SC98353

IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:

SYREETA L. MCNEAL

Missouri Bar No. 60207

Respondent.

RESPONDENT'S BRIEF

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ARGUMENT

RESPONSE IN SUPPORT OF INFORMANT'S POINT RELIED ON II

II. RESPONDENT AGREES THAT THE SUPREME COURT SHOULD INDEFINITELY SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR ONE YEAR, STAY THE SUSPENSION, AND PLACE RESPONDENT ON PROBATION FOR THREE YEARS BECAUSE RESPONDENT'S MENTAL HEALTH ISSUES EXPLAIN AND MITIGATE THE LEVEL OF DISCIPLINE THIS COURT SHOULD IMPOSE AND WITH PROPER MENTAL HEALTH TREATMENT, RESPONDENT IS UNLIKELY TO HARM THE PUBLIC OR CAUSE THE COURTS OR PROFESSION TO FALL INTO DISREPUTE.

Respondent committed misconduct in three separate fee disputes in the summer and fall of 2018. Prior to these three instances, no one had accused Respondent of misconduct in regard to how she collects fees from her clients. After this time period, there have been no bar complaints whatsoever against Respondent. However, there is absolutely no dispute that Respondent violated her ethical obligations in regard to the three fee disputes for which she is charged in this case.

In regard to her clients Willie and Teresa Smith, Respondent called them late at night and used abusive language to collect legal fees that they owed her.

She threatened Joseph Taylor, a former client, that she knew about lies he had told her in regard to his personal injury claim and that these lies would come out if she sued him for fraudulently inducing her to enter into a contingent fee agreement with him. To avoid this, Respondent demanded that Mr. Taylor pay her $350 to release her attorney's lien on his personal injury claim, which Mr. Taylor eventually did.

Respondent threatened another former client, Virginia McNeal, with revealing her illegal acts if she did not settle a fee suit that Respondent had brought. Respondent then proceeded to report to the IRS that Ms. McNeal had not paid taxes for several years. However, Ms. McNeal had filed her back taxes by the time of Respondent's report.

In regard to both Joseph Taylor and Ms. McNeal, Respondent repeatedly told their successor counsel that she had a right to be paid for work performed on unrealized contingent fee contracts and to reveal confidences as there was a fee dispute. Respondent repeatedly made these claims without having done research to support her opinion. She also continued to insist on the above even after her clients' new counsel corrected her. Respondent filed a suit against Ms. McNeal in which

she made frivolous objections to discovery, and which she eventually settled for $6,000.

Respondent does not dispute that the above has occurred and constitutes violations of the ethical duties for which Informant has charged her. Similarly, Informant does not dispute that mitigating factors exist that warrant a downward deviation in the discipline imposed. Respondent has expressed remorse, has made full and free disclosure to the Informant, and had a cooperative attitude toward the proceedings. She was also stressed financially and about her father's health when the misconduct occurred.

In addition to the above mitigating factors, Respondent suffered from three previously undiagnosed mental health disorders. These three mental disorders caused Respondent to see threats that were not there, to overreact to those perceived threats, and to blame others. Dr. Elizabeth Pribor, an independent mental health examiner, has opined that Respondent's conditions contributed to cause the above misconduct through Respondent's unthinking angry escalation. Equally important, Dr. Pribor has stated that if Respondent's mental disorders that led to that behavior are treated, then Respondent is unlikely to harm the public. To that end, Respondent is currently in treatment and is committed to obtaining treatment even after her discipline ends.

The above mitigating factors should bear heavily on the discipline imposed on Respondent, which is why, after interviewing her exhaustively and in detail, the Panel recommended an indefinite suspension with leave to reapply in a year but stayed that suspension subject to the Respondent successfully completing three years of probation with terms to ensure that she gets the treatment she needs. This Court should accept the Panel's recommendation for discipline because, given the mitigating factors, it is a reasonable and appropriate penalty for the misconduct that the Respondent has admitted.

A survey of rulings around the country show that the Panel's recommended discipline is appropriate. The baseline discipline that courts issue for similar misconduct is a suspension with mitigating factors allowing for a stay of that suspension subject to probation. The fact that the baseline discipline is suspension is important here as none of the attorneys in the below cited cases had a mitigating factor as compelling as the mental disorders that substantially contributed to Respondent's misconduct.

There is no Missouri case law directly on point. The closest Missouri case that Respondent could find to the wrongdoing Respondent committed is *In re Lim*, 210 S.W.3d 199 (Mo. 2007). In *Lim,* the attorney sent a letter to the Immigration and Naturalization Service (INS) reporting that the former clients "lack the good moral character needed to obtain immigration benefits" because they had "lied and

deceived our office" and had an outstanding balance of "over $7000…." The attorney went on to ask the INS to place the letter in the clients' file "to prevent them from obtaining any further immigration benefits." Unlike here, there was no violation of Mo. Sup. Ct. R. 4-1.6(a) in *Lim*, because Lim's letter to the INS did not disclose confidential factual information. However, like here, *Lim* involved a lawyer reporting negative information about a client to a federal administrative agency as part of a fee dispute. This Court imposed a public reprimand on the attorney for the letter.

Therefore, this Court has already held that similar, but lesser, misconduct only warrants a public reprimand. Therefore, a stayed suspension, such as the Panel recommended, is a natural escalation from the discipline imposed in *Lim*. That is especially true here given the mitigating factors present, particularly the mental disorders that have now been diagnosed.

Even when the lawyer actually reveals client confidences as part of a fee dispute, courts have stayed that discipline when mitigating factors warrant it. In *Cleveland Metro. Bar Assn. v. Heben*, 81 N.E.3d 469 (Oh. 2017), attorney Edward Heben moved to withdraw from his client's divorce case. To support his withdrawal, Heben submitted an affidavit. In that affidavit, Heben recounted communications he had had with his client about the scope of his representation and his compensation, accused her of refusing to pay his agreed-upon fees "without cause," and also

disclosed legal advice that he had given her. He described his client's discharge of him as "retaliatory" and alleged that it had "occurred because of his advice to her concerning her objectionable and potentially illegal actions relating to her ex-husband," which he characterized as a problem "similar to the one he experienced in his previous representation of her." The client denied engaging in the allegedly fraudulent activity and denied discussing it with Heben. In imposing discipline, the court found that an aggravating factor existed as Heben had "been motivated by a vengeful purpose owing to his displeasure at being dismissed as counsel without having been paid." But the court also found that mitigating factors existed, because Heben had no prior disciplinary record, had cooperated in the disciplinary proceedings, and had submitted letters attesting to his good character. Based on balancing the above, the court imposed a fully stayed one-year suspension for Heben's disclosure of client confidences as part of a fee dispute.

The facts of *Heben* are similar to those in this case. Like the attorney in *Heben*, Respondent revealed alleged client illegal activity as a part of a fee dispute. Here, Respondent reported to the IRS that Ms. McNeal had not filed taxes for several years. Whereas, in *Heben,* the attorney apparently made up the illegal activity altogether, Respondent acted on information about Ms. McNeal's tax filings that was out of date. Like Respondent, Heben had cooperated in the investigation. While Respondent made threats in two cases, she only actually disclosed client confidences

in one case like *Heben* - and again, the attorney in *Heben* did not have mental disorders that allegedly contributed to his misconduct. But even without that additional mitigating factor, the *Heben* court found that a stayed suspension was warranted, given the existence of other mitigating factors – both of which are also present here -- namely remorse and cooperation. But Respondent also has the additional and very substantial mitigating factor that her mental disorders caused her to perceive the existence and degree of undeserved criticism -- all far in excess of what would be perceived in the absence of those disorders. The disorders heavily contributed to the behavior at issue here – and fortunately it is remediable with treatment and physician supervision, now that it has been identified.

Heben is not an exception in regard to the typical level of discipline imposed on lawyers for threatening to expose alleged client illegality in a fee dispute. It should be noted that the lawyers in those cases did not suffer from any contributory mental disorders, whereas here, Respondent's diagnosed disorders have been a key contributory factor in her unprofessional behavior. In *People v. Farrant*, 852 P. 2d 452, 453–54 (Colo. 1993), the attorney represented a client in a bankruptcy proceeding. The attorney filed an application for compensation with the bankruptcy court. The client filed an objection to the attorney's fee application. In response, the attorney wrote the client a letter enclosing a copy of a letter that he had drafted to the United States Trustee assigned to the bankruptcy matter. The attorney's letter

to the trustee purported to reveal criminal activity on the part of a principal of the client. The attorney very inappropriately implied that he would have to send the letter disclosing the alleged criminal activity to the trustee unless the client withdrew the objection to the fee application. The court found that the attorney threatened criminal prosecution in order to induce the client to withdraw the objection to his application for attorney's fees and to immediately pay respondent the fees requested. The attorney in *Farrant* defaulted in the ethics hearing in a brute disregard of the discipline process, so all the allegations against him were deemed admitted with no mitigating factors presented. The court found that, under the ABA standards, a suspension was warranted as the attorney knew he was violating a rule with potential injury to the client. But even with all of that, the *Farrant* court found that a mere 60-day suspension was the appropriate discipline.

Like here, the lawyer in *Farrant* threatened to reveal criminal acts unless the client paid him. But, unlike here, the lawyer in *Farrant* did not cooperate in the investigation or show remorse, much less have a mitigating mental disorder. Worse yet, the lawyer in *Farrant* did not even bother to participate in the disciplinary hearing. Nevertheless, the court only imposed a 60-day suspension of the lawyer's license. Here, Respondent has voluntarily agreed to a much longer suspension than that imposed in *Farrant* if she does not successfully complete her three-year

probation. So, *Farrant* certainly supports the Panel's recommended discipline as being appropriate.

As referenced earlier, the above cases represent the norm for the type of disciplinary sanction that courts impose on lawyers for making threats or revealing client confidences in fee disputes. *See e.g., In Matter of Yarborough*, 327 S.C. 161, 488 S.E.2d 871 (1997) (suspending an attorney for six months for having sent a letter to a client in which the attorney promised not to continue pursuing criminal case against client for breach of trust with fraudulent intent if she paid the attorney the total amount that she owed for his representation). In fact, the New York Supreme Court handed out even less punishment for misconduct similar to that of Respondent *In Matter of Blumberg*, 171 A.D.2d 383, 384, 576 N.Y.S.2d 888, 888 (1991). In *Blumberg*, the attorney was charged with professional misconduct involving dishonesty, fraud, and deceit revealing of confidence or secret of client, use of confidence or secret to client's disadvantage, and failure to pay to client funds in attorney's possession. The wrongdoing occurred in attempts by the attorney to collect fees that he believed were owed to him by several different clients. The court found that the above misconduct by the attorney warranted a censure of the attorney involved.

Moreover, the cases that Informant cites in its Brief show similar outcomes to the ones cited above. In one case cited by Informant, *State ex rel. Oklahoma Bar*

Ass'n v. Moody, 394 P.3d 223 (Ok 2017), the court only publicly reprimanded an attorney for sending threatening emails to the client for failing to pay his bills. In another case cited by Informant, *In re Disciplinary Proceeding Against Boelter*, 139 Wash. 2d 81, 84, 985 P.2d328, 331 (1999) the attorney received a six month suspension for threatening to report his client to the IRS and misrepresenting that he had taped evidence of the client confessing to concealing assets from the IRS. In fact, the harshest sanction handed down for similar misconduct in a case cited by either party was still a suspension. *State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Wilson,* 262 Neb. 653, 634 N.W.2d 467 (2001). In *Wilson*, the attorney threatened to report to the Immigration and Naturalization Service (INS) that the client's job status had changed and to reopen client's divorce case if certain moneys were not paid. Code of Prof.Resp., DR 1–102(A)(1, 6). The court found that a two-year suspension was the appropriate sanction.

Likewise, while it does not involve a fee dispute, *In re Bryan*, 275 Kan. 202, 61 P.3d 641 (2003), is informative on the amount of discipline imposed by courts for wrongful disclosure of client confidences even when combined with other wrongful acts. In *Bryan*, the court held that public censure was appropriate disciplinary sanction for attorney's conduct in engaging in sexual relationship with client and thereby creating a conflict of interest, revealing client confidences, attempting to reveal client confidences to the former client's litigation adversary, and

failing to take steps to the extent reasonably practicable to protect client's interests after termination of representation.

In sum, around the country, the discipline handed down for similar misconduct ranges from public reprimand to suspension. Here, Respondent has agreed to a suspension. That is a fair outcome given the mitigating factors present. First, Respondent has expressed remorse and cooperated in the Informant's investigation. Second, Informant agrees that Respondent has shown her mental health caused the misconduct.

Per her IPE report, Dr. Pribor believed all three disorders (which were diagnosed and validated through proven scientifically verified standard objective verified testing administered by professionals in addition to Dr. Pribor's interviews with Respondent) substantially contributed to the violations currently before this court. The IPE report explained the involvement of those disorders in the behavior raised by the OCDC information. *See* Appendix (bolding supplied for quick reference to key portions).

That evidence warrants significant downward departure from the appropriate discipline because: (1) It identifies and explains the mechanisms behind Respondent's episodic atypical behavior that led to the complaints here, via momentary situational interference with Respondent's normal logical processes, and (2) It explains why, as no party to this case disputes, Respondent is unlikely to

commit further offenses, provided that she gets treatment to resolve and manage her mental disorders. *In re Belz,* 258 S.W.3d 38, 46 (Mo. 2008) (a mental disorder is a mitigating factor that can support downward deviation in discipline for even intentional misconduct, such as misappropriating client funds). Here, Respondent is currently getting treatment and will continue to get treatment under her probation terms, and has acknowledged that she will need treatment after her probation ends.

As treatment will help prevent future misconduct, Respondent believes that the suspension should be stayed while she is under probation with intensive supervision. Rule 5.225 provides an attorney is only eligible for probation for misconduct that does not warrant disbarment. The above case law in which courts routinely issue discipline far short of disbarment for similar misconduct means that Respondent is eligible for probation.

Probation is appropriate so long as Respondent is: (a) unlikely to harm the public; (b) can be adequately supervised; and (c) is able to practice law without causing the courts or profession to fall into disrepute. Here, the facts show that the above requirements are present. Dr. Pribor does not believe that a reoccurrence is likely during the probation terms as Respondent will be in treatment per the terms of the probation. Furthermore, Respondent has had no further bar complaints since she has started her therapy, which bodes well for lack of future reoccurrence. Respondent has also agreed as part of her probation to allow the Informant access to

her medical treatment which will allow relevant supervision of Respondent to occur. It should also be noted that, while her mental disorders led to Respondent's conduct that was intentional and unbecoming of a lawyer, the conduct was not of the type that allowing her to practice will cause the legal profession to fall into disrepute. This is evidenced by the above cases, where the courts imposed similar or lesser discipline for similar misconduct (and again, in contrast, the attorneys in those cases did not have specific contributory mental disorders).

For all the above reasons, Respondent is a good subject for probation, and she asks this Court to uphold the Panel's recommendation of a stayed suspension and probation as being a reasonable and appropriate sanction.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the attached brief complies with Supreme Court Rule 84.06(b) and contains **3,266** words, excluding the cover, the certificate of service, the certificate of compliance and the appendix as determined by Microsoft Word software, utilizing 13-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this **29th** day of **May, 2020**, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all participating parties of record.

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