

IN THE SUPREME COURT OF THE
STATE OF MISSOURI

In re

REBECCA J. GROSSER,
Attorney-Respondent.

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Supreme Court #SC97779

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 3

JURISDICTIONAL STATEMENT..... 5

CASE SUMMARY 6

STATEMENT OF FACTS 7

Bar admissions and personal background 7

Diversion Agreement..... 7

Audit of Ms. Grosser’s Trust Account 8

Ms. Grosser’s response to OCDC record requests..... 9

Ms. Grosser’s mental health 9

Ms. Grosser’s improvements since the incident..... 10

Ms. Grosser’s leadership of the organized bar..... 10

Hearing Panel’s recommendation 10

POINTS RELIED UPON..... 12

ARGUMENT 13

Preliminary statement 13

Standard of review 13

Standard of imposition of discipline 13

POINT RELIED #1: The undisputed facts, compelling evidence in mitigation, and applicable precedent support Ms. Grosser should receive no more than a reprimand without conditions..... 14

A. Missouri case law supports Ms. Grosser should receive at most a simple reprimand for the conduct at issue..... 14

B. Under ABA Standard 9.32, Ms. Grosser’s mitigating evidence supports a downward departure from the sanction her errors would merit..... 17

POINT RELIED #2: This Court should not impose conditions relating to mental health when Ms. Grosser did not to pursue mitigation under Rule 5.285. 20

Conclusion..... 21

CERTIFICATE OF SERVICE 22

CERTIFICATE OF COMPLIANCE 23

TABLE OF AUTHORITIES

CASES

In re Winterberg, Case No. SC97492 (Mo. Dec. 18, 2018)..... 15

In re Coleman, 295 S.W.3d 857 (Mo. 2009) 13

In re Eisenstein, 485 S.W.3d 759 (Mo. 2016) 13

In re Elliott, 964 S.W.2d 262 (Mo. 1985)..... 12, 16

In re Armano, Case No. SC9601 (Mo. Oct. 4, 2011)..... 12, 14

In re Madison, 282 S.W.3d 850 (Mo. 2009)..... 14

In re Cullan, Case No. SC97305 (Mo. Oct. 19, 2018)..... 15

In re Cox, Case No. SC86837 (Mo. Dec. 20, 2017) 15

In re Penny, Case No. SC96248 (Mo. Sept. 26, 2017) 16

In re Wiles, 107 S.W.3d 228 (Mo. 2003) 13

STATUTES

Missouri Revised Statute § 484.040..... 3

OTHER AUTHORITIES

ABA Standards for Imposing Lawyer Sanctions 12, 14, 17

RULES

Missouri Supreme Court Rule 4-1.15 13, 14

Missouri Supreme Court Rule 4-8.1 13

Missouri Supreme Court Rule 5 5

Missouri Supreme Court Rule 55.03 23

Missouri Supreme Court Rule 84.06 23

CONSTITUTIONAL PROVISIONS

Article V, Section 5 of the Missouri Constitution 3

JURISDICTIONAL STATEMENT

Respondent Rebecca J. Grosser 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 sole issue in this case is what discipline Ms. Grosser should receive for conduct that Ms. Grosser has consistently admitted. The material facts are not in dispute.

After practicing more than twenty years without incident and serving as a leader of the organized bar including as a leader of the Bar Association of Metropolitan St. Louis and Missouri Association of Criminal Defense Lawyers, Ms. Grosser entered a 2015 Diversion Agreement with the Office of Chief Disciplinary Counsel (“OCDC”) after a complaint alleged Ms. Grosser had not completed a couple’s will in a timely fashion. OCDC then requested certain records from Ms. Grosser as part of an audit occasioned by the diversion, and Ms. Grosser did not respond within OCDC’s deadline. Also, although Ms. Grosser generally complied with all trust accounting requirements, the audit did reveal that Ms. Grosser had left guardian ad litem (“GAL”) fees in her trust account longer than was proper.

A Disciplinary Hearing Panel advised that Ms. Grosser should receive a reprimand. Neither OCDC nor Ms. Grosser rejected this recommendation, but in July 2019, this Court asked the parties if they would concur in this Court imposing two years’ probation in addition to the reprimand. Ms. Grosser elected for briefing and argument on the matter instead of acceding to this request.

As set forth herein, Ms. Grosser believes proper weighing of aggravating and mitigating factors should result in discipline no greater than a reprimand, if formal discipline is to be imposed.

STATEMENT OF FACTS

Bar admissions and personal background. Ms. Grosser was admitted to practice law as a Missouri attorney on or about October 10, 1997, and has practiced law for twenty-two years, with the Missouri Bar Number 46447. (R. 29, Answer,)¹ Ms. Grosser's license is currently in good standing. (R. 29, Answer)

After obtaining her law license in 1997, Ms. Grosser worked as a Public Defender for approximately ten years in Clayton, Missouri and Hillsboro, Missouri. (R. 65) In early 2007, Ms. Grosser then became a prosecutor in Jefferson County, Missouri, where she worked for approximately five years. (R. 66) In approximately June 2012, Ms. Grosser started her own solo law practice – Grosser Law – where she currently works. (R. 67)

Throughout her career as a lawyer, Ms. Grosser has handled various legal matters including criminal defense, criminal prosecution, employment and civil rights cases. Ms. Grosser also serves as a guardian ad litem (“GAL”) and certified mediator. (R. 67-68)

Diversion Agreement. In September 2015, Ms. Grosser entered into a two-year Diversion Agreement with the Office of Chief Disciplinary Counsel. (R. 82) The Diversion Agreement stemmed from Ms. Grosser's representation of family friends, a married couple, who had engaged Ms. Grosser's services for the purpose of preparing a will. (R. 69) Unfortunately, the couple felt Ms. Grosser did not prepare the will fast enough, so Ms. Grosser refunded their money and subsequently received a diversion relating to this

¹ Citations to the record are denoted by the appropriate Record page, for example “R. (page number).”

engagement. (R. 117, Diversion Agreement) Prior to this Diversion Agreement, Ms. Grosser had no prior discipline history. (R. 118, Diversion Agreement)

The Diversion Agreement required Ms. Grosser to complete and Ms. Grosser completed a CLE series that included education on the duty of diligence. (R. 117, Diversion Agreement) The Agreement also required Ms. Grosser to file quarterly reports with the Office of Chief Disciplinary Counsel (“OCDC”).

In January 2018, Informant’s counsel Carl Schaeperkoetter (now retired) reviewed Ms. Grosser’s quarterly report and found Ms. Grosser was in compliance with the Agreement, which was scheduled to end April 30, 2018. (R. 123, Informant Exhibit 2)

Audit of Ms. Grosser’s Trust Account. As a condition of the Diversion Agreement, Ms. Grosser agreed that the OCDC could conduct a random audit of Ms. Grosser’s trust account. (R. 31, Answer) OCDC initiated an audit prior to Ms. Grosser’s completion of diversion. (R. 32, Answer) This audit determined that on occasion Ms. Grosser had left earned fees in her client trust account at US Bank for months longer than necessary (R. 32, Answer)

At the Disciplinary Hearing, Ms. Grosser explained that she had made this error because misunderstood how she was supposed to handle GAL fees. Ms. Grosser thought she was to allow all GAL fees on a case to accumulate in her trust account, and then sweep all of those funds out at the end of the GAL service, instead of the proper practice of sweeping GAL funds out earlier when earned. (R. 71-72) There was no evidence that Ms. Grosser’s practice of leaving earned fees in her trust account actually resulted in any harm to Ms. Grosser’s clients.

Ms. Grosser's response to OCDC record requests. OCDC initiated its review of Ms. Grosser's trust account by requesting that Ms. Grosser produce certain trust account records. Ms. Grosser did not timely produce the requested records. (R. 84) When Ms. Grosser did not produce the requested records by OCDC's initial deadline, OCDC attorney Mr. Schaeperkoetter and paralegal Kelly Dillon attempted to contact Ms. Grosser to request the records. Mr. Schaeperkoetter's attempts to reach Ms. Grosser include that Mr. Schaeperkoetter attempted to contact Ms. Grosser by telephone every work day between April 23, 2018, and May 1, 2018. In each instance, Mr. Schaeperkoetter left a message asking Ms. Grosser to return his call. (R. 90)

Twice Ms. Grosser responded to Mr. Schaeperkoetter's telephone calls between April 23, 2018, and May 1, 2018. (R. 90) In one instance, Ms. Grosser left a voicemail on May 1, 2018. That same day, Mr. Schaeperkoetter called Ms. Grosser back and left a message requesting a return telephone call, but Ms. Grosser did not return the call or have further contact with OCDC prior to the filing of the Information. (R. 91)

Ms. Grosser's mental health. During the Disciplinary Hearing, OCDC counsel Mr. Schaeperkoetter asked why Ms. Grosser did not just send the requested information. Ms. Grosser explained she was prioritizing client work over non-client work. (R. 91) Ms. Grosser further explained that she was struggling with depression, resulting in days where it was a task to even get out of bed. (R. 92) Ms. Grosser had not made the Rule 5.285 disclosure relating to such issues because Ms. Grosser did not intend to raise them at hearing.

Ms. Grosser's improvements since the incident. Ms. Grosser has adopted and is continuing to adopt procedures within her practice to prevent future problems, including that Ms. Grosser has retained a life coach and practice mentor to assist with her law practice, responsiveness to client and other communications, and the like. (R. 34, Answer) Ms. Grosser has also received further education and believes she has full understanding of her trust accounting obligations. (R. 96) Additionally, Ms. Grosser has contracted with an external receptionist organization to assist in answering her law firm's telephone calls. (R. 96)

Ms. Grosser's leadership of the organized bar. Ms. Grosser has been involved in a number of bar and civic organizations for many years, including as vice chair for the Bar Association of Metropolitan St. Louis ("BAMSL") Solo and Small Firm Committee. (R. 75) As part of her involvement with this BAMSL Committee, Ms. Grosser would help plan a yearly solo small firm CLE seminar. (R. 75)

Ms. Grosser was also involved with the Missouri Association of Criminal Defense Lawyers Juvenile Committee as the committee chair from 2015 through 2018. (R. 76) Ms. Grosser's committee chair duties included keeping up with legislation and communicating with the committee and lobbyists about juvenile criminal laws in the state of Missouri. (R. 76) Ms. Grosser was also appointed to and serves on the Jefferson County Drug Court Program and related Auxiliary support programs. (R. 77-78)

Hearing Panel's recommendation. A Hearing Panel heard the case against Ms. Grosser on October 22, 2018. Throughout the Hearing, Ms. Grosser admitted to the alleged

misconduct. The Hearing Panel recommended that Ms. Grosser be reprimanded. Neither Informant nor Ms. Grosser rejected the recommended reprimand. (R. 216)

On July 8, 2019, however, this Court directed that it would set the case for briefing and argument unless the “unless the parties agree to accept a reprimand without conditions and probation for a term of two years.” Ms. Grosser did not accept the proposed sanction, resulting in these proceedings.

POINTS RELIED UPON

1. THE UNDISPUTED FACTS, COMPELLING EVIDENCE IN MITIGATION, AND APPLICABLE PRECEDENT SUPPORT MS. GROSSER SHOULD RECEIVE NO MORE THAN A REPRIMAND WITHOUT CONDITIONS.

In re Elliott, 694 S.W.2d 262 (Mo. 1985)

In re Armano, Case No. SC9601 (Mo. Oct. 4, 2011)

In re Miller, 568 S.W.2d 246 (Mo. 1978)

ABA Standards for Imposing Lawyer Sanctions

2. THIS COURT SHOULD NOT IMPOSE CONDITIONS RELATING TO MENTAL HEALTH WHEN MS. GROSSER DID NOT TO SEEK MITIGATION UNDER RULE 5.285.

ARGUMENT

Preliminary statement. Ms. Grosser has consistently admitted that Ms. Grosser violated Missouri Supreme Court Rule 4-1.15(a) because she incorrectly retained earned GAL fees in her client trust account on occasion for months longer than was necessary.

Additionally, Ms. Grosser has admitted to failing to cooperate with disciplinary authority in violation of Missouri Supreme Court Rule 4-8.1(c) by failing to communicate with Informant counsel regarding the request for bank records despite numerous requests to do so. Informant has described Ms. Grosser's conduct as "negligent" rather than "knowing." (R. 131, Informant Trial Brief) Rule 4-8.1(c), however, prohibits only a "knowing" failure to respond.

Nevertheless, any sanction or punishment issued against Ms. Grosser should be no more than a straight (unconditional) reprimand, without any extra conditions or requirements.

Standard of review. In lawyer discipline cases, this Court reviews the disciplinary hearing record and the evidence *de novo*. *In re Wiles*, 107 S.W.3d 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).

Standard of 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 the 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: The undisputed facts, compelling evidence in mitigation, and applicable precedent support Ms. Grosser should receive no more than a reprimand without conditions.

Case law from previous Missouri attorney discipline cases supports the imposition of at most a straight reprimand without conditions. In fact, published opinions that relate to imposition of a reprimand for mishandling of client property involve much greater wrongdoing than is at issue in the present case. Such precedent actually supports that Ms. Grosser should receive no formal discipline for the conduct at issue.

A. Missouri case law supports Ms. Grosser should receive at most a simple reprimand for the conduct at issue.

Recent and long-standing precedent support that more severe conduct than that at issue in Ms. Grosser’s case results in a reprimand. Ms. Grosser provides five recent examples. First, In *In re Kwado Jones Armano*, Case No. SC9601 (Mo. Oct. 4, 2011), for example, this Court imposed only a reprimand on Mr. Armano for violations of Rules 4-1.15(c) and 4-1.15(d). Mr. Amano conduct resulting in the reprimand, according to the Brief filed by the Office of Chief Disciplinary Counsel, included that Armano “routinely

us[ed] his trust account for personal banking.” Armano’s violations were more numerous and serious, and involved much greater sums of money than any trust accounting mistake by Ms. Grosser. Further, Ms. Grosser’s trust account was generally found to comply with all trust accounting regulations, except that she sometimes left GAL earned fees too long. Thus, Ms. Grosser should not receive a harsher penalty than what Armano received, a reprimand without further conditions. In fact, *Armano* supports that a sanction even less than a reprimand would be more appropriate.

Second, in *In re Brent L. Winterberg*, Case No. SC97492 (Mo. Dec. 18, 2018), the attorney received only a reprimand. The Hearing Panel decision accepted by Informant, Winterberg, and this Court reveals that Winterberg (a) failed to timely prepare a proposed judgment for his client, causing his client financial injury; and (b) failed to appear for an investigative hearing before a Regional Committee panel. In this case, Ms. Grosser’s conduct caused no financial injury to anyone, and Ms. Grosser’s belated response was significantly less egregious than Mr. Winterberg missing an investigative meeting.

Third, in *In re Patrick J. Cullan*, Case No. SC97305 (Mo. Oct. 19, 2018), this Court entered a reprimand on reciprocal discipline after Mr. Cullan was found to have violated Rule 4-8.4(c) by engaging in conduct involving fraud, deceit or misrepresentation. In applying for admission *pro hac vice* in Iowa, Mr. Cullan had apparently marked “no” in response to a question about whether he had previously been sanctioned twice – for more than \$14,000 and more than \$8,000 – in the previous four years.

Fourth, in *In re Thomas Christian Cox*, Case No. SC86837 (Mo. Dec. 20, 2017), Mr. Cox was found to have repeatedly placed advance fees (of as much as \$17,000 and

\$20,000) into his operating account, and also paying personal expenses from his trust account. Mr. Cox also failed to maintain a balance on his trust account sufficient to pay trust account checks issued to third parties. This Court nevertheless imposed a reprimand on Mr. Cox – apparently without further conditions, although the Hearing Panel had suggested certain conditions relating to Mr. Cox receiving further training and undergoing future audits of his trust account.

Fifth and finally, in *In re Troy R. Penny*, Case No. SC96248 (Mo. Sept. 26, 2017), Mr. Penny (a) had in 2011 received a cautionary letter for overdrafting his trust account, and (b) in 2013-14 was found to have used nevertheless was found to have used earned fees left lingering in his trust account to pay his tax preparer and certain tax obligations (at least five payments in total). This Court nevertheless imposed a reprimand without further conditions on Mr. Penny.

In addition to recent precedent such as *Armano*, *Winterberg*, *Cullan*, *Cox*, and *Penny*, older precedent supports that a reprimand would be the harshest sanction Ms. Grosser should receive. In *In re Miller*, 568 S.W.2d 246 (Mo. 1978), this Court imposed only a reprimand where the lawyer Miller misappropriated \$30,000.00 in client funds purportedly held in trust for a client, and also caused the client to transfer an interest in real estate to the client's wife. Likewise, in *In re Elliott*, 694 S.W.2d 262 (Mo. 1985), this Court imposed only a reprimand where the lawyer – in addition to maintaining poor records and having insufficient funds in the account – had mishandled deposits, failed to forward payments to a client promptly, and failed to respond to client inquiries about those funds.

Ms. Grosser is not seeking to make light of her conduct. Ms. Grosser understands what she did wrong, and accepts responsibility for that conduct. However, Ms. Grosser also believes strongly that the punishment should fit the misconduct. Ms. Grosser's errors were significantly less than those in *Armano*, *Winterberg*, *Cullan*, *Cox*, *Penny*, Miller, and *Elliot*. Thus, Ms. Grosser should not receive harsher sanctions than what those lawyers received – a simple reprimand.

From Missouri Supreme Court's own precedence, Ms. Grosser should be sanctioned with nothing more than a reprimand without conditions.

B. Under ABA Standard 9.32, Ms. Grosser's mitigating evidence supports a downward departure from the sanction her errors would merit.

In addition to the nature of her misconduct, Ms. Grosser has provided substantial evidence of evidence in mitigation that, under the *ABA Standards for Imposing Lawyer Discipline* Standard 9.32, should result in her receiving a less harsh sanction. ABA Standard 9.32 lists the following mitigating factors that support imposition of a lighter sanction than otherwise indicated:

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify consequences of misconduct;

- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) character or reputation;
- (h) physical disability;
- (i) mental disability or chemical dependency including alcoholism or drug abuse [];
- (j) delay in disciplinary proceedings;
- (k) imposition of other penalties or sanctions;
- (l) remorse; and
- (m) remoteness of prior offenses.

Ms. Grosser's own mitigating evidence demonstrates (a) absence of a prior disciplinary history; (b) absence of a dishonest or selfish motive; (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure and cooperation with disciplinary counsel; and (g) good character and reputation.

Unlike *Miller*, for example, Ms. Grosser clearly had no selfish or dishonest motive. In fact, the only error she made in handling trust account funds was leaving GAL fees in her trust account *for too long* after the fees were earned, because Ms. Grosser did not have a full understanding regarding how GAL fees should be handled. OCDC has offered no evidence anything Ms. Grosser did was due to dishonesty or selfishness.

Ms. Grosser has also demonstrated a good character and reputation, including

substantial involvement in the legal community. Ms. Grosser has served as Chair and Vice Chair of the Bar Association of Metropolitan St. Louis Solo & Small Firm Section, a vibrant group that holds its own large Section continuing legal education program. Ms. Grosser has also chaired the Juvenile Committee of Missouri Association of Criminal Defense Lawyers, and participated in the Jefferson County Drug Court Program and related Auxiliary support programs.

Additionally, Ms. Grosser has subsequently adopted and continues to adopt procedures within her practice to prevent such future problems that originated these proceedings, including that Ms. Grosser has retained a life coach and contracted with an external receptionist service to assist her firm in answering telephone calls.

Finally, although Ms. Grosser initially was not timely in her response to the Informant's request for records and to the Information, Ms. Grosser ultimately cooperated in the disciplinary process including admitting her misconduct and showing remorse and appearing before the Disciplinary Hearing Panel where she testified and answered questions under oath from the Informant's counsel.

These factors support mitigating or lessening any disciplinary sanction Ms. Grosser should receive. Accordingly, it would be unfair to instead impose a greater disciplinary sanction on Ms. Grosser.

POINT RELIED #2: This Court should not impose conditions relating to mental health when Ms. Grosser did not to pursue mitigation under Rule 5.285.

Ms. Grosser has made clear that she should receive discipline no harsher than a simple reprimand. Yet, if additional conditions are imposed, fundamental fairness dictates any conditions not include conditions relating to mental health treatment.

As this Court is aware, Missouri Supreme Court Rule 5.285 imposes special requirements if a lawyer intends to seek mitigation for mental health during a lawyer discipline proceeding. The lawyer must provide notice of intent to seek such mitigation when answering the formal charge, and then submit to an independent medical examination.

Although Ms. Grosser included a Rule 5.285 affirmative defense, Ms. Grosser did not seek mitigation under Rule 5.285. In fact, the only reference to any mental health issues at the Disciplinary Hearing arose when Informant pressed Ms. Grosser to explain her belated responsiveness to communications from OCDC. The Hearing Panel Chair recognized that Informant's questioning opened the door for such testimony; to provide a complete response, Ms. Grosser had to provide applicable information. But Ms. Grosser has not sought mitigation for such conditions.

Nevertheless, in proposing conditions for Ms. Grosser's sanction, Informant has suggested conditions include requirements relating to Ms. Grosser's mental health. Imposing such conditions would be fundamentally unfair, in light of the fact Ms. Grosser chose not to invoke the Rule 5.285 process. Rather, while Ms. Grosser believes no further

conditions should be imposed beyond a simple reprimand, she certainly believes any conditions that are imposed should not include conditions relating to mental health.

Conclusion. Proper consideration of all evidence in this case, as well as the applicable precedent, support that Ms. Grosser should receive a sanction no harsher than a straight reprimand without conditions. In fact, although Ms. Grosser recognizes this Court may follow the Hearing Panel's recommendation and impose a reprimand, Ms. Grosser believes the interests of protecting the public and administration of justice will be adequately served by not imposing formal discipline in this case.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that a copy of the foregoing document was served via the Court's electronic filing system CaseNet on this 18th day of November, 2019, to the following:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Missouri Supreme Court 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 Missouri Supreme Court Rule 84.06(b) in that it contains 3,511 words.

/s/ Michael P. Downey