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IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
JOVANNA R. BEARDEN	)	**Supreme Court No. SC100642**
110 East Cherry Street	)	
Nevada, MO 64772	)	
	)	
Missouri Bar No. 60294	)	
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF CHIEF DISCIPLINARY COUNSEL

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INFORMANT

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STATEMENT OF JURISDICTION

This action is one in which Informant, the Chief Disciplinary Counsel, is asking this Court 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 Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040, RSMo.

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STATEMENT OF FACTS

General Information Regarding Respondent

Respondent was licensed to practice law in Missouri on or about April 16, 2008. Respondent's Missouri Bar No. is 60294, and her license is currently in good standing. She practices in western/southwestern Missouri with two other lawyers, in a practice that focuses on criminal justice primarily through appointments by the Missouri State Public Defender's office as conflict counsel, as well as family law, and juvenile office appointments as needed by local circuits. For the majority of her career, Respondent handled consumer debt defense, Fair Debt Collection Practices Act (FDCPA) matters, and bankruptcy cases but has recently shifted primarily to supporting the firm's other attorneys. Respondent has no disciplinary history. **R. at pp. 38-39.**

General Information Regarding Chapter 7 Bankruptcies

The alleged misconduct in this case arises from Respondent's handling of Chapter 7 bankruptcies. These allegations are easier to evaluate with an understanding of the basic law pertaining to Chapter 7 bankrupties. This general information is taken directly from the Joint Stipulation document that was prepared by the parties. **R. at pp. 39-42.**

Generally, consumers seeking bankruptcy protection may file a Chapter 7 petition. Theoretically, with a Chapter 7 bankruptcy, all of a debtor's assets, except for exempt assets or assets with no equity, are sold off and the proceeds are distributed among unsecured creditors. Bankruptcy law permits debtors to keep a certain amount of property after going through bankruptcy proceedings. However, in most consumer Chapter 7 cases, the debtor's assets are exempt or have no equity, and the debtor is therefore

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permitted to retain those assets. These types of Chapter 7 cases are referred to as "no asset" Chapter 7 cases.

Ordinarily, Chapter 7 bankruptcy clients must pay all attorney fees and expenses prior to the filing of the bankruptcy petition. This is done because fees or expenses owed to the attorney at the time of filing cannot be collected while the bankruptcy is ongoing or after the debtor receives his or her discharge, because upon the filing of the bankruptcy petition, an automatic stay goes into effect that halts actions by creditors, with certain exceptions, from collecting debts from the debtor. 11 U.S.C Section 362. At the conclusion of the bankruptcy, the debtor's unsecured debts (except for certain limited exceptions) are discharged. The discharge releases the debtor from personal liability of the debt and prevents the creditor from taking any collection action against the debtor. 11 U.S.C. Section 524(f). As a result, most attorneys require their attorney fees to be paid in full before filing the petition upon behalf of the debtor. Attorney fees incurred for post-petition services, however, may survive the discharge, assuming there has been proper disclosure and compliance with applicable rules.

Bifurcating occurs when the lawyer unbundles the preparation and filing of the Chapter 7 petition from the other required legal work. Unbundling is the practice of limiting the scope of services that an attorney will initially provide and involves dividing comprehensive legal representation into a series of discrete tasks. *In re Seare,* 493 B.R. 158 (Bankr. D. Nev. 2013). When bifurcation is employed, the client's attorney fee obligation for post-petition services becomes a post-petition, non-dischargeable debt that can be collected from the client after the bankruptcy is filed.

With a bifurcated filing, the attorney typically files the bankruptcy petition and maybe just a handful of the required schedules and documents. The attorney then files the other required schedules and statements at a later date. This practice differs from a typical "no asset" Chapter 7 case where all of the schedules and the statements are routinely filed with the initial petition. For example, Local Rule 1007-1 of the United States Bankruptcy Court for the Western District of Missouri identifies all of the "lists, schedules, statements, and other documents" that "shall" be part of the initial pleadings.

In a bifurcated Chapter 7 bankruptcy, the client pays no fee or a smaller fee for the filing of the initial petition and then, in a completely separate transaction, engages the lawyer to handle all post-petition matters, including the filing of schedules and statements, for a larger fee. The client may also make arrangements to make monthly installment payments on those post-petition fees.

To facilitate the bifurcation, and to accommodate clients interested in financing the costs associated with a Chapter 7 bankruptcy, clients are asked to sign two separate fee agreements at two different times. Initially, the attorney requires the client to sign a prefiling fee agreement. This agreement limits the attorney's scope of services generally to the filing of the petition. After the attorney files the petition, the attorney requests that the client sign a post-petition fee agreement. This second agreement addresses the remainder of the work that needs to be completed on the bankruptcy, including the filing of all the required statements and schedules. The post-petition agreement may also allow the client to make installment payments on the fees owed.

Under this model, bifurcating the bankruptcy case creates potential risks for the

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debtors. For one thing, it is difficult for the debtor to either find new counsel or handle a bankruptcy *pro se* if they do not enter into the post-petition contract with the original attorney. Additionally, bifurcated filings are not favored by the bankruptcy court and if all the bankruptcy schedules, statements, and documents are not filed within 14 days of the filing of the bankruptcy petition, the bankruptcy court will dismiss the petition. Finally, the cost to the debtor can be higher.

There can also be advantages to bifurcation; primarily, there is no need for the debtors to pay all of the attorney fees up front. This can be significant to a debtor who is facing legal collections and dealing with garnishments. Accordingly, debtors can obtain relief faster, and they appreciate the convenience of making installment payments post-discharge. Notably, bifurcation is not expressly prohibited by the bankruptcy court, but attorneys who choose to offer this option to their clients must be careful to comply with the Bankruptcy Code, the local rules, and all ethical requirements.

For one thing, the Bankruptcy Code and the applicable local rules require attorneys to make certain disclosures regarding their attorney's fees. Section 329(a) of the Bankruptcy Code provides:

> Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the

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case by such attorney, and the source of such compensation.

The bankruptcy court does not typically review attorney fees. However, if the attorney's compensation exceeds the "reasonable value" of the bankruptcy-related services, § 329(b) in turn authorizes the court to cancel the agreement or order the return of a payment to the extent the payment is excessive.

Section 329(a) is implemented by Rule 2016(b). Rule 2016(b) requires that debtors' attorneys disclose the details of their fee agreements and timely supplement their disclosures. It provides:

> Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief . . . the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with another entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney . . . A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.

To comply with the mandates of § 329 and Rule 2016(b), attorneys must file a "Disclosure of Compensation of Attorney for Debtor(s)," otherwise known as Official Form B2030. **R. at pp. 64-65 (Ex. 1 to Joint Stipulation).**

Local Rule 2016-1 in turn, implemented § 329 (and § 330) and Rules 2016 and 2017. Local Rule 2016-1 excuses attorneys from filing motions seeking court approval of

their fees, provided two conditions are met. First, the attorneys must certify that they have executed the court's Rights and Responsibilities Agreement for one flat fee for pre-filing and post-filing legal services. Second, that fee must not exceed the "No Look" amount that changes from time to time. Currently, the "No Look" amount is $4,100 for someone with below median family income. **R. at p. 66 (Ex. 2 to Joint Stipulation).**

The Rights and Responsibilities Agreement ("RRA") is a local form that identifies both the pre-petition and post-petition duties of the attorney and the debtor. Where the two conditions for using the RRA are not met, attorneys are required to file a motion asking the bankruptcy court to approve their fees. Additionally, those fees must be held in the attorney's trust account until payment is approved by the court. The RRA is not filed with the bankruptcy court because it is an agreement between the attorney and the debtor; rather, the attorney files a certification stating that the RRA has been executed.

Notably, it is not appropriate to use the Rights and Responsibilities Agreement in bifurcated cases because the RRA requires the attorney to "provide all services necessary for representation" and expressly details the prefiling and post-petition services. It also expressly provides that the attorney cannot withdraw from the representation without approval from the bankruptcy court. Consequently, with bifurcated cases, the attorney is required to file an application seeking the bankruptcy court's approval of his or her fees.

Respondent Signed on with Fresh Start Funding

Financing companies have marketed the "zero down" bifurcated bankruptcy model to attorneys, making representations that the company would provide the necessary training and forms to the attorneys to ensure compliance with both the Rules of

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Professional Conduct and the Bankruptcy Code and Rules. Fresh Start Funding (FSF), an Arizona-based finance company, marketed its services to Respondent representating that it was attorney owned and would provide support to her regarding compliance with the Bankruptcy Code and Local Rules. **R. at p. 45.**

On or about October 2, 2019, Respondent entered into a financing agreement with FSF. Pursuant to the terms of that agreement, FSF granted Respondent a $50,000 line of credit secured by her account receivables consisting of fees to be paid by prospective bankruptcy clients. FSF provided Respondent with forms, sample documents, sample language for pre-filing and post-filing agreements, and training for how to use the forms according to their method, which they assured Respondent complied with all required bankruptcy and local rules. **R. at pp. 45-46.**

Respondent's financing agreement with FSF included a term titled "Defense Guarantee:"

> In the event [Respondent] is challenged by the US Trustee or a Bankruptcy Judge with regard to the legality or ethical propriety of chapter 7 bifurcation, FSF will defend [Respondent] in accordance with FSF's Defense Guarantee Policy described on the FSF website (the "Defense Policy"). [Respondent] understands that in order to qualify for the Defense Policy, [Respondent] must satisfy the "Attorney Responsibilities" outlined in the Defense Policy, which responsibilities include with limitation bifurcating the case correctly, making proper disclosures to the court, obtaining informed consent from the debtor, and charging a reasonable fee

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for the post-petition legal services. If a final non-appealable order is issued holding that bifurcation of Chapter 7 cases is not allowed under the Bankruptcy Code, FSF will indemnify [Respondent], in accordance with the Defense Policy against disgorgement of fees in an amount not to exceed $50,000.

R. at pp. 46-47.

Respondent Began Bifurcating Some Bankruptcy Cases and Assigning her Interest in the Installment Contracts for the Post-Petition Work

Shortly after signing up with FSF, Respondent began bifurcating her fee agreements for Chapter 7 debtors who desired a "no fee down" arrangement. The contracts and disclosure forms executed by Respondent and her clients were submitted to and approved by FSF in each case. Respondent bifurcated a total of ten Chapter 7 bankruptcy cases. **R. at p. 47, pp. 67-68 (Ex. 3 to Joint Stipulation).**

Respondent presented these clients with a pre-petition services agreement that limited the scope of her services. That agreement specified that Respondent's contractual responsibilities would end upon the filing of the bankruptcy petition. The pre-petition agreement gave the client two options for paying for the Chapter 7 bankruptcy. The client could:

a. Prepay a fixed amount for the handling of all aspects of the bankruptcy (traditional); or

b. Choose to go ahead and file the petition immediately, but pay a larger fee amount (bifurcated).

R. at pp. 47-48, pp. 69-75 (Ex. 4 to Joint Stipulation).

Respondent usually charged higher fees to the clients who opted to bifurcate their Chapter 7 bankruptcies. During the relevant time period, Respondent typically charged $2,000 for a traditional bankruptcy that involved paying the attorneys' fees in advance and filing all of the client's associated schedules and statements with the bankruptcy petition. In cases where Respondent charged bifurcated fee agreement clients a higher amount, it was $500 more for these services. **R. at p. 48.**

The higher fee was justified in the fee agreement by explaining that Respondent was taking on extra work and extra risks by allowing clients to pay the fee over time. Additionally, the pre-filing agreement included this information:

> FSF charges a fee for its financing, payment management, credit reporting and other services to the Law Firm, and that fee is equal to 25% of the fees that the Law Firm charges you under the Post-Filing Agreement.

When signing the pre-petition agreement, the debtor acknowledged that s/he had already received a copy of the second, post-petition agreement and had agreed to the significant terms: the attorney fee amount and the services to be provided. **R. at p. 48.**

The pre-petition services agreement also included a provision related to the $335 filing fee, which is usually required to be paid by the debtor at or before the time that the bankruptcy petition is filed:

> After the case is filed, I may enter into the post-petition services agreement described below in which case [Respondent] will advance the $335 filing fee and I will repay [Respondent] in accordance with the agreement.

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However, Respondent's post-petition agreement makes no mention of the $335 filing fee, even though that agreement includes a detailed list of post-petition services. **R. at p. 49, pp. 76-81 (Ex. 5 to Joint Stipulation).**

Because Respondent advanced the filing fees for these bifurcated cases prior to the filing of the bankruptcy petition, Respondent became an unsecured creditor of the bankruptcy estate. The automatic bankruptcy stay should have prevented Respondent (and subsequently FSF) from collecting on the prepetition debt while the bankruptcy was ongoing and once the debtor received a discharge. **R. at p. 49.**

After Respondent filed the client's petition, Respondent offered the client the opportunity to sign the post-petition agreement and a "Recurring Payment Authorization and Consent Form." The "Recurring Payment Authorization and Consent Form" provided FSF with the banking information necessary for it to collect the post-petition fees. **R. at p. 49, p, 82 (Ex. 6 to Joint Stipulation).**

Respondent submitted these documents to FSF who forwarded approximately 60 percent of the total post-petition fees to Respondent as an advance on her line of credit. FSF retained approximately 15 percent in a "hold back" account as a hedge against future defaults, and FSF retained 25 percent of the total post-petition fees as payment for their services. Pursuant to the terms of their agreement, FSF assumed full responsibility for collecting the future installment payments directly from Respondent's clients. **R. at p. 50.**

Respondent's Disclosure of Her Attorney Fees and Expenses to the Bankruptcy Court

In each of the ten cases, Respondent certified to the bankruptcy court that she had

executed the RRA that included terms agreeing to represent each debtor for one legal fee for all pre-petition and post-petition services. This certification was contradicted by the fact Respondent had also entered into a pre-petition agreement with each debtor essentially saying she would not represent them for the post-petition services unless and until they signed a new agreement after the filing of the petition.

In each of the ten cases, Respondent filed the B2030 form (Disclosure of Compensation of Attorney for Debtor(s)), but the inconsistencies and inaccuracies of the information reported on the form, combined with the RRA certification, made it impossible for the bankruptcy court to ascertain what Respondent was actually charging and collecting in the bifurcated cases. Because Respondent failed to provide accurate information in these ten cases, the bankruptcy court was not able to adequately analyze whether Respondent's attorneys' fees were reasonable. **R. at pp. 50-51.**

The Bankruptcy Court Questions Respondent's Handling of Bifurcated Chapter 7 Bankruptcy Cases

By the spring of 2020, the bankruptcy court had become aware of the fact that Respondent was bifurcating bankruptcy cases and financing the attorney fees pursuant to the FSF model. The court issued orders to show cause in each of these ten cases, demanding an explanation for why the information on the Form 2030, Disclosure of Compensation of Attorney for Debtor(s), was inconsistent with the provisions of the RRA. Respondent's ten cases were eventually consolidated for purposes of discovery,

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hearings, and trial.[1] **R. at p. 51.**

At some point early in the litigation, the Acting United States Trustee for Region 13 sought and received leave to intervene. The issues raised by the bankruptcy court were litigated for more than two years, and Respondent was represented for much of this time by one of FSF's founders, a Mr. Daniel Garrison. Mr. Garrison assured the court that should it order the disgorgement of any fees, Respondent would promptly reimburse her clients because FSF would be indemnifying Respondent. The bankruptcy court relied upon this assurance even though it later described the "so-called indemnity policy" as a "ruse and a sham." **R. at pp. 51-52.**

Eventually, Mr. Garrison was replaced and on or about May 17, 2022, Respondent signed a joint motion asking the bankruptcy court to approve a settlement agreement that had been negotiated with the Acting Trustee. Respondent admitted to the following, with respect to these ten bifurcated cases:

a. To the extent that the total amount of fees and expenses charged in the bifurcated and financed cases exceeded the normal and customary fees charged for a Chapter 7 bankruptcy case, those fees were "unreasonable under Section 329(b) of the Bankruptcy Code;

b. The disclosures required to be filed by the Code and Local Rules were insufficient and misleading."

c. The unbundling of services was contrary to the provisions of the

[1] The consolidation included Chapter 7 bankruptcy cases filed by another attorney, but those details are not relevant to this proceeding, so they have been omitted.

RRA and she had failed to timely file fee approval applications.

As part of the settlement agreement, Respondent agreed to self-report to the Office of Chief Disciplinary Counsel (OCDC), and she agreed to make refunds to the impacted clients. **R. at p. 52, pp. 83-97 (Ex. 7 to Joint Stipulation).**

On July 8, 2022, U.S. Bankruptcy Judge Cynthia Norton issued a Memorandum Opinion and Order approving the settlement agreement. In approving the settlement agreement, the Bankruptcy Court noted that "a reasonable bifurcation of fees in and of itself is not prohibited under the Code, Rules, and local rules, although collection of bifurcated fees may be subject to the automatic stay and the discharge injunction." However, the Bankruptcy Court found that Respondent had failed to completely and accurately disclose her fee agreements in these bifurcated and financed cases. Respondent agreed to, and the Bankruptcy Court approved, the following conditions of settlement. Respondent would:

d. Personally refund fees and/or expenses to each of the ten clients who elected to bifurcate and finance their Chapter 7 bankruptcy;

e. Comply, in all future cases, with all federal and local rules regarding disclosure and approval of fee arrangements;

f. Cease advancing bankruptcy filing fees;

g. Cease unbundling services which are required by the RRA;

h. Cease filing engagement agreements drafted by third-parties;

i. Self-report to the OCDC and be bound by the admissions contained in the settlement agreement.

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R. at pp. 52-53, pp. 98-147 (Ex. 8 to Joint Stipulation).

Respondent timely self-reported to the OCDC and made full restitution to her clients in accordance with the terms of the settlement agreement. **R. at p. 53.**

The Disciplinary Hearing

On October 19, 2023, Informant filed an Information alleging that Respondent had violated Supreme Court Rules 4-1.1 (competence), 4-1.4 (communication), 4-1.5 (fees), 4-5.4 (fee sharing), and 4-3.3 (candor to the tribunal). **R. at pp. 1-33.** The parties filed a Joint Stipulation of Facts, Joint Proposed Conclusions of Law, Joint Recommended Discipline, and Informant's Suggestions in Support of the Recommended Discipline (Joint Stipulation) on December 14, 2023. This document also served as Respondent's Answer to the Information. **R. at pp. 38-147.**

On March 27, 2024, the appointed Disciplinary Hearing Panel (DHP) held a hearing on the matter in Kansas City, Missouri. Informant was represented by Laura E. Elsbury, Chief Disciplinary Counsel. Respondent was present in person and represented herself. The DHP accepted the Joint Stipulation as Exhibit A and also took testimony from Respondent. **R. at p. 148 (DHP Decision).**

On April 25, 2024, the DHP issued its decision, adopting the facts, conclusions, and recommendation for discipline as set forth in the Joint Stipulation. **R. at p. 148.** The DHP recommended a Reprimand, which had been jointly proposed to the DHP by the parties. While Informant was comfortable with that proposal, it was made with the understanding of the parties that it was only a recommendation that was not binding upon the DHP or upon this Court. **R. at p. 58.**

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On or about May 7, 2024, Informant accepted the DHP decision. **R. at p. 175.** Respondent indicated her acceptance of the DHP decision on or about May 21, 2024. **R. at p. 176.** The record of these proceedings was filed with the Court on June 27, 2024, along with a statement regarding the parties' acceptance of the DHP decision, pursuant to the provisions of Rule 5.16(m). On September 3, 2024, the Court rejected the DHP decision and ordered briefing and oral argument, pursuant to Rule 5.19(c).

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RESPONDENT VIOLATED SUPREME COURT RULES 4-1.4, 4-1.5, & 4-3.3

Standard of Review

Professional misconduct is established by a preponderance of the evidence. *In re Crews*, 159 S.W. 3d 355, 358 (Mo. banc 2005). This Court reviews the evidence *de novo*, independently determining all issues pertaining to the credibility of witnesses and the weight of the evidence and reaches its own conclusion of law. *Id.* In matters of attorney discipline, the disciplinary panel's decision is advisory. *In re Farris*, 472 S.W.3d 549, 557 (Mo. banc 2015). An attorney must comply with the Rules of Professional Conduct as set forth in Supreme Court Rule 4 as a condition of retaining his license. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004). Violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *Id.*

Violations

The Joint Stipulation document contained Joint Proposed Conclusions of Law, where Respondent admitted to violating Rule 4-1.1. 4-1.4, 4-1.5, and 4-3.3. Informant dismissed one count from the Information. Count IV alleged a violation of Rule 4-5.4 (improper fee sharing). **R. at pp. 54-57.**

Rule 4-1.1 – Competence

Rule 4-1.1 requires lawyers to "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Respondent violated Rule 4-1.1 when she:

a. Failed to accurately and completely and consistently fill out fee agreements and other documents;

b. Continued to utilize the RRA even though the form was not designed for use in bifurcated cases;

c. Violated the automatic stay by assigning her interest in the pre-filing debts of these bankruptcy clients, thus allowing FSF to collect these fees.

Rule 4-1.4 - Communication

Rule 4-1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Respondent violated Rule 4-1.4(b) in that she failed to adequately disclose and explain the scope of her services to these ten clients. Respondent's bankruptcy clients could not have made informed decisions regarding whether it was in their best interest to use the bifurcated model. For example:

a. Respondent and her clients executed RRAs that expressly stated Respondent would be providing all pre-petition and post-petition services for a single fee and that Respondent could not withdraw from the case except under very specific circumstances;

b. In some cases, the disclosed fee on the RRA was $0;

c. Contrary to the express conditions in the RRA, Respondent also asked her clients to sign a pre-petition agreement that limited the scope of the pre-petition services, and then presented the clients with the option of signing a second agreement that would authorize Respondent to finalize the

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bankruptcy matter.

Rule 4-1.5 - Fees

Rule 4-1.5(a) states: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." The rule includes the following "factors to be considered in determining the reasonableness of a fee":

a. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

b. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

c. the fee customarily charged in the locality for similar legal services;

d. the amount involved and the results obtained;

e. the time limitations imposed by the client or by the circumstances;

f. the nature and length of the professional relationship with the client;

g. the experience, reputation, and ability of the lawyer or lawyers performing the services; and

h. whether the fee is fixed or contingent.

Rule 4-1.5(b) states: "The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation[.]"

Respondent violated Rule 4-1.5(a) and (b) when she:

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a. Failed to complete all applicable blanks in the fee agreements or completed the various fee agreements with inconsistent information;

b. Charged some of her bifurcated clients $500 more than she would ordinarily charge a Chapter 7 bankruptcy client;

c. Asked clients to agree to the post-petition terms in the pre-petition agreement;[2]

d. Violated the automatic stay by collecting – and asking/allowing FSF to collect – the pre-filing obligation that arose when Respondent advanced the $335 filing fee.

Rule 4-3.3 - Candor to the Tribunal

Rule 4-3.3 prohibits lawyers from knowingly making "a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]" Respondent violated Rule 4-3.3 when she completed and submitted to the bankruptcy court Disclosure of Compensation Forms that contained inaccurate and inconsistent information. The forms described the bifurcation process, which was inconsistent with the terms of the RRA, and Respondent had already declared to the court that an RRA had been executed. Additionally, Respondent represented to the court that she had received no payments and that the balances owed would be paid by the clients, when in fact she had already received payment from FSF, who would be collecting and retaining the amounts owed by the clients.

[2] In the words of the bankruptcy court, with reference to a motion filed by the Trustee, the "bifurcation" was simply a ruse to collect dischargeable prepetition fees post-petition. **R. at p. 109.**

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THE COURT SHOULD CONSIDER ITS DECISIONS IN PREVIOUS ATTORNEY DISCIPLINE CASES, AS WELL AS THE ABA SANCTION GUIDELINES, WHEN DETERMINING THE APPROPRIATE DISCIPLINE

This Court, when determining the appropriate discipline, "considers the ethical duty that was violated, the attorney's mental state, the extent of actual or potential injury caused by the misconduct, and any aggravating or mitigating factors." *In re Ehler*, 319 S.W.3d 442, 451 (Mo. banc 2010). "This Court also gleans guidance from the *American Bar Association Standards for Imposing Lawyer Sanctions* (ABA Standards) and prior disciplinary precident." *In re Schuessler*, 578 S.W.3d 762, 772 (Mo. banc 2019).

ABA Standards

Lawyers owe ethical duties to clients, to the public, to the legal system, and to the profession. *See* Theoretical Framework. When one of those duties has been violated, the appropriate discipline differs based upon the attorney's state of mind, which states are defined in the ABA Standards as follows:

- "Intent" is the conscious objective or purpose to accomplish a particular result;
- "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result;
- "Negligence" is the failure of a lawyer to heed 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 situations.

See Black Letter Rules.

Injury is defined as "harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of harm can range from 'serious' injury to 'little or no' injury[.]" *Id.* Additionally, if there are multiple violations, the ABA Standards provide that the sanction imposed should be, at a minimum, consistent with the sanction for the most serious instance of misconduct and generally should be greater than that sanction. *See* Theoretical Framework.

In this case, there are multiple violations and the most serious involves Rule 4-3.3(1), which states: "A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Such a violation is a knowing violation of the duty owed to the legal system. The injury or potential injury in this matter was generally summarized by the bankruptcy court, which observed that Respondent was cooperative with the Trustee and that she:

> [D]id not actively intend to deceive the court, even though [she] made many, many mistakes, and that [she] relied on the bad advice of Mr. Garrison in choosing to fight the court's orders, rather than to fully disclose and to file motions.

R. at pp. 145-46.

The stipulated facts detail Respondent's duty and subsequent failure to provide the bankruptcy court with accurate information regarding how much she charged her clients and how much she was paid in the Chapter 7 bankruptcy cases that were bifurcated.

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Respondent relied too heavily upon the direction provided by Fresh Start Funding. She knew or should have known of the inaccuracies and inconsistencies in the documents she was asking her clients to sign and in the representations that she was making to the bankruptcy court.

ABA Standard 6.12 provides that a suspension is generally appropriate under these circumstances:

> Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Although suspension is the presumptive discipline, the Court should consider mitigating and aggravating circumstances to see if these factors might suggest either increasing or decreasing the level of discipline.

> Mitigating factors do not constitute a defense to a finding of misconduct. But they may justify a downward departure from the presumptively proper discipline. By the same token, an aggravating factor need not constitute a separate instance of misconduct. Instead, aggravating circumstances may justify a level of discipline greater than the presumed discipline or confirm that the presumed discipline is appropriate for the particular case.

In re Farris, 472 S.W.3d 549, 563 (Mo. banc 2015).

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With respect to mitigating factors, it should be noted that Respondent has no disciplinary history.[3] Similarly, she has been cooperative throughout the investigative process. By complying with the conditions of the settlement agreement, Respondent made a timely and good faith effort to make restitution or to rectify the consequences of her misconduct. Additionally, Respondent has expressed remorse for these violations (9.32(l)).

The following aggravating factors are present in this matter.[4] First, there are multiple offenses to be considered. Additionally, those clients should be considered vulnerable due to the complexity of bankruptcy matters and the inherent reliance upon the bankruptcy attorney. Finally, Respondent has substantial experience in the practice of law.

Prior Disciplinary Precedent

The most recent case involving the application of ABA Standard 6.12 for a violation of Supreme Rule 4-3.3 is *In re Krigel*, 480 S.W.3d 294 (Mo. banc 2016). There, the Court first discussed ABA Standard 6.11, which provides the appropriate sanction for intentional misconduct: disbarment. With reference to ABA Standard 6.12, the Court noted that "suspension may be appropriate in cases when the attorney merely knows of the misrepresentation[.]" *Id.* at 302 (citing *In re Caranchini*, 956 S.W.2d 910, 919 (Mo. banc 1997)). Ultimately, in light of the mitigating factors present in that case, the Court

[3] See ABA Standard 9.3.
[4] See ABA Standard 9.2.

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suspended Krigel, but stayed the suspension and placed him on probation for a two-year term. *Id.*

An older precedent, *In re Oberhellmann*, also distinguishes intentional conduct from knowing conduct with respect to a Rule 4-3.3 violation. 873 S.W.2d 851 (Mo. banc 1994). Citing to ABA Standard 6.12, the Court observed that "Suspension is appropriate only if a lawyer knows that a false statement is being submitted to a court and takes no remedial action." *Id.* at 856. Oberhellmann was disbarred because his conduct was found to be intentional.

Pursuant to ABA Standard 6.12, the baseline sanction in this case is suspension, but when both mitigating and aggravating factors are considered, the mitigating factors appear to outweigh the aggravating factors. Additionally, it is worth noting that "This Court adheres to a practice of applying progressive discipline when imposing sanctions on attorneys who committee misconduct." *In re Forck*, 418 S.W.3d 437, 444 (Mo. banc 2014). Respondent has no prior discipline.

In the Joint Stipulation, and with consideration of the preceding analysis of the ABA Standards, the parties recommended to the DHP that a reprimand was the appropriate discipline in this matter. Informant did not believe that probation or a stayed suspension with a term of probation was necessary since Respondent had ceased bifurcating cases pursuant to the terms of the settlement agreement that was approved by the bankruptcy court, and since there was no indication that she had any other problems with her practice that would warrant monitoring by the OCDC.

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CONCLUSION

In light of the record that is before the Court, and for all of the reasons set forth above, Informant respectfully requests that this Court:

(a) Find Respondent guilty of professional misconduct for violating Supreme Court Rule 4-1.1, Rule 4-1.4, Rule 4-1.5, and Rule 4-3.3;

(b) Impose the appropriate sanction; and

(c) Tax all costs in this matter to Respondent, including the investigative fee pursuant to Rule 5.19(k).

Respectfully submitted,

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INFORMANT

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2024, a copy of Informant's Brief is being served upon Respondent through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08:

Jovanna R. Bearden
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Nevada, MO 64772

Respondent

Laura E. Elsbury

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. includes the information required by Rule 55.03;
2. was served on Respondent through the Missouri electronic filing system pursuant to Rule 103.08;
3. complies with the limitations contained in Rule 84.06(b);
4. contains 6,450 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Laura E. Elsbury