. Respondent shall bear the burden of proof that the mental disorder is a mitigating factor.

Ms. Lemp's counsel argued that Informant clearly had notice of Ms. Lemp's claimed mental disorder and Ms. Lemp's intent to rely upon that mental disorder as evidence in mitigation. (App. 393-94) Ms. Lemp's counsel also asserted that Ms. Lemp could not on

her own secure an IME; rather, such an examination would ordinarily be requested by the opposing party (here the Informant) and then arranged by cooperation of the parties. (App. 394)

Ultimately the Hearing Panel declined to consider Ms. Lemp’s evidence of mental disorder in mitigation. (Hearing Panel Decision, App. 382) This decision appears critical to the Hearing Panel’s decision to recommend suspension of Ms. Lemp’s license, instead of recommending a stayed suspension as Ms. Lemp had urged.

Ms. Lemp’s mental condition at the time of the misconduct clearly should be a mitigating factor. The unrefuted testimony in this matter clearly establishes that Ms. Lemp’s mental condition should be considered a mitigating factor. All evidence demonstrates that, after her accident, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Ms. Lemp satisfied the requirements of Rule 5.285 for mental health to serve as a mitigating factor. This Court should consider Ms. Lemp’s mitigation evidence relating to mental disability, for Ms. Lemp has adequately complied with Rule 5.285. Rule 5.285 directs that a respondent “claiming a mental disorder as a mitigating factor shall identify the mental disorder and how it relates to the alleged professional misconduct no later than in the answer or amended answer.” Rule 5.285(b). Ms. Lemp clearly satisfied this burden by stating, *inter alia* in Affirmative Defense #2 in her Answer, that Ms. Lemp was

“suffering from an episode of major depressive disorder and experiencing side effects from medication taken after suffering nerve damage to and the loss of use of her right (dominant) arm in an automobile accident on Christmas 2014” at the time of her admitted misconduct. (App. 39-40) Ms. Lemp’s Answer also includes a second affirmative defense where “Ms. Lemp ask[ed] that her major depressive episode experienced including during April 2016 be considered when determining any appropriate discipline that may be taken against her.” (Answer, Affirmative Defense #3, App. 40)

Rule 5.285 also requires that Ms. Lemp “bear the burden of proof that the mental disorder is a mitigating factor.” Ms. Lemp bore that burden, offering copious testimony, medical records, and information and testimony regarding the side effects caused by the drugs she was taking at the time Ms. Lemp engaged in her misconduct.

Ms. Lemp admittedly did not arrange an Independent Medical Examination (“IME”) to examine herself. But Rule 5.285 itself never states that a respondent must procure an IME on her own. Moreover, a medical examination arranged by Ms. Lemp would not be “independent.” Common practice is that such an IME would be arranged at the opposing counsel’s request, and through cooperation of opposing counsel and Ms. Lemp’s counsel. Ms. Lemp anticipated she would be examined by an IME when she asserted Rule 5.285 as a defense, and was prepared to submit to such an examination. Yet Informant’s counsel never raised the issue of an IME or requested that an IME examination occur. Frankly, Ms. Lemp assumed this indicated Informant would not contest Ms. Lemp’s claim of mitigation from mental disorder, presumably because Informant was aware the nature of injuries Ms.

Lemp sustained in December 2014 and the severity of pain and the prescriptions Ms. Lemp was taking in early 2016 would make such matters incontrovertible.

Further, in addition to Ms. Lemp's mental disorder as of April 2016 being clear, other testimony and common sense supports that no medical provider could have assessed Ms. Lemp in spring 2018 and testified about Ms. Lemp's medical and mental condition in April 2016. Ms. Lemp had stopped using the prescription drugs that were impacting her life and mental condition more than a year prior to the time any IME could have been conducted in this case. The Information against Ms. Lemp was filed in December 2017, and Ms. Lemp answered in February 2018. An IME engaged after February 2018 would have been trying to assess Ms. Lemp's condition approximately twenty months earlier, when Ms. Lemp was taking and suffering the side effects of prescription drugs she ceased taking approximately one year earlier. (App. 389-90) Any assessment of such issues would have been speculative at best, certainly inferior to the testimony Ms. Lemp could and did provide of people – including an imminently qualified medical professional – who regularly observed Ms. Lemp during the relevant periods.

Imposition of more significant hurdles to consider mental disorder would be constitute an undue burden and be contrary to the purposes of the lawyer discipline system. It would also be improper for this Court to require a respondent to provide testimony of an independent medical examiner before mental disorder could be considered as mitigating evidence in a disciplinary proceeding. This Court has repeatedly emphasized that twin aims of the Missouri lawyer discipline system are “to protect the public and maintain the integrity of the legal profession,” not to punish the lawyer. *In re Coleman*,

295 S.W.3d at 869. Many respondents including Ms. Lemp have limited financial resources, a problem particularly likely when the respondent is or like Ms. Lemp has suffered some mental health issue or disorder that impaired that respondent's ability to practice. Enforcing Rule 5.285 to require the lawyer to obtain (and pay for) an IME before allowing fair consideration of the lawyer's mental disability would place an unfair burden and, inconsistent with the purposes of Missouri's lawyer discipline system, would impose greater punishment on a lawyer who (like Ms. Lemp) is unable – including financially and due to mental condition – to obtain the requisite IME.

On information and belief, if read to require a respondent to secure his or her own IME, Missouri's Rule 5.285 would impose a unique, *sui generis* requirement on lawyer respondents in Missouri disciplinary proceedings. Ms. Lemp's counsel has been unable to locate any jurisdiction other than Missouri that requires a respondent to retain and submit an IME to claim mitigation due to mental health condition or disorder. In fact, most states use a regime similar to that employed by the ABA Standards for Imposing Lawyer Sanctions (the "ABA Standards"). ABA Standard 9.32(i) simply requires:

(i) mental disability or chemical dependency including alcoholism or drug abuse when:

(1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;

(2) the chemical dependency or mental disability caused the misconduct;

(3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

ABA Standard 9.32(i). There is no mention or requirement under ABA Standard 9.32(i) – or, on information and belief, under any states’ rules other than Missouri’s – for a respondent to be examined and submit a report from an IME before the Respondent’s mental disorder can be considered as mitigating evidence.

Refusing to consider mental health conditions absent satisfaction of such additional hurdles like an IME would contravene both legal prohibitions against discriminating against person with mental illness as well as the organized Bar’s recent attention to and attempts to assist lawyers with mental disorders. Courts have repeatedly evaluated how federal anti-disability protections impact state bar disciplinary proceedings. These courts hold that federal anti-disability protections allow a state to discipline a lawyer who has a mental disability but engages in misconduct.² But none of these cases could be read to allow what would result from Informant’s proffered reading of Rule 5.285, that a lawyer with a mental health disability must overcome a unique, rather expensive hurdle before mitigating evidence relating to that disability will even be considered.

Further, the mental illness (particularly depression) epidemic within the legal profession is well-recognized. *See, e.g.,* Ryan Lovelace, *ABA ‘Furiously Working’ to Craft Proposal on Lawyers’ Mental Health*, *The National Law Journal* (May 21, 2018); Dina

² *See, e.g., In re Marshall*, 762 A.2d 530, 539 (D.C. 2000); *In re Milloy*, 571 N.W.2d 39 (Minn. 1997); *State Bar Association v. Busch*, 919 P.2d 1114, 1116-18 (Okla. 1996); *The Florida Bar v. Clement*, 662 So. 2d 690, 700 (Fla. 1995).

Roth Port, *Lawyers Weigh In: Why is there a depression epidemic in the legal profession*, ABA Journal (May 11, 2018); *see also* ABA For Law Students, *Mental Health Resources* (last visited October 3, 2018); Jennifer Jolly-Ryan, *The Last Taboo: Breaking Law Students with Mental Illness and Disabilities Out of the Stigma Straightjacket*, 79 U.M.K.C. Law Review 123 (2010) (discussing prevalence of mental health issues in the legal profession, and the problems lawyers have to seek aid for and after seeking aid for such conditions). Reading Rule 5.285 as Informant requests would impose only another hurdle on this vulnerable, stigmatized segment of the legal profession.

Ms. Lemp's mental health as of April 2016 should defeat the scienter required to impose an active suspension. Even if this Court declined to consider the mental disorder as a mitigating factor, Ms. Lemp's mental condition should be considered when assessing the *scienter* with which Ms. Lemp engaged in the admitted misconduct. In any discipline case involving misrepresentations, *scienter* is an appropriate consideration when assessing the appropriate sanction. *See, e.g.*, ABA Standards for Imposing Lawyer Sanctions 6.13 (stating reprimand is appropriate when a lawyer is negligent when determining whether statements or documents are false) and 6.14 (stating an admonition is appropriate where the lawyer engages in an isolated instance of neglect in determining whether statements or documents are false, and causes "little or no actual or potential injury to a party" or "little or no adverse or potentially adverse effect on the legal proceeding").

Ms. Lemp's misconduct in this case is both fully admitted and nonsensical. Ms. Lemp copied and pasted a notary block onto a document that (a) originally reported a notarization date months before the pleading was filed; and (b) was then modified in

manner such that the tampering was immediately self-evidence (including that opposing counsel filed his Notice of Irregular Documents the very same day, with little or no investigation necessary). Moreover, (c) the document improperly notarized did not even require notarization in the first place. Further, as Ms. Lemp herself later realized, her explanatory memorandum filed April 25, 2016, was at best obvious, incoherent and unpersuasive claptrap. In light of these obvious issues, it is quite hard to claim that Ms. Lemp's conduct was knowing deception by anyone acting in their right mind – and no one was deceived, for more than perhaps a moment, by Ms. Lemp's apparent addled efforts to mislead regarding the presence of an unnecessary notarization.

Ms. Lemp has fully recovered from her mental impairment. Finally, there is no suggestion that Ms. Lemp's prior mental condition impedes her present ability to practice law. Rather, all relevant testimony supported that in 2017 Ms. Lemp has ceased using the prescription painkillers whose side effects impaired her ability to practice law. Also, since 2017, Ms. Lemp has been able to successfully work as an attorney with no issues or complaints. Therefore, no suspension is necessary to protect the public from future harm by Ms. Lemp.

**POINT RELIED #2: Even Without Consideration of Ms. Lemp's
Mental Health Injuries as of April 2016, Discipline of Ms. Lemp
Should Not Exceed a Stayed Suspension.**

Even if this Court will accept Informant's reading of Rule 5.285, a sanction of a stayed suspension or less is still appropriate for Ms. Lemp based upon Ms. Lemp's conduct

and her circumstances surrounding the conduct. Specifically, Ms. Lemp's conduct is consistent, if not less severe, than prior situations where this Court has previously imposed stayed suspensions, and Ms. Lemp has considerable support for mitigation beyond her mental condition in April 2016.

Circumstances Giving Rise to Sanction. In discussing the appropriate sanction, this Court should be attentive to the evidence presented to the Hearing Panel of the following:

- (a) Ms. Lemp is a young attorney, relatively new to the practice who had received little meaningful mentoring and guidance during or prior to the misconduct at issue;
- (b) The charge against Ms. Lemp arises from one limited set of actions over a four-day period when Ms. Lemp was heavily medicated by prescription drugs and suffering the lingering physical effects (including pain and chronic sleep deprivation) from a serious automobile accident that left Ms. Lemp to this day without the full use of her dominant arm;
- (c) Ms. Lemp's primary misconduct involved blatant, easily recognizable errors, the copying and pasting a notary block that initially contained a clearly nonsensical date, months earlier, and then refileing the pleading with that nonsensical date obviously – and illegibly – altered;
- (d) Ms. Lemp's unrefuted and uncontested testimony is that she meant to come clean regarding her misconduct when filing her April 25, 2016, response to the order to show cause, but Ms. Lemp inadvertently filed the wrong

document – further nonsense that did little to conceal Ms. Lemp’s prior misconduct;

- (e) Ms. Lemp has fully admitted her mistakes in this proceeding, including in her Answer; and
- (f) Ms. Lemp is no longer on the medications that she was taking during the time of this incident, medications that caused her severe side effects.

Precedent Supports a Stayed Suspension. Based upon the misconduct described above and established in this case, prior precedent of this Court fully supports imposing a penalty less than an actual suspension. The best example is *In re Krigel*, 480 S.W.3d 294 (Mo. 2016), which Respondent also cites and describes as involving “similar” conduct. Informant’s Brief at 20-21. In *Krigel*, the respondent – a very experienced attorney – misled a trial court in an adoption case by omitting crucial, material information, resulting in the trial court believing (incorrectly) that the birth father did not want to assert his parental rights. The misconduct included that the respondent and his client misled the birth father about the mother’s due date, did not tell the birth father or birth father’s counsel that the child had been born or hearing set, and then made representations to the court at the hearing suggesting the birth father had chosen to miss the hearing and did not to assert his parental rights, when respondent and his client both knew such representations were false. *In re Krigel*, 480 S.W.3d at 298. At no point did the respondent admit any wrongdoing. *Id.* Moreover, his deception delayed the birth father from being able to gain legal and physical custody of his child for more than a year. *Id.* Evaluating this conduct, this Court imposed only a stayed suspension with probation.

Similarly, in *In re Hess*, 406 S.W.3d 37 (Mo. 2013), the respondent filed a lawsuit to recover attorney fees against his former clients despite knowing his claims were “frivolous and without legal merit,” because the respondent was involved in an employment dispute with his former law firm employer regarding payments on client matters at the same time. *Id.* at 38 n.1 and 41. The respondent then pursued his baseless claims against the primary clients for several months, and also asserted baseless lien claims in other clients’ cases, until the cases were dismissed and the respondent sanctioned. *Id.* at 40-41. Illinois imposed a six-month suspension on the respondent. *Id.* at 42. This court then considered reciprocal discipline. The respondent did not accept responsibility for his actions, instead arguing (a) he could not be disciplined under the rules cited (including Rule 8.4) because he was acting as a client not an attorney and (b) he had been denied due process in the Illinois disciplinary proceedings. *Id.* at 43. Evaluating the respondent’s misconduct, this Court again chose to impose only a stayed suspension.

In contrast to the respondents in both *Hess* and *Krigel*, Ms. Lemp was a very junior attorney who readily admitted her misconduct throughout these disciplinary proceedings, including in her Answer. Moreover, Ms. Lemp’s misconduct was so patent and blatant that it was discovered immediately – Mr. Smith filed his Notice of Irregular Documents the same day Ms. Lemp filed the motions for extension with improper notary blocks.

Further, even if this Court refuses to consider Ms. Lemp’s compelling evidence of mental disorder (addressed in full in Point Relied #1), Ms. Lemp still has strong evidence supporting mitigation. Ms. Lemp is relatively inexperienced in the practice of law and has no prior disciplinary history. There is no evidence of – nor did Ms. Lemp have – a selfish

motive: her misguided actions can only be seen as intending to aid her client. Further, Ms. Lemp introduced positive character evidence (albeit from family members) that, both before her accident and now, Ms. Lemp is genuine and honest, a hard worker that cares about her family and practice as a lawyer.

Finally, Ms. Lemp is no longer taking the medications that contributed to the misconduct and now has a better grasp on her health, which has led to her successfully practicing and thriving as a lawyer for the last two years. Ms. Lemp will not repeat the mistakes made here in her future practice.

Thus, to the extent this Court is considering imposing more serious discipline than a stayed suspension as discussed above, the discipline Ms. Lemp will face should be reduced or mitigated under ABA Standard for Imposing Sanctions on Lawyers 9.32 to a stayed suspension with probation, or a lesser sanction.

Conclusion. Ms. Lemp asks this Court to consider her evidence of mental disorder under Rule 5.285. And whether that information is considered or not, Ms. Lemp asks that this Court impose discipline no greater than a stayed suspension and probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent via email on this 5th day of October, 2018, to the following:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03. It was drafted using Microsoft Word. The font is Times New Roman, proportional 13-point font, which includes serifs. The brief complies with Rule 84.06(b) in that it contains 7,773 words.

*/s/ Michael P. Downey*_____