

IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:

REBECCA J. GROSSER

225 S. Meramec Avenue, Suite 1100

St. Louis, MO 63105-3561

Missouri Bar No. 46447

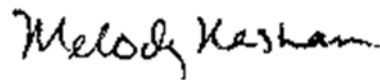
Respondent.

Supreme Court #SC97779

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

This action is one in which the Chief Disciplinary Counsel is seeking to discipline an attorney licensed in the State of Missouri for violations of the Missouri Rules of Professional Conduct. Jurisdiction over attorney discipline matters is established by this Court's inherent authority to regulate the practice of law, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Procedural History

Informant is the Chief Disciplinary Counsel (hereinafter “OCDC”). Informant filed an Information on May 22, 2018, charging Respondent with violating Rules 4-1.15(a) and 4-8.1(c). **Rec. 1.**¹ Respondent filed Respondent’s Answer and Affirmative Defenses to the Information on August 10, 2018. **Rec. 29.**

Via a letter dated August 15, 2018, the Advisory Committee chair appointed a disciplinary hearing panel to hear the case. **Rec. 40.** A hearing was held in this matter on October 22, 2018, in St. Louis, Missouri, before Albert Rose, Presiding Officer, David Bailey, and Theresa White. **Rec. 47.** Informant was present through Carl Schaeperkoetter, Staff Counsel. **Rec. 47.** Respondent was present in person and through counsel, Michael P. Downey. **Rec. 47.** Informant’s Exhibits 1 and 2 were admitted by agreement of the parties. **Rec. 53, 90** (Tr. 5, 42); **117** (Ex. 1); **123** (Ex. 2). Respondent admitted numerous factual allegations in her Answer to the Information, as outlined below. **Rec. 29.** Informant

¹ Citations to the Record are denoted by page reference followed by a description of the cited material if it’s not obvious from the preceding text, for example, “**Rec. _** (Answer ¶ _).” Citations to Respondent’s testimony before the Disciplinary Hearing Panel are denoted by the appropriate page reference, followed by the specific transcript page reference in parentheses, for example, “**Rec. _** (Tr. _).” Citations to the Appendix are denoted by page reference followed by a description of the cited material if it’s not obvious from the preceding text, for example, “**App. A_** (DHP Decision _).”

relied on Respondent's admissions in her Answer to the Information, and Exhibits 1 and 2. Respondent also testified. **Rec. 63 – 100** (Tr. 15 – 52).²

After considering the evidence presented, the Disciplinary Hearing Panel ("DHP") found that Respondent had violated Rules 4-1.15(a) and 4-8.1(c) and recommended that Respondent be reprimanded. **Rec. 201 – 02, 211, App. A6 – A7, A16 (DHP Decision 4 – 5, 14)**. The DHP filed its decision on February 6, 2019, and Legal Ethics Counsel served the decision on the parties by letter dated February 8, 2019. **Rec. 198, 215 and App. A3**. By letter dated February 8, 2019, Informant accepted the DHP's decision. **Rec. 216**. Respondent was deemed to have accepted the DHP's decision because she did not timely file a notice rejecting the decision.

On June 4, 2019, the Court ordered: "This cause will be set for briefing and argument unless the parties agree to accept a reprimand with two years probation and submit proposed terms of probation... Said submissions are due on or before June 24, 2019." On June 24, 2019, Respondent filed a Motion for Clarification of Order Regarding Sanction and for Additional Time to Respond Thereto. On July 8, 2019, this Court ordered: "This cause will be set for briefing and argument unless the parties agree to accept a reprimand without conditions and probation for a term of two years." The Court further imposed deadlines for the parties' acceptance. Respondent did not so accept. By Order

² Informant dismissed the allegation that Respondent violated Rule 4-1.15(b). **Rec. 130** (Trial Brief ¶ 3).

dated July 30, 2019, the Court activated the briefing schedule. The record was filed with the Supreme Court of Missouri on August 29, 2019.

Facts Underlying Disciplinary Case

Respondent was licensed as an attorney in Missouri on October 10, 1997. **Rec. 29** (Answer ¶ 3). Respondent's bar number is 46447. **Rec. 29** (Answer ¶ 3). Respondent's license is currently in good standing. **Rec. 29** (Answer ¶ 4). The address Respondent designated in her most recent registration with the Missouri Bar is 225 South Meramec Avenue, Suite 1100, St. Louis, Missouri 63105-3561. **Rec. 29 - 30** (Answer ¶ 5).

Respondent, after being licensed as an attorney, served approximately 10 years as a public defender in Jefferson County and St. Louis County. **Rec. 64 - 65** (Tr. 16 - 17). She later had a five-year term of service as an assistant prosecutor and a chief assistant prosecuting attorney in Jefferson County. **Rec. 66** (Tr. 18). Since May of 2012, she has been a solo practitioner with an office in St. Louis County. **Rec. 67** (Tr. 19).

Respondent's primary practice is in the areas of criminal defense, the representation of plaintiffs in employment discrimination cases, and service as a guardian ad litem. **Rec. 67** (Tr. 19). She is on the panel of appointment in the federal district courts for Missouri and Illinois. **Rec. 68** (Tr. 20). Approximately 20 - 25% of her work comes from federal appointments. **Rec. 68** (Tr. 20).

BK and MK met with Respondent in early February of 2013 to retain her to prepare estate planning documents. **Rec. 30** (Answer ¶ 6). In March of 2013, Respondent mailed them a packet of information to complete and return to her office. **Rec. 30** (Answer ¶ 7). On

April 16, 2013, BK and MK returned the completed paperwork and mailed a check for \$750. **Rec. 30** (Answer ¶ 7). The check cleared on May 17, 2013. **Rec. 30** (Answer ¶ 7).

BK and MK attempted to reach Respondent several times to get an update on the status of their estate planning documents. **Rec. 30 - 31** (Answer ¶ 8). Respondent did not return their calls or complete their documents. **Rec. 30 - 31** (Answer ¶ 8). BK and MK terminated Respondent by letter dated September 20, 2013. **Rec. 30 - 31** (Answer ¶ 8). During the investigation of the complaint, Respondent agreed that the completed documents were not provided to BK and MK. **Rec. 31** (Answer ¶ 9).

Based upon the foregoing conduct, Respondent entered into a Diversion Agreement (Agreement) with OCDC on September 18, 2015. **Rec. 31** (Answer ¶ 10). Respondent's Agreement required random audits of her trust account. **Rec. 31** (Answer ¶ 11). The Diversion Agreement specifically provided that "[f]ailure to comply with one or more of the diversion conditions shall be considered a violation of Supreme Court Rule 4-8.1(c)." **Rec. 122** (Diversion Agreement ¶ 11).

Respondent failed to abide by the terms of the Agreement by failing to provide financial records requested by OCDC Investigative Examiner Kelly Dillon. **Rec. 31 - 32** (Answer ¶ 12). Respondent didn't respond to letters dated May 24, 2019 and July 12, 2017 or to July and August 2017 emails sent by Ms. Dillon to Respondent. **Rec. 84** (Tr. 36). Respondent also failed to maintain communication with the designated diversion monitor, Carl Schaeperkoetter, regarding the conditions of the Agreement. **Rec. 31 - 32** (Answer ¶ 12).

A random audit was conducted of Respondent's client trust account located at US Bank. **Rec. 32** (Answer ¶ 13). A subpoena was issued to US Bank because Respondent failed to provide financial records requested by OCDC. **Rec. 32** (Answer ¶ 13); **Rec. 85** (Tr. 37). A review of those records, and subsequent interview with Respondent, revealed that Respondent allowed earned fees to remain in the client trust account, failing to sweep the earned fees from the trust account in a reasonable time period. **Rec. 32** (Answer ¶ 14). Respondent also testified at the disciplinary hearing that she had left earned fees from her work as a guardian *ad litem* and her criminal defense and employment work in her client trust account too long. **Rec. 71 – 73** (Tr. 23 – 25).

Respondent met with Ms. Dillon and Mr. Schaeperkoetter on December 12, 2017. **Rec. 85** (Tr. 37). A plan was agreed to regarding Respondent's provision of information to OCDC by the end of March 2018. **Rec. 85 - 90** (Tr. 37 - 42). The agreement was confirmed by letter sent by Mr. Schaeperkoetter on January 24, 2018. **Rec. 86 - 87** (Tr. 38); **Rec. 123 - 28** (Informant's Ex. 2). Respondent never provided the information to OCDC. **Rec. 31** (Answer ¶ 12); **Rec. 88, 95** (Tr. 40, 47).

Carl Schaeperkoetter, Respondent's designated diversion monitor, attempted to contact Respondent every work day from April 23, 2018 through May 1, 2018 and left a message requesting a return call. **Rec. 32** (Answer ¶ 15). A message was left by Respondent at approximately noon on May 1, 2018. **Rec. 32** (Answer ¶ 15). Mr. Schaeperkoetter called Respondent back that afternoon but got voicemail and left a message requesting a return call. **Rec. 32** (Answer ¶ 15). The diversion monitor, Mr. Schaeperkoetter, had no further contact

with Respondent. **Rec. 32** (Answer ¶ 15). Shortly thereafter, Informant filed the Information. **Rec. 1**.

Respondent pled in her Answer a request that “her mental health conditions in 2013 through the present be considered when determining any appropriate discipline that may be taken against her.” **Rec. 34** (Answer, Defenses and Affirmative Defenses ¶ 12). The record, however, includes no evidence of Respondent’s compliance with Rule 5.285. She provided no medical evidence, did not submit to an independent mental health examination, did not disclose her mental health history to OCDC, and did not provide written consent for OCDC to contact mental health providers. At the disciplinary hearing, in response to Informant asking her why she didn’t provide the information Informant had requested, Respondent replied that she was having “mental health issues, depression specifically.” **Rec. 91 – 92** (Tr. 43 – 44). Informant objected to her testimony, but the Presiding Officer allowed her to testify about her depression. **Rec. 91 – 92** (Tr. 43 – 44).

The Disciplinary Hearing Panel’s Decision

A hearing was held in this matter on October 22, 2018, in St. Louis County, Missouri before Albert Rose, presiding officer, David H. Bailey, Jr., attorney member, and Theresa White, public member. **Rec. 47**. The Disciplinary Hearing Panel found that Respondent violated the following Rules of Professional Responsibility:

1. Rule 4-1.15(a) by failing to hold property of clients or third persons in the lawyer’s possession in connection with a representation separate from the lawyer’s own property when she allowed earned fees to remain in the client trust account.

2. Rule 4-1.15(a) by continuing to maintain earned fees from guardian *ad litem* retainers in her trust account, which account contained at the same time other client funds and, thereby, commingling client funds with personal funds.
3. Rule 4-8.1(c) by failing to comply with one or more of the conditions of her Diversion Agreement with OCDC, i.e., she failed to provide financial records requested by OCDC, and she failed to maintain communication with OCDC Diversion Monitor.

App. A6 - A7. The DHP further found that Informant did not prove Respondent violated Rule 4-1.15(b)³ and found that Respondent had not followed the procedures of Rule 5.285 for any alleged mental disorder and the Panel therefore disregarded any evidence of same.

App. A7.

The DHP found the follow aggravating factors: a pattern of misconduct, multiple offenses, and substantial experience in the practice of law. **App. A12.** The DHP found the following mitigating factors: the absence of a prior disciplinary history, a cooperative attitude toward the proceedings, adopting procedures to minimize future problems, retaining a life coach, and “possibly” the absence of a dishonest or selfish motive. **App. A12.** The DHP did not find remorse to be an applicable mitigating factor, noting that Respondent did not cooperate with OCDC before the Information was filed. **App. A12.** “After-the-fact remorse is not a mitigating factor.” **App. A12.** The DHP found that the

³ Informant had dismissed that charge. **Rec. 130** (Informant’s Trial Brief ¶ 3).

aggravating and mitigating factors tended “to balance each other out, not change the baseline sanction.” **App. A12.**

The Disciplinary Hearing Panel’s Recommendation

The Disciplinary Hearing Panel recommended that Respondent be reprimanded. **App. A10 – A13.** Informant expressly accepted the Panel’s recommendation. **Rec. 216.** Respondent accepted the Panel’s recommendation by not timely rejecting it. The Court ordered the matter briefed and argued after the parties did not accept the sanction proffered by the Court: “a reprimand without conditions and probation for a term of two years.”

POINT RELIED ON

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S
LICENSE BECAUSE SHE VIOLATED RULES 4-1.15 and 4-8.1 IN
THAT RESPONDENT FAILED TO HOLD HER PROPERTY
SEPARATE FROM CLIENT PROPERTY, AND FAILED TO
COMPLY WITH THE DIVERSION AGREEMENT SHE ENTERED
INTO WITH INFORMANT BY FAILING TO PROVIDE
REQUESTED RECORDS AND TO ADEQUATELY
COMMUNICATE WITH HER DIVERSION MONITOR.**

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

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

In re Hardge-Harris, 845 S.W.2d 557 (Mo. banc 1993)

In re Staab, 719 S.W.2d 780 (Mo. banc 1986)

ABA Standards for Imposing Lawyer Sanctions (1986 ed., as amended 1992)

Rule 4-1.15

Rule 4-8.1

ARGUMENT

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT’S LICENSE BECAUSE SHE VIOLATED RULES 4-1.15 and 4-8.1 IN THAT RESPONDENT FAILED TO HOLD HER PROPERTY SEPARATE FROM CLIENT PROPERTY, AND FAILED TO COMPLY WITH THE DIVERSION AGREEMENT SHE ENTERED INTO WITH INFORMANT BY FAILING TO PROVIDE REQUESTED RECORDS AND TO ADEQUATELY COMMUNICATE WITH HER DIVERSION MONITOR.

“The findings of fact, conclusions of law, and the recommendations from the DHP are advisory. This Court reviews the evidence *de novo*, independently determining all issues pertaining to the credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed.” *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005), citing *In re Snyder*, 35 S.W.3d 380, 382 (Mo. banc 2000).

Violations of the Rules of Professional Conduct

Rule 4-1.15(a) provides: “A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property.” In her answer to the Information, Respondent admitted that she had retained earned fees in her client trust account “for months longer than was necessary.” Also, Respondent testified at the disciplinary hearing that she left earned fees in her client trust account for too long. In *In re Coleman*, 295 S.W.3d 857, 865- 66 (Mo. banc 2009),

this Court held that Mr. Coleman violated Rule 4-1.15 when he deposited settlement proceeds into his client trust account and then left his earned fees in that account, commingled with client property, until he paid personal obligations from that account. Respondent violated Rule 4-1.15(a) by commingling personal and client property when she left her earned fees in her client trust account for too long.

Rule 4-8.1(c) provides: "...[A] lawyer ... in connection with a disciplinary matter shall not ... knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority." Respondent entered into a Diversion agreement with OCDC after failing to diligently represent and adequately communicate with her clients, BK and MK. Respondent, in her answer to the Information, admitted that she entered into a Diversion Agreement with the Informant, failed to abide by its terms, failed to provide financial records requested by the Informant, and failed to maintain communication with the OCDC Diversion Monitor, Carl Schaeperkoetter, regarding terms of the Diversion Agreement. The Diversion Agreement specifically provided that a failure to comply with the diversion conditions shall be considered a violation of Rule 4-8.1(c). In *In re Farris*, 472, S.W.3d 549, 558-59 (Mo. banc 2015), this Court found that Farris violated Rule 4-8.1 by providing tardy and incomplete responses and by lying to the OCDC. Respondent violated Rule 4-8.1(c) by failing to respond to the requests of OCDC for financial information, to maintain communication with her diversion monitor, and to abide by the terms of the Diversion Agreement.

Appropriate Sanction

In determining the appropriate sanction for attorney misconduct, this Court relies on several sources. First and foremost, the Court applies its own standards to maintain consistency and fairness and, ultimately, to accomplish the overriding goal of protecting the public and maintaining the integrity of the legal profession. *In re Kazanas*, 96 S.W.3d 803, 807 (Mo. banc 2003). When determining an appropriate sanction, the Court's opinions in attorney discipline cases are always the first source for analysis.

The Court also looks to the *ABA Standards for Imposing Lawyer Sanctions* (1986 ed., as amended 1992) (hereinafter "*ABA Standards*") for guidance when imposing discipline but considers the *ABA Standards* advisory. See *In re Ehler*, 319 S.W.3d 442, 451 (Mo. banc 2010). The Court considers aggravating and mitigation circumstances. *Kazanas*, 96 S.W.3d 808.

The Court considers as advisory the Disciplinary Hearing Panel's findings of fact, conclusions of law, and recommendation of sanction. *Ehler*, 319 S.W.3d 448. In this instance, the Panel recommended that Respondent be reprimanded.

Case law and ABA sanction analysis support imposition of a range of discipline in this case, from a public reprimand to a public reprimand with requirements to probation.⁴

⁴ Rule 5.16(d) lists the discipline that the disciplinary hearing panel may recommend to this Court: "a public reprimand, probation, suspension, or disbarment" and provides that the reprimand "may include additional requirements to improve the lawyer's practice."

Although the discipline options available to the disciplinary hearing panel are listed in the

The evidence demonstrates that Respondent violated two Rules of Professional Conduct. She violated Rule 4-1.15 regarding safekeeping the property of others by failing keep her earned fees separate from her client's property. She violated Rule 4-8.1 (c) regarding cooperating with disciplinary authority by failing to produce financial documents needed to complete an audit of her trust account, by failing to maintain adequate communication with her diversion monitor, and by breaching the Diversion Agreement she entered into with Informant. At the disciplinary hearing stage, Informant requested the imposition of a reprimand, and the Disciplinary Hearing Panel recommended that Respondent be reprimanded.

This Court's opinions regarding violations of Rules 4-1.15 and 4-8.1 illustrate the range of appropriate discipline. In *In re Hardge-Harris*, 845 S.W.2d 557, 560 (Mo. banc 1993), the Court issued a reprimand to the respondent for failure to cooperate with disciplinary counsel despite finding the respondent committed no rule violations in her representation of the client who made the initial complaint. In *Hardge-Harris*, the respondent failed to produce financial documents, failed to respond to requests for

disjunctive, Rule 5.19(e) provides only that the Court "shall impose appropriate discipline." Rule 5.19(h), however, lists fees to be taxed to a respondent upon whom discipline is imposed by the Court depending upon the nature of the discipline imposed. The "nature of the discipline imposed" are listed as: reprimand, reprimand with requirements, suspension, probation, and disbarment.

information, and failed to communicate with disciplinary counsel. *Id.* at 560. Her conduct, therefore, was similar to that of Respondent in this case.

The Court in *Hardge-Harris* noted the time commitment of those serving in the disciplinary system and the concurrent expectation that lawyers in the profession therefore should treat those serving the system with respect. *Id.* The Court also noted that prompt responses to disciplinary requests reflect on the willingness of respondents to resolve issues, and is part of the individual lawyer's obligation to the profession. *Id.* Respondent failed in her obligation to the profession in the same way as the *Hardge-Harris* respondent.

In *In re Staab*, 719 S.W.2d 780, 783 - 84 (Mo. *banc* 1986), the respondent neglected matters entrusted to him by two clients and he failed to cooperate with the Bar Committee in the disciplinary matters filed against him. The appointed Master recommended the respondent be suspended for a period of sixty days. *Id.* at 781. The Court noted that the respondent had not sought personal gain by his actions, that there was no irreparable harm to the neglected clients, that that respondent enjoyed a "fine reputation," that "trying personal circumstances may have clouded his judgment" during the period in question, and that he had taken measures to prevent future issues. *Id.* at 784 – 85. The Court ordered the respondent publicly reprimanded. *Id.* at 785.

In *In re Gardner*, 565 S.W.3d 670, 676 - 77 (Mo. *banc* 2019), this Court noted that the respondent had not engaged in misappropriation or self-dealing, but he had violated Rule 4-1.15 "by failing to safekeep property when he withdrew money for personal representative fees without court authorization." The respondent also was found to have violated Rules 4-3.4, 4-3.3, and 4-8.4(c). This Court suspended the respondent indefinitely

with no leave to apply for reinstatement for six months, but stayed the suspension and placed him on a one-year term of probation. *Id.* at 680.

In *In re Coleman*, 295 S.W.3d 857, 863 - 68 (Mo. banc 2009), this Court found that the respondent had violated Rule 4-1.15 when he put his personal funds in his client trust account, and that he had violated Rules 4-1.2, 4-1.7, 4-8.4, and 4-1.16. The Court suspended the respondent, with no leave to reapply for one year, and with execution of the suspension stayed, subject to his completion of a one-year term of probation. *Id.* at 871.

In *In re McMillin*, 521 S.W.2d 604, 608 (Mo. banc 2017), this Court found that the respondent had violated Rule 4-1.15 by commingling personal funds and client funds in his trust accounts, by making premature withdrawals from the trust accounts for earned fees, by making cash withdrawals from his trust accounts, and by failing to keep complete and accurate trust account records. McMillan also had misappropriated client money, failed to cooperate with disciplinary counsel (including breaching a diversion agreement), and had “essentially abandoned his clients” through his lack of diligence and failure to communicate. *Id.* at 610. This Court took into consideration certain mitigating and aggravating factors, but found that the presumptive discipline for misappropriation, disbarment, appropriate. *Id.* at 612.

While no prior case can be said to match the circumstances in the instant case, consideration of the violations in those cases and the discipline imposed can, perhaps, provide outer margins for the discipline appropriate in this case. *Hardge-Harris* is most similar, and a public reprimand was imposed. *Staab* included neglect of a client matter in addition to the failure to cooperate, but was similar in that no irreparable client harm

occurred, and a reprimand was imposed. *Coleman, Gardner, and McMillan* involved obviously more serious misconduct and resulting harm, and the discipline imposed was, concomitantly, more severe.

The *ABA Standards* support the imposition of a reprimand or probation. The *ABA Standards* provide a standard for the violation of a particular rule. Section II of the *ABA Standards* states in part:

The Standards do not account for multiple charges of misconduct.

The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it may well be and generally should be greater than the sanction for the most serious violation.

In this case, the evidence shows that the Respondent violated Rules 4-1.15 and 4-8.1, and that she violated those Rules multiple times. *ABA Standard 3.0* provides:

In 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; and
- (c) the actual or potential injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating or mitigating factors.

The duty violated. Under Section II, The Theoretical Framework, the *ABA Standards* provide that the most important ethical duties are those obligations that an

attorney owes the client. Respondent violated an ethical duty to her clients: safeguarding client funds. She also violated an ethical duty to the legal system: cooperating with the disciplinary process.

The sanction standard for violation of Rule 4-1.15 is Sanction Standard 4.1 entitled “Failure to Preserve the Client’s Property.”

ABA Standard 4.11 states:

Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

ABA Standard 4.12 states:

Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property or causes injury or potential injury to a client.

ABA Standard 4.13 states:

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

The applicable *ABA Standard* for violation of 4-8.1(c) is Sanction Standard 7.0 entitled “Violations of Duties Owed to the Profession.”

ABA Standard 7.1 provides:

Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a

professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

ABA Standard 7.2 provides:

Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public or the legal system.

ABA Standard 7.3 provides:

Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system.

Mental state. The *ABA Standards* define the mental states used in the *ABA Standards* as follows:

The most culpable mental state is of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct but without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result

will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

ABA Standards, Sec. II.

Respondent's mental state was that of knowledge. She knew she was supposed to keep her property separate from client property, but she left earned fees from her work as a guardian *ad litem* and her criminal defense work in her client trust account for too long. She testified that she was confused as to when she could withdraw guardian *ad litem* fees, but she also left earned fees from her criminal defense work in her account too long.

Respondent also failed to cooperate with disciplinary counsel. She knew or should have "known" that she was obliged to cooperate, yet she failed to comply with a Diversion Agreement she voluntarily entered into, failed to provide financial records requested by OCDC, and failed to adequately communicate with OCDC.

Injury or potential injury caused by Respondent's misconduct. There is no evidence that Respondent gained any benefit from the misconduct charged or that a client was harmed by such misconduct. There was only potential injury to clients. Commingling client and personal funds could subject client property to creditors and government action against the lawyer. Respondent on numerous occasions left fees in her client trust account for months at a time. The longer attorney property is maintained in the client trust account, and the more instances of such retention, the greater the risk to clients.

Additionally, her failure to cooperate with disciplinary counsel caused injury or potential injury to the legal system because OCDC was required to repeatedly seek the requested information and finally subpoena bank records that could have been provided by

Respondent. There was potential injury to clients in that the records, when obtained, showed that Respondent was commingling her property with that of clients by failing to timely withdraw earned fees.

Baseline sanction. Straight analysis would indicate that Respondent's baseline sanction is suspension per *ABA Standards* 4.12 and 7.2. There is no evidence that Respondent had a scheme where she knowingly put client property at risk as required in *ABA Standard* 4.11, that she intended to obtain a benefit through her failure to cooperate as stated in *ABA Standard* 7.1, or that any client was harmed. Respondent's conduct is more than the negligence of *ABA Standard* 4.13, because she knew she was supposed to keep client property separate from her property, but she allowed the two to be commingled in her client trust account instead of timely withdrawing her earned fees. Her failure to cooperate also was not merely negligent as provided in *ABA Standard* 7.3 because she knew she was to cooperate with disciplinary counsel, yet she failed to provide requested financial records, failed to communicate with her Diversion Monitor, and failed to abide by the terms of her Diversion Agreement.

Aggravating and mitigating factors. Once a base sanction has been established, in this case suspension, this Court has stated it is appropriate to consider any mitigating and aggravating factors in *ABA Standards* 9.22 and 9.32. *In re Ehler*, 319 S.W.3d at 451. Certain aggravating and mitigating factor are applicable in this case. "Aggravation or aggravating circumstances are any considerations, or factors that may justify an increase in the degree of discipline to be imposed." *ABA Standard* 9.21. In the case at bar, aggravating factors include a pattern of misconduct (*ABA Standard* 9.22(c)); multiple

offenses (*ABA Standard 9.22 (d)*); and substantial experience in the practice of law (*ABA Standard 9.22 (i)*). Respondent left earned fees in her client trust account -- fees from multiple guardian *ad litem* and criminal defense cases. She failed to respond to repeated efforts by OCDC to obtain records. Her conduct violated multiple rules -- Rules 4-1.15 and 4-8.1. Respondent has been licensed since 1997, thus having years of experience.

“Mitigation or mitigating circumstances are any consideration or factors that may justify a reduction in the degree of discipline to be imposed.” Mitigating factors from 9.32 are the absence of a prior disciplinary history (*ABA Standard 9.32 (a)*), and a cooperative attitude toward the proceedings (*ABA Standard 9.32 (e)*). The disciplinary hearing panel found “the absence of a prior disciplinary history, a cooperative attitude toward the proceedings, adopting procedures to minimize future problems, retaining a life coach and possibly the absence of a dishonest or selfish motive.” **App. A12.** The Disciplinary Hearing Panel did not find that “remorse” was an applicable mitigating factor, stating: “After-the-fact remorse is not a mitigator.” **App. A12.**

Respondent’s alleged mental disorder is not properly before the Court as a mitigating factor. Missouri Supreme Court Rule 5.285 sets forth a specific procedure for any respondent claiming any kind of mental disorder as a mitigating factor. Requirements include, but are not limited to, specific allegations in the pleading, the provision of information to the OCDC, independent examination and verification, and the provision of appropriate releases to the Informant for investigation. At all times the burden of proof is on the Respondent that a mental disorder is a mitigating factor.

Respondent's alleged depression was not properly raised by Respondent.

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.

Rule 5.285(b). Respondent in her Answer to the Information stated in paragraph three for affirmative defenses: "Ms. Grosser asks that her mental health conditions in 2013 through the present be considered when determining any appropriate discipline that may be taken against her." This language does not identify a mental disorder or specify how it relates to the alleged professional misconduct. There is no language connecting it to any specific allegation against the Respondent.

Further, Rule 5.285(c) states:

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.

Respondent did not present evidence from an independent, licensed mental health professional, much less evidence from such professional that a mental disorder caused Respondent's misconduct.

Rule 5.285(h), in part, states:

A person who asserts a mitigation claim or reinstatement claim shall disclose to the chief disciplinary counsel, beginning with the date the person first applied to attend law school, the name of every healthcare provider by whom and at which the person has been examined or treated related to any and all mental disorders, including, but not limited to, every psychiatrist, psychologist, professional counselor, social worker, physician, treatment center, and hospital.

The person shall furnish to the chief disciplinary counsel written consent for each named person or entity to divulge information and records related to such examination, treatment, or both, to the chief disciplinary counsel.

Respondent also did not disclose to the Informant the healthcare provider information required by Rule 5.285 for a mental disorder to be considered in mitigation. Nor did she provide written consent for the Informant to contact any such mental health providers.

Respondent's claim that Informant somehow "opened the door" with regard to her alleged mental disorder is without merit. At the hearing, Informant's counsel merely asked why Respondent had not produced the financial records OCDC had requested. Respondent replied that she was having "mental health issues, depression specifically." Informant objected to her testimony, but the Presiding Officer allowed her to testify about her depression. Such testimony, however, is not enough. Rule 5.285 includes many

requirements, including those discussed above. Respondent failed in her burden of proof and her alleged depression is not a mitigating factor. The DHP also found that Respondent did not establish a Rule 5.285 mitigating factor. **App. A13 – A16.**

Sanction range. Informant does not believe suspension is appropriate based on the facts presented in this case. The Disciplinary Hearing Panel “chose[] to classify Respondent’s conduct as negligent rather than knowing, even though she admitted not following through with Informant[‘s] requests for information after knowing of them the DHP uses the ‘negligent’ analysis because there was no significant client harm (the harm was to the profession), and because a ‘knowing’ mental state would require discussion of suspension, which the DHP does not think warranted in this case.” **App. A10.** Given the totality of the record, Informant believes a sanction in the range of a public reprimand to a reprimand with requirements to probation is an appropriate sanction.

The *ABA Standards* do not include specific parameters for a reprimand with requirements or probation. *ABA Standards* 2.7 regarding probation provides:

Probation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be imposed alone or in conjunction a reprimand, an admonition or immediately following a suspension. Probation can also be imposed as condition of readmission or reinstatement.

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.

Informant believes Respondent is eligible for probation.

Rule 5.16(d)(1) also provides that a reprimand may include additional requirements to improve the lawyer's practice. Rule 5.225(a)(1) provides that a lawyer is eligible for a reprimand with requirements if the lawyer:

- (A) Is unlikely to harm the public;
- (B) Should be required to take specific steps for practice improvement;
- (C) Does not need to be monitored;
- (D) Is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; and
- (E) Has not committed acts warranting suspension or disbarment.

Informant believes Respondent is eligible for a reprimand with requirements.

If the Court determines that Respondent should be monitored and that probation is appropriate, Informant suggests the following conditions of probation:

PROPOSED CONDITIONS OF PROBATION

The conditions of the probation shall be satisfied prior to termination of the probation. The conditions are:

1. Probation Monitor: The Probation Monitor for the term of probation shall be Melody Nashan of the OCDC, or such other person as the Chief Disciplinary Counsel shall designate in her stead;

2. Quarterly Reporting Responsibility:

a. Respondent shall submit written quarterly reports to the Probation Monitor concerning the status of Respondent's practice of law and the extent and nature of Respondent's compliance with the conditions of probation. The quarterly reports shall be due as of March 31, June 30, September 30, and December 31 of each calendar year during the probation term. If the first report would cover less than thirty (30) days, that report shall be submitted on the following quarter and shall cover the extended period. Each quarterly report shall include:

- (1.) any address change;
- (2.) any arrests of Respondent;
- (3.) any criminal charges brought against Respondent;
- (4.) any criminal conviction of Respondent;
- (5.) any civil lawsuit filed against Respondent;
- (6.) any civil judgment entered against Respondent;
- (7.) a description of any disputes with clients;

(8.) a written statement under penalty of perjury regarding whether Respondent has complied with the Rules of Professional Conduct and all conditions of probation during the preceding calendar quarter;

(9.) Notification to the OCDC of any investigation of Respondent, or any action taken by Respondent, which would raise a question as to Respondent's fitness to practice law; and

(10.) A report on the status of conditions 4, 5, 7, 8, 9, and 10 detailed below.

b. In addition to all quarterly reports, a final report containing the same information, is due no earlier than thirty (30) days or less than fifteen (15) days prior to the last day of the probation period. With the final report, Respondent may file an application with the Court for an order of successful completion of probation as set forth in Rule 5.225(g). The application shall be accompanied by an affidavit that Respondent has complied with all terms of probation. A copy of the application and affidavit shall be served on the Office of Chief Disciplinary Counsel.

3. Compliance with Rules of Professional Conduct:

a. Respondent shall not engage in conduct that violates the Rules of Professional Conduct;

- b. Receipt of a complaint by the OCDC during the probation term alleging that Respondent has violated the Rules of Professional Conduct does not, in itself, constitute a violation of the terms of probation;
- c. In the event that the OCDC receives a complaint during Respondent's participation in the probation program, the term of the probation shall be extended until such charge has been investigated and a determination made by the OCDC regarding disposition of such charge.

4. Continuing Legal Education:

- a. Respondent shall attend the Solo & Small Firm Conference of the Missouri Bar in June of each year during the term of probation. Upon prior written approval of the Probation Monitor, Respondent may attend other CLE courses in lieu of this Solo & Small Firm Conference. Attendance at the Solo & Small Firm Conference may be counted toward the CLE requirements set forth in Rule 15.05.
- b. Respondent, in addition to attending the Solo & Small Firm Conference, shall obtain at least four (4) CLE credits by attend the following Missouri Bar Continuing Legal Education seminars:
 - (1.) Trust Account Rules & Best Practices Program;
 - (2.) Trust Account Basics: The Self-Audit;
 - (3.) Any other Missouri Bar Continuing Legal Education seminar on the topic of ethics, professionalism, or law practice management that has been pre-approved by the Probation Monitor.

Attendance may be counted toward the required annual CLE requirements set forth in Rule 15.05.

- c. Proof of attendance at the seminars in (a) and (b) set forth above shall be provided to the Probation Monitor within ten (10) days of attendance.

5. Malpractice Insurance:

- a. Respondent shall maintain malpractice insurance in an amount of not less than \$100,000 per occurrence and an aggregate amount of not less than \$300,000.
- b. Respondent shall provide the Probation Monitor with proof of insurance within thirty (30) days of the date of commencement of the probation term.

- 6. Change of Employment: Respondent shall notify the Chief Disciplinary Counsel within fourteen (14) days of any change of employment.

7. Mental Health Treatment:

- a. Respondent shall select a mental health professional to provide treatment and execute a release permitting the mental health professional to advise the Probation Monitor at least once every quarter whether Respondent has obtained the recommended treatment and that Respondent's mental health condition does not substantially impede occupational functioning as a lawyer. The treating mental health professional shall be expected to advise the Probation Monitor at any time of conduct that raises a

substantial question as to Respondent's honesty, trustworthiness, or fitness as a lawyer;

- b. Respondent shall provide the Probation Monitor with the name, telephone number, and address of any mental health care professional providing treatment to Respondent during the period of probation. Respondent shall notify the OCDC within fourteen (14) days of any change in treatment professionals;
- c. Respondent shall, within 30 days of the date of the Court's order placing Respondent on probation, provide to the Probation Monitor a list of at least two (2) individuals who will serve as personal observers of Respondent's functioning. The personal observers may be family members, friends, co-workers, and/or others who have frequent personal contact with Respondent. The primary purpose of the personal observers shall be to provide constructive feedback to Respondent regarding Respondent's management of the condition. The personal observers shall also be expected to report to the Probation Monitor observations which raise concern about Respondent's management of the condition or risk to clients. The Probation Monitor also may request reports from the personal observers;
- d. Respondent shall, at least 30 days prior to any motion to terminate probation, provide the Probation Monitor with a maintenance treatment plan which Respondent intends to follow to sustain the treatment gains.

8. Mentor:

- a. Respondent shall, within ten (10) days of the Court's order of probation, propose to the Probation Monitor a mentor attorney to serve as Respondent's mentor for law practice management and organization;
- b. The Probation Monitor shall have the authority to accept or reject the mentor proposed by the Respondent. If rejected, the Respondent and Probation Monitor shall make every effort to agree to a mutually acceptable mentor. If they cannot agree within thirty (30) days of the date of the Court's order placing Respondent on probation, at that time they shall request that the coordinator of the Missouri Bar's mentoring program designate a mentor for Respondent;
- c. Respondent shall meet with the Mentor at least once every month;
- d. Upon designation of the Mentor, Respondent shall execute a release permitting the Mentor to advise the Probation Monitor at least quarterly regarding Respondent's implementation of the suggested law practice management and organization changes recommended by the Mentor.
- e. The Mentor shall advise the Probation Monitor at any time of conduct the Mentor becomes aware of that raises a substantial question as to Respondent's honesty, trustworthiness or fitness as a lawyer.

9. Disability/Disaster Plan. Respondent shall, within 90 days of the commencement of the diversion term, prepare and deliver to the Probation Monitor for approval a disability and/or disaster plan to protect clients in the event of a personal problem

or natural disaster that prohibits Respondent from practicing law. Respondent's plan shall include the designation of a trustee as contemplated by Rule 5.26(b), *i.e.*, Respondent shall, at the time of the next annual enrollment statement required by Rule 6.01, designate a trustee by specifying the name and the bar number of the trustee and certifying that the trustee has agreed to the designation in a writing in possession of both the lawyer and the trustee. Respondent shall provide the Probation Monitor a copy of the annual enrollment statement reflecting compliance with this requirement by February 15, 2020.

10. Client Trust Account Audits: Respondent shall submit to audits of Respondent's trust account, conducted by OCDC or an auditor of OCDC's designation. The audits shall be at Respondent's expense and may be conducted at random times during the period of probation. The timing of any audit shall be determined by OCDC.

11. Costs of Participating in the Probation Program: Respondent shall pay all costs incurred in connection with participation in the probation program. The Office of Chief Disciplinary Counsel shall not be responsible for payment of costs.

12. Breach of Probation: Failure to comply with any of the terms of probation shall constitute a probation violation. Upon violation, the OCDC may file a motion in the Supreme Court of Missouri, pursuant to Rule 5.225(f), specifying the alleged violation and seeking an order requiring Respondent to show cause why the probation should not be revoked and further discipline imposed.

[End of Proposed Conditions of Probation]

CONCLUSION

WHEREFORE, the Chief Disciplinary Counsel requests this Court to enter an order finding that Respondent violated Rules 4-1.15(a) and 4-8.1(c), and issuing Respondent a public reprimand or a reprimand with requirements, or placing Respondent on probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Informant's Brief has been sent via the Court's electronic filing system on this 7th day of October, 2019 to:

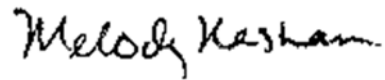
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Melody Nashan
Melody Nashan, Staff Counsel

CERTIFICATE OF COMPLIANCE: 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 via the Missouri electronic filing system pursuant to Rule 103:08;
3. Complies with the limitations contained in Rule 84.06(b);
4. Contains 8004 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Melody Nashan, Staff Counsel