

**IN THE SUPREME COURT OF MISSOURI
EN BANC**

IN RE,)	
)	
ANISSA FAYE BLUEBAUM)	
901 E St. Louis Street)	
Suite 200-14)	
Springfield, MO 65807)	Case No. SC97919
)	
Missouri Bar No 56779)	
)	
Respondent.)	

RESPONDENT’S BRIEF

Respectfully Submitted,

/s/ Anissa Bluebaum

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent to the Informant via the Missouri electronic filing system this 3rd day of September, 2019.

/s/ Anissa Bluebaum

Anissa Bluebaum

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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

A. RESPONDENT'S PRIOR DISCIPLINARY HISTORY

Respondent has previously been disciplined by this court for violating Rules 4-1.16(d), 4-8.4(a), 4-8.4(c), 4-8.4(d), 4-5.3(c), and 4-7.3(a). Respondent's license was suspended indefinitely and the suspension was stayed with probation for a period of two years. **Rec. 835-836.** Respondent successfully completed probation. **Rec. 848-849.**

B. KERRY SMITH

In April 2016 Respondent began representing Kerry Smith. **Tr. Vol. II 41.** Ms. Smith hired Respondent to represent her in a divorce. **Tr. Vol. II 41-42.** During the representation of Ms. Smith the Respondent became very ill and was hospitalized in October 2016. **Tr. Vol. II 51.** During the months of September through December of 2016 the Respondent's health prevented her from keeping up with the demands of her practice. **Tr. Vol II 23.** During this time Respondent failed to communicate with Ms. Smith and work on Ms. Smith's case. **Tr. Vol. II 85-86.**

Throughout September through December 2016 the Respondent maintained an answering service to take messages and inform the Respondent's clients that Respondent was ill. **Tr. Vol. II 82.** Respondent brought in a relief attorney during November to call her clients and work with them to get court dates continued and deadlines met. **Tr. Vol. II 82.**

In December 2016 Respondent closed one of her offices and continued to downsize her practice in order to begin recovery from her health problems. **Tr. Vol. II 217.** During December the Respondent brought in another colleague to help her contact all of her clients, explain to them the continuing health issues of Respondent, and all of the clients were given the option of a refund or to continue with the Respondent's services. **Tr. Vol. II 8-13.** Several of Respondent's clients

were issued refunds. Ms. Smith decided to continue with Respondent's services. **Tr. Vol. II 83.**

In January 2017 Respondent met with Kerry Smith. **Tr. Vol. II 86.** During the meeting Ms. Smith and Respondent went over Ms. Smith's case at length. **Tr. Vol. II 66.** When Ms. Smith decided to stay with the Respondent the Respondent gave Ms. Smith her cell phone number so Ms. Smith could contact her any time day or night to try and compensate for the lack of communication during the months of October –December 2016.

Also in January the Respondent requested a continuance of Ms. Smith's trial date due to the past months of illness. **Tr. Vol. II 55.** The Respondent received the new trial date by electronic notification, which she negligently overlooked. **Tr. Vol. II 61.** The Respondent stated she did not expect a trial date to be set by docket entry, where she was not familiar with this practice as she did not regularly practice in Barry County, and she was accustomed to trial dates being set in other Counties at a trial setting hearing. **Tr. Vol. II 62-63.**

In May 2017, due to missing the electronic notification of the trial date, the Respondent failed to appear at Ms. Smith's trial. **Tr. Vol. II 62.** Respondent was in Stone County Court that day in a criminal sentencing hearing. **Tr. Vol. II 62.** When Respondent left Stone County Courthouse and got the messages from the Judge and Ms. Smith Respondent immediately returned their calls and apologized profusely to both the Judge and Ms. Smith. **Tr. Vol. II 62.** Respondent offered to drive from Stone County to Barry County but the Judge had already reset the matter for a status conference in June. **Tr. Vol. II 62.** Ms. Smith was extremely upset and Respondent offered to immediately withdraw from Ms. Smith's case. Ms. Smith decided to continue with Respondent's services. **Tr. Vol. II 86.**

At the June 2017 Status Conference Ms. Smith's trial was continued to August 2017. Respondent met with Ms. Smith in July 2017 to prepare for her trial and to review and update all of the discovery and exhibits to be introduced at the trial. **Tr. Vol. II 49.** Soon after the meeting with Ms. Smith the Respondent

received email notification through the Missouri e-filing system that Ms. Smith had hired a new attorney, Scott Taylor. **Tr. Vol. II 49.**

During the disciplinary hearing in January 2019 Ms. Smith testified that she had never received any paper documents or a copy of her file in the mail from Respondent. Ms. Smith testified she had a copy of her file she had printed from the electronic file Respondent provided to her in the Clio Online Software program. Respondent confirmed no paper copies were mailed to Ms. Smith. Respondent explained her practice was all electronic and clients were given access to their files electronically through Clio.

C. MOLLIE BREWER

In January 2017 Mollie Brewer hired Respondent to represent her in her divorce. **Tr. Vol. II 17.** Ms. Brewer was served divorce papers in March 2017. **Tr. Vol. II 25.** The Respondent did not file an entry of appearance or an answer in Ms. Brewer's divorce case. **Tr. Vol. II 24.** During the representation Respondent had spoken to Ms. Brewer over the phone only because Ms. Brewer lived in Texas. **Tr. Vol. II 17.** Respondent spoke with Ms. Brewer several times regarding her rights to marital property in the divorce case as well as how Ms. Brewer could bring a personal injury action against her husband for the other half of the marital property because of his domestic violence and personal injury against her. **Tr. Vol. II 17.** Ms. Brewer negotiated a property division with her husband with the information provided to her by Respondent. **Tr. Vol. II 17.**

In April 2017 a default judgment was entered against Ms. Brewer because neither the Respondent nor Ms. Brewer filed any response to the divorce petition. **Tr. Vol. II 24.** When the default judgment was entered the Respondent called Ms. Brewer and went over the judgment with her. **Tr. Vol. II 18.** During that conversation Ms. Brewer indicated that the property division was how she wanted it and her only concern was that she wanted to make sure she would still get her portion of her husband's retirement if he were to pass away before her. **Tr. Vol. II**

18. Respondent offered to file a motion to amend the judgment but Ms. Brewer declined. **Tr. Vol. II 18-19, 36.**

After the divorce was over Ms. Brewer's niece began calling and emailing the Respondent for a refund and a copy of an itemized bill. **Tr. Vol. II 30-32.** Respondent told Ms. Brewer's niece she would send the refund and the itemized bill. **Tr. Vol. II 30-32.** From April 2017 until August 2017 Ms. Brewer's niece continued to threaten that Ms. Brewer was going to chargeback the \$1500.00 advanced fee she had paid in January 2017. **Tr. Vol. II 20, 33-40.** Because the fees were in dispute the Respondent believed the Rules of Professional Conduct required her to leave the \$1500.00 in her trust account until the dispute was resolved. **Tr. Vol. II 40.** The dispute was the threat of the chargeback as well as a Missouri Bar Fee Dispute. **Tr. Vol. II 22-23.** When no chargeback had gone through the trust account the Respondent sought counsel from a colleague in March 2018 the Respondent fully refunded the \$1500.00 to Ms. Brewer in April 2018. **Tr. Vol. II 19-20, 23.**

D. RESPONDENT'S HEALTH ISSUES

Respondent has had type 1 diabetes for 34 years. **Tr. Vol. II 20.** As a result of diabetes the Respondent has health complications with infections, kidney disease, and general lack of energy and focus. **Tr. Vol. II 70.** Respondent also has major depression and anxiety. **Tr. Vol. II 16. Rec. 893-900.** Since approximately 2012 Respondent's health problems continued to decline until finally the Respondent was hospitalized in October 2016 for attempted suicide and anxiety. **Tr. Vol. II 51, 70, 81-82.**

Throughout the years of 2012 until 2016 the Respondent knew her health was declining and had sought treatment from the Missouri Bar Lawyers Assistance Program, several natural remedies and other counselors. **Tr. Vol. II 273.** It was not until the hospitalization in October 2016 that Respondent began medication for depression and anxiety as well as regular weekly therapy. **Tr. Vol. II 271.**

Respondent began recovery in October 2016. In December she began downsizing her practice. Throughout 2017 the Respondent continued working with doctors on her medications and consistent therapy sessions for major depression and anxiety. **Tr. Vol. II 84.** Due to reduction in income from her law practice, Respondent filed bankruptcy in June 2017. **Tr. Vol. II 73.** The financial problems throughout 2017 caused several health setbacks, depressive episodes and panic attacks.

During 2017 the Respondent further downsized her practice to only limited scope, uncontested divorces and local appearances for other attorneys. During this time the Respondent was unable to handle any kind of stress in any form. During this time the Respondent had a colleague help her get her mail, where getting the mail, among other normal daily activities, was impossible for the Respondent to do on her own. **Tr. Vol. II 71-73.**

During 2018 and 2019 the Respondent has continuously been on a medication regimen for her depression and anxiety and continuously sees a therapist twice a month. Respondent's physical health also continues to improve. **Tr. Vol. II 70.** Respondent still maintains a very small part-time practice and acknowledges she is still not well enough to practice law full time due to her health limitations. **Tr. Vol. II 71.**

E. FAILURE TO RESPOND TO OCDC COMPLAINTS

The Smith and Brewer complaints were received by the Respondent in October and November 2017. **Tr. Vol. II 84.** Due to Respondent's severe depression and anxiety the Respondent could not physically or mentally deal with them and prepare a proper response. **Tr. Vol. II 16.** Respondent tried on several occasions to begin preparing responses, which would lead to depressive episodes and panic attacks. **Tr. Vol. II 81-82.**

In March 2018 one of Respondent's colleagues who helped her check her mail asked if he could help her prepare responses to the complaints. The Respondent's

colleague, Michael Lutke, appeared at the disciplinary hearing and testified regarding Respondent's inability to check her mail and respond to the complaints. He further testified that ultimately the Respondent was unable to assist him in preparing responses and so he could not prepare them. **Tr. Vol. II 8-13, 85.**

F. TRUST ACCOUNTING

During 2016 through 2018 the Respondent had several public defender appointed clients. At that time the trust accounting rule was that all advance flat fees must go into the trust account until earned. When the public defender appoints a client the Respondent would immediately begin work on the matter. **Tr. Vol. II 88.** The payment from the public defender would be made later. The public defender payments were direct deposited from the State of Missouri to the Respondent's trust account. At the time of the deposits some of the funds were earned and some were not. The Respondent had no control over the earned funds portion that was deposited into the trust account where she could only denote one account for the direct deposits to be deposited into. **Tr. Vol. II 121-123.**

Respondent's trust account never became negative and never fell under the \$1500.00 that belonged to Mollie Brewer being kept in trust because it was in dispute. **Rec. 821-834.** Kerry Smith's funds were earned when she paid them because she had a balance due to Respondent's office at the time she was making payments. **Tr. Vol. II 43-44, 124.**

Respondent used an online software program to collect advance fees from clients. The clients would log in and make their fee deposits with a credit or debit card. The payment company "wepay" would keep a portion of the payment for their credit card service resulting in an amount less than what the client actually paid being deposited into trust. To reconcile this the Respondent would keep enough of her own funds in the trust account to cover the fees so the clients' deposits would be whole. When the funds were earned the amount the client

actually paid would be transferred to the operating account as earned funds. **Tr. Vol. II 117-121.**

G. THE DISCIPLINARY HEARING PANEL DECISION

The Disciplinary Hearing Panel found Respondent violated Rule 4-8.4(a) as a result of violating Rule 4-1.3 (diligence) as to Ms. Smith and Ms. Brewer; Rule 4-1.4 (communication) as to Ms. Smith and Ms. Brewer; Rule 4-8.1 (failing to respond to disciplinary complaints); Rule 4-8.4(c) (by accepting advanced fee payments and failing to provide the agreed upon services); Rule 4-8.4(d)(engaging in conduct that is prejudicial to the administration of justice)

The Disciplinary Hearing Panel found the Respondent did not violate Rule 4-1.15 (trust accounting).

The Disciplinary Hearing Panel recommended Respondent's license be suspended indefinitely with no leave to apply for reinstatement for a period of two years.

The Informant accepted the recommendation and Respondent rejected the recommendation.

POINT RELIED ON I

THE RESPONDENT VIOLATED RULE 4-8.4(A) AS A RESULT OF VIOLATING RULE 4-1.3 (DILIGENCE) AS TO MS. SMITH AND MS. BREWER; RULE 4-1.4 (COMMUNICATION) AS TO MS. SMITH AND MS. BREWER; RULE 4-8.1 (FAILING TO RESPOND TO DISCIPLINARY COMPLAINTS); RULE 4-8.4(C) (BY ACCEPTING ADVANCED FEE PAYMENTS AND FAILING TO PROVIDE THE AGREED UPON SERVICES); RULE 4-8.4(D)(ENGAGING IN CONDUCT THAT IS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE) AND SHOULD BE DISCIPLINED FOR THESE VIOLATIONS BUT SUSPENDING THE RESPONDENT’S LICENSE FOR TWO YEARS IS NOT THE APPROPRIATE SANCTION BECAUSE THERE ARE SEVERAL MITIGATING FACTORS IN THIS CASE THAT WOULD WARRANT THE COURT STAYING A SUSPENSION WITH PROBATION OR IMPOSING A SUSPENSION OF 60 TO 180 DAYS.

POINT RELIED ON II

THE RESPONDENT DID NOT VIOLATE RULE 4-1.15 (TRUST ACCOUNTING) AND SHOULD NOT BE DISCIPLINED UNDER THAT RULE.

LEGAL ARGUMENT

POINT RELIED ON I

THE RESPONDENT VIOLATED RULE 4-8.4(A) AS A RESULT OF VIOLATING RULE 4-1.3 (DILIGENCE) AS TO MS. SMITH AND MS. BREWER; RULE 4-1.4 (COMMUNICATION) AS TO MS. SMITH AND MS. BREWER; RULE 4-8.1 (FAILING TO RESPOND TO DISCIPLINARY COMPLAINTS); RULE 4-8.4(C) (BY ACCEPTING ADVANCED FEE PAYMENTS AND FAILING TO PROVIDE THE AGREED UPON SERVICES); RULE 4-8.4(D)(ENGAGING IN CONDUCT THAT IS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE) AND SHOULD BE DISCIPLINED FOR THESE VIOLATIONS BUT SUSPENDING THE RESPONDENT’S LICENSE FOR TWO YEARS IS NOT THE APPROPRIATE SANCTION BECAUSE THERE ARE SEVERAL MITIGATING FACTORS IN THIS CASE THAT WOULD WARRANT THE COURT STAYING A SUSPENSION WITH PROBATION OR IMPOSING A SUSPENSION OF 60 TO 180 DAYS.

The Respondent offers no argument that she did not violate Rule 4-8.4(a) as a result of violating Rule 4-1.3 (diligence) as to Ms. Smith and Ms. Brewer; Rule 4-1.4 (communication) as to Ms. Smith and Ms. Brewer; Rule 4-8.1 (failing to respond to disciplinary complaints); Rule 4-8.4(c) (by accepting advanced fee payments and failing to provide the agreed upon services); Rule 4-8.4(d)(engaging in conduct that is prejudicial to the administration of justice).

The Respondent concedes she should be disciplined for these violations. The Respondent argues that the appropriate discipline should not be a suspension of her license for two years. In *In re Frank*, 885 S.W.2d 328 (Mo. banc 1994) *Frank* was suspended for two years for neglecting his clients. Mr. Frank’s case had 39 violations showing neglect of 14 of his clients, he had been admonished several times before regarding the same types of violations, he showed no remorse for his actions throughout the entire matter, there were no mitigating factors for the court to consider, he engaged in bad faith obstruction of disciplinary

proceedings, and intentionally failed to reply to requests for information by the disciplinary board.

The Respondent argues that this case is nothing like *Frank* in that the misconduct of Respondent was the result of her serious mental health disabilities, her reactions to her misconduct were remorseful, she tried her best to rectify the consequences of the misconduct and there are many other mitigating factors that suggest a stayed suspension with probation or a suspension of 60 to 180 days is the appropriate sanction.

The purpose of attorney disciplinary proceedings is to protect the public and maintain the integrity of the legal profession. In imposing discipline, the Court considers the ethical duty violated, the attorney's mental state, the extent of actual or potential injury caused by the attorney's misconduct, and any aggravating or mitigating factors. *In re Coleman*, 295 S.W.3d 857, 863 (Mo. Banc 2009).

In determining the appropriate sanction the Court relies on its own standards to maintain consistency and fairness. Those standards are written into law when the Court issues opinions in attorney discipline cases. *In re Kazanas*, 96 S.W.3d 803, 806 (Mo. banc 2003). The Court also relies on the ABA Standards for Imposing Lawyer Sanctions.

Under the ABA Standards for Imposing Lawyer Sanctions imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

- (a) the duty violated;
- (b) the lawyer's mental state;
- (c) the potential or actual injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating or mitigating factors.

In this case the duties violated are those duties to clients to be diligent in their matters. Standard 4.42 provides that suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. In this case the Respondent knew she was not diligently

working on Ms. Smith's and Ms. Brewers matters. Ms. Smith potentially could have been injured because Respondent failed to appear at her court date. Ms. Brewer potentially could have been injured if the default judgment in her divorce was not what she expected because the Respondent did not enter her appearance in the case.

Under ABA Standard 9.2 the aggravating factors in this case are that: (1) Respondent has been disciplined in the past for violating other Rules of professional conduct unrelated to the rules violated in this case. She was suspended indefinitely and the suspension was stayed with probation. Respondent successfully completed probation. (2) Also aggravating is that Respondent has substantial experience in the practice of law. She has been practicing since September 2004.

Under ABA Standard 9.3 the mitigating factors are that: (1) The Respondent had no dishonest or selfish motive for failing to be diligent or properly communicate with her clients. (2) The Respondent was suffering from personal financial problems, poor health including diabetes and kidney disease and emotional problems including major depression and anxiety with suicide attempts. During the time frame of the violations Respondent was ultimately hospitalized and was unable to practice law due to these illnesses. All throughout 2017 the Respondent continued to have setbacks with her health while consistently working toward a medication and therapy regimen that would assist in her recovery. (3) Throughout the period of time of the violations the Respondent consistently made good faith efforts to rectify the consequences of the misconduct:

- a. Respondent brought in a relief attorney to work with her clients while she was ill and could not practice law;
- b. After coming back to work Respondent contacted all of her clients and informed them of her illness and offered refunds to all of her clients or the option to maintain the representation if they chose;

- c. When Ms. Smith decided to stay with the Respondent the Respondent gave Ms. Smith her cell phone number so Ms. Smith could contact her any time day or night to try and compensate for the lack of communication during the months of October –December 2016.
- d. After coming back to work Respondent immediately began downsizing her practice to prevent her illnesses from causing any more harm to clients;
- e. When Respondent missed Ms. Smith’s court date she immediately called the judge, apologized profusely, and told the judge it was Respondent’s fault for overlooking the email notification with the trial date and to please not hold it against her client;
- f. When Respondent missed the court date she also told the judge she offered to be on her way from Stone to Barry County as soon as she could but the judge had already rescheduled a status conference;
- g. When Respondent missed Ms. Smith’s court date she called Ms. Smith right after speaking with the judge and apologized profusely and offered to immediately withdraw from Ms. Smith’s case if that is what Ms. Smith wished for her to do;
- h. Upon Ms. Brewer’s default judgment the Respondent immediately called Ms. Brewer and went over it with her and asked Ms. Brewer if there was anything she didn’t agree with and offered to file a motion to amend the judgment to include language regarding her husband’s retirement benefits continuing after his death;
- i. Respondent kept Ms. Brewer’s funds in trust until the Respondent felt the funds were no longer in dispute as the Respondent believed this is what the Rules required;
- j. After consulting with a colleague regarding Respondent’s belief the funds were no longer in dispute Respondent returned the entirety of Ms. Brewer’s advanced fee deposit to her;

- k. During the 2016 – 2018 period of time while Respondent was ill and recovering she sought counsel and help from a colleague to make sure no other rules were being violated, clients were being taken care of, and mail and messages were being checked and responded to;
- l. Respondent tried on many occasions to answer the complaints even at one point agreeing to let her colleague help her which all efforts resulted in depressive episodes and panic attacks.

(4) Respondent gave free and full disclosure to the disciplinary board during their investigation of the Respondent, Respondent appeared for deposition, prepared several documents to turn over to the disciplinary board, provided additional information when requested during the disciplinary hearing; (5) Respondent has good character and reputation as shown by her colleague Michael Lutke testifying that Respondent has a good reputation in the legal community and is a credit to the bar when she is healthy and that the past couple of years since the Respondent has been ill have not been the norm during Respondent's 15 year career practicing law (6) The Respondent suffers from the mental disabilities of major depression and anxiety,

a. medical evidence of those disabilities was offered and entered into evidence at the disciplinary hearing,

b. the lack of diligence and communication with clients was caused by the continuing nature of her illnesses over the period of time between October 2016 and August 2018 where she was unable to practice law at her full capability where depressive episodes and panic attacks frequently interfered with Respondent's ability to function at work or any area of her life,

c. Respondent's recovery from the mental disability has been demonstrated by a meaningful and sustained period of successful rehabilitation where Respondent has been on medications for over two

years and has consistently gone to counseling over the last two years at least twice per month,

d. Respondent's ability to know her limitations by keeping her practice part time and her continuing recovery have arrested the misconduct and recurrence of the misconduct is unlikely,

(5) The Respondent is remorseful. The respondent was remorseful each time the misconduct occurred and called her clients to apologize and Respondent tried to rectify the situations as best as she knew how.

Suspension of Respondent's License with the Suspension Stayed and Respondent placed on Probation is the Most Appropriate Sanction

Probation is an appropriate sanction in this case. Rule 5.225(a)(2) provides that a lawyer is eligible for probation if the lawyer (A) Is unlikely to harm the public during the period of probation and can be adequately supervised; (B) Is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; and (C) Has not committed acts warranting disbarment.

The Respondent is unlikely to harm the public where she has taken great steps to prevent her misconduct from recurring by continuing to recover from her mental health disabilities, reducing her work load, downsizing her practice and narrowing the case types she takes.

The Respondent has shown she can be adequately supervised where she has invited her colleague Michael Lutke to assist and supervise her in the past and she has completed probation in the past without violation of any terms of probation.

Since the complaints in 2017 the Respondent has continued to practice law on a part time basis without causing the courts or the profession to fall into disrepute and the Respondent has not committed any acts warranting disbarment.

When a lawyer is eligible for probation, a prior sanction of probation does not disqualify the attorney from being eligible for probation a second time. In fact,

this Court has imposed a suspension stayed with probation on a lawyer who had a significant disciplinary history which included two previous suspensions where one suspension was stayed and the lawyer successfully completed probation.

In 2004 in *In Re Devkota* (SC86499) this Court placed *Devkota* on an interim suspension due to his alcohol dependency issues causing him to neglect his practice. The interim suspension was lifted when he successfully completed an alcohol rehabilitation program in 2006.

In 2006 in *In Re Devkota* (SC87955) this Court suspended *Devkota* for violating Rules 4-1.3 and 4-1.4 relating to the 2004 interim suspension and stayed the suspension placing him on probation for one year. *Devkota* successfully completed probation in 2008.

In 2011 in *In Re Devkota* (SC91579) this Court again suspended *Devkota* for violating Rules 4-1.15(c) and 4-1.15(i) and stayed the suspension placing him on probation for three years. *Devkota* successfully completed probation again in 2014.

Additionally, in April 2004, prior to the first interim suspension, *Devkota* was admonished for cashing a check without the knowledge of a third party.

Although no opinion was drafted by this Court as to their findings and conclusions of law in the last case (SC91579) the facts regarding the *Devkota* disciplinary cases were that none of his suspensions or periods of probation sanctions were the result of repeated violations of the same Rules, *Devkota* completed the required conditions each time, one of the suspensions was an alcohol dependency problem that led to his neglect of his practice, and the Informant's brief indicated that *Devkota* was eager to rectify his misconduct and was deemed credible and honest by the disciplinary panel.

The case at bar is most like the line of *Devkota* cases where the Respondent has a prior disciplinary history of being suspended with the suspension stayed and the Respondent being placed on probation. The Respondent successfully completed probation. The Respondent is now facing a possible second suspension

for violating completely different Rules unrelated to the Rules violated in her first disciplinary suspension. The cause of the violations was due to the Respondent's mental health disabilities disrupting her ability to practice law rather than intentional disregard of her clients. And like *Devkota*, the Respondent has been eager to rectify her misconduct, has been remorseful, and it would seem that the Respondent, at least as far as the allegations of trust account misuse, was deemed credible and honest by the disciplinary panel where they found the Respondent did not violate the trust accounting rules.

Where the Respondent's case is most like the circumstances in *In Re Devkota* (SC91579) as far as a possible second suspension based on mental health issues (which is the same category of mitigating factors as alcohol dependency), the Rules violated are different than the past disciplinary violations and the mitigating circumstances of the Respondent trying her best to rectify her misconduct and recover from her illnesses the Respondent argues that Suspension of her license for three years with the suspension stayed and Respondent placed on probation for three years would be consistent and fair based on prior decisions of the Court and is therefore the most appropriate sanction.

Suspension is also an Appropriate Sanction

Suspension is also an appropriate sanction in this case. However, the Respondent does not believe a two year suspension would be necessary to protect the public where the Respondent had no intent, dishonest or selfish motive when engaging in the misconduct. Respondent is certain that the type of misconduct that occurred in 2016 and 2017 was the result of her mental health disabilities and that but for those illnesses the misconduct would not have occurred.

In the event this Court determines that suspension is necessary to protect the public and to maintain the integrity of the profession the Respondent believes that a suspension of 60-180 days would serve those purposes where this court has

consistently imposed suspensions of 60 to 180 days in disciplinary matters concerning the issue of client neglect where no highly significant mitigating or aggravating factors were present.

See *In the matter of Dorsey*, 731 S.W.2d 252 (Mo. banc 1987). Dorsey was suspended for 90 days when he neglected four clients' matters and failed to make a prompt refund to one client; *In the matter of Striebel*, 744 S.W.2d 778 (Mo. banc 1988). Striebel was suspended for 60 days for neglecting one client matter but had a prior admonition for the same type of client neglect; *In re Lavin*, 788 S.W.2d 282 (Mo. banc 1990). Lavin was suspended for 120 days for refusing to refund client money, refusing to participate in the disciplinary proceedings, neglecting his clients, he had previously been admonished for similar conduct and was also ordered to pay his client restitution; *In re Vails*, 768 S.W.2d 78 (Mo. banc 1989). Vails was suspended for 180 days for neglecting his client and his client's matter, failing to respond to the bar investigation, mailed his client's money back only after an information was filed against him, and then the check was insufficient funds.

Other suspensions for neglect of clients and their matters where significant aggravating factors were present See. *In Re Fluhr*, (SC90496). Fluhr was suspended for 180 days and then reinstated and place on probation for two years for failing to respond to disciplinary investigation, regularly failing to show up for court with clients, failing to show up to the second day of jury trial for a client without leave to withdraw, resulting in the court having to declare a mistrial, not completing work for clients and refusing to issue refunds; *In re Crews*, 159 S.W.3d 355, 359 (Mo. banc 2005). Crews was suspended for one year after neglecting his client's personal injury matter for four years, lying to his clients about their case being dismissed and his failures to file responses, never took responsibility for his actions throughout the case, did nothing to rectify his negligence, and also had previous discipline to client neglect; *In re Genuik*, (SC95726). Genuik was suspended for one year after writing a check on behalf of

a client that was insufficient funds and not making the check good at the clerks office in the court house even after the judge filed a compliant against him it still took him over a year to make the check good, failing to work diligently on client matters and communicate with his clients, and he had been admonished 3 times before two of which were for previous instances of client neglect and failure to communicate with clients.

In the event this Court determines that suspension of Respondent's License is necessary to protect the public and to maintain the integrity of the profession the Respondent believes that a suspension of 60-180 days would serve those purposes where this court has consistently imposed suspensions of 60 to 180 days in disciplinary matters concerning the issue of client neglect and especially considering the many mitigating factors in the case at bar.

POINT RELIED ON II

THE RESPONDENT DID NOT VIOLATE RULE 4-1.15 (TRUST ACCOUNTING) AND SHOULD NOT BE DISCIPLINED UNDER THAT RULE.

During 2016 through 2018 the Respondent had several public defender appointed clients. At that time the trust accounting rule was that all advance flat fees must go into the trust account until earned. When the public defender appoints a client the Respondent would immediately begin work on the matter. The payment from the public defender would be made later. The public defender payments were direct deposited from the State of Missouri to the Respondent's trust account. At the time of the deposits some of the funds were earned and some were not. The Respondent had no control over the earned funds portion that was deposited into the trust account where she could only denote one account for the direct deposits to be deposited into.

During her time on probation the Respondent took trust accounting CLE classes and learned if a payment from a client was a mixture of earned and unearned portions the correct account to deposit the money into was the trust account then to transfer the earned portion to the operating account.

Respondent's trust account never became negative and never fell under the \$1500.00 that belonged to Mollie Brewer being kept in trust because it was in dispute. Kerry Smith's funds were earned when she paid them because she had a balance due to Respondent's office at the time she was making payments. No other evidence was offered or any complaint made that Respondent transferred money from trust to operating accounts before it was earned.

Respondent used an online software program to collect advance fees from clients. The clients would log in and make their fee deposits with a credit or debit card. The payment company "wepay" would keep a portion of the payment for their credit card service resulting in an amount less than what the client actually paid being deposited into trust. To reconcile this the Respondent would keep enough of her own funds in the trust account to cover the fees so the clients' deposits would be whole. When the funds were earned the amount the client actually paid would be transferred to the operating account as earned funds.

During the trust accounting CLE Respondent learned that a cushion amount of money can be left in the trust account to cover bank fees and so Respondent felt that constantly leaving a cushion in the trust account to cover the credit card fees and make the client deposit whole was in accordance with the trust accounting rules.

The Respondent did not violate 4-1.15 and should not be disciplined under that rule.

Conclusion

The Respondent offers no argument that she did not violate Rule 4-8.4(a) as a result of violating Rule 4-1.3 (diligence) as to Ms. Smith and Ms. Brewer; Rule 4-1.4 (communication) as to Ms. Smith and Ms. Brewer; Rule 4-8.1 (failing to respond to disciplinary complaints); Rule 4-8.4(c) (by accepting advanced fee payments and failing to provide the agreed upon services); Rule 4-8.4(d)(engaging in conduct that is prejudicial to the administration of justice).

The Respondent concedes she should be disciplined for these violations. The Respondent argues that the appropriate discipline should not be a suspension of her license for two years.

The Respondent argues that this case has many mitigating factors that suggest a stayed suspension with probation or a suspension of 60 to 180 days is the appropriate sanction.

Probation is an appropriate sanction in this case. Rule 5.225(a)(2) provides that a lawyer is eligible for probation if the lawyer (A) Is unlikely to harm the public during the period of probation and can be adequately supervised; (B) Is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; and (C) Has not committed acts warranting disbarment.

The Respondent is unlikely to harm the public where she has taken great steps to prevent her misconduct from recurring by continuing to recover from her mental health disabilities, reducing her work load, downsizing her practice and narrowing the case types she takes.

The Respondent has shown she can be adequately supervised where she has invited her colleague Michael Lutke to hold her accountable and she has completed probation in the past without violation of any terms of probation.

Since the complaints in 2017 the Respondent has continued to practice law on a part time basis without causing the courts or the profession to fall into disrepute and the Respondent has not committed any acts warranting disbarment.

Suspension is also an appropriate sanction in this case. However, the Respondent does not believe a two year suspension would be necessary to protect the public where the Respondent had no intent, dishonest or selfish motive when engaging in the misconduct. Respondent is certain that the type of misconduct that occurred in 2016 and 2017 was the result of her mental health disabilities and that but for those illnesses the misconduct would not have occurred.

Where the Respondent's case is most like the circumstances in *In Re Devkota* (SC91579) as far as a possible second suspension based on mental health issues (which is the same category of mitigating factors as alcohol dependency), the Rules violated are different than the past disciplinary violations and the mitigating circumstances of the Respondent trying her best to rectify her misconduct and recover from her illnesses the Respondent argues that Suspension of her license for three years with the suspension stayed and Respondent placed on probation for three years would be consistent and fair based on prior decisions of the Court and is therefore the most appropriate sanction.

However, in the event this Court determines that suspension of Respondent's License is necessary to protect the public and to maintain the integrity of the profession the Respondent believes that a suspension of 60-180 days would serve those purposes where this court has consistently imposed suspensions of 60 to 180 days in disciplinary matters concerning the issue of client neglect and especially considering the many mitigating factors in the case at bar.

The Respondent did not violate Rule 4-1.15 and should not be disciplined under that rule.

Respectfully Submitted,

/s/ Anissa Bluebaum

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent to the Informant via the Missouri electronic filing system this 3rd day of September, 2019.

/s/ Anissa Bluebaum

Anissa Bluebaum

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. Was served on Respondent through the Missouri electronic filing system pursuant to Rule 103.08;
3. Complies with the limitations contained in Rule 84.06(b);
4. Contains 6,778 words, according to Microsoft Word, which is the word processing system used to prepare the brief.

/s/ Anissa Bluebaum

Anissa Bluebaum