IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
WILLIAM R. MERRYMAN,	**)**	**Supreme Court #SC88720**
	)	
Respondent.	**)**	

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Background

Respondent William Merryman was licensed to practice law in Missouri in 1977. **App. 3**. He has practiced law in the Kansas City area throughout his career. **App. 10-13**. Respondent is a sole practitioner. He does not currently maintain a physical law office, but would arrange to meet with clients in their homes if necessary. **App. 55 (T. 164)**. Respondent does not carry malpractice insurance. **App. 55 (T. 165)**.

Facts Underlying Disciplinary Case

Preliminary Information

The case presented to the disciplinary hearing panel combined the complaints from four of Mr. Merryman's former clients and a continuing legal education noncompliance issue.[1] The former clients were named Vincent Coker, Susan Merritt, Dale Mort, and Debbie Tipler. Respondent Merryman initially denied all allegations of the information save for some identifying information, **App. 58**, but did enter into a joint stipulation of facts prior to commencement of the hearing in which he admitted many of the information's allegations. In the stipulation, Respondent admitted eight of the fourteen pending allegations of professional misconduct. **App. 3-9**. Of the six remaining allegations, i.e., those not conceded by Respondent, the disciplinary hearing panel concluded that Respondent violated four (Counts II, III (as amended in the joint

[1] The complaints of two other clients, pleaded in Counts XII–XV and XX–XXI, were dismissed prior to the hearing. **App. 4**.

stipulation), VI, and IX). The panel concluded Respondent did not violate two of the allegations (Counts XVI and XVII), both of which stemmed from the complaint of client Debbie Tipler. Informant is not briefing the two Tipler allegations. In sum, Informant's brief is in accord with the findings of fact and conclusions of Rule violations as they are set forth in the disciplinary hearing panel's decision.

Vincent Coker

Respondent represented Mr. Coker on various matters arising out of injuries Coker incurred in 1997. **App. 4-5, 42 (T. 113)**. Mr. Coker's workers' compensation case was scheduled for hearing on January 10, 2003. **App. 60**. Mr. Coker, who lived in Diamond, Missouri, drove to Kansas City on January 9 to meet with Respondent to prepare for the hearing. When Mr. Merryman finally answered Mr. Coker's knocks on his door, it was apparent that Respondent was intoxicated. **App. 29 (T. 59)**. The January 9 incident was not the first time Respondent had appeared intoxicated when Coker met with him after driving up from Diamond. **App. 30 (T. 63)**. Respondent told Mr. Coker he would have to meet with him before the workers' compensation hearing started the next morning. **App. 29 (T. 59)**.

Respondent did not appear to represent Mr. Coker at his hearing the next morning. **App. 29 (T. 60)**. The workers' compensation judge, opposing counsel, their clients, a physician, and Mr. Coker were all present. **App. 5**. The workers' compensation judge telephoned Respondent and told him that because he had failed to appear for his client's hearing, she would not approve any attorney's fee for him. **App. 5**. Opposing counsel moved for dismissal of Coker's case due to Mr. Merryman's nonappearance, as he had

previously warned Respondent he would if Respondent did not show up. **App. 29 (T. 61), 42 (T. 111), 61**. It was not the first time Respondent failed to appear or appeared intoxicated in the matter. **App. 61**. Respondent did not show up for Mr. Coker's hearing because he was intoxicated. **App. 5**.

Mr. Merryman had done no hearing preparation with Mr. Coker. **App. 30 (T. 64)**. He had not discussed hearing strategy with Coker. **App. 30 (T. 64)**. Many times when Coker or opposing counsel attempted to communicate with Respondent by telephone, he was unable to even leave a message on Respondent's phone because the answering machine was full. **App. 30-31 (T. 65-66), 61**. After January 10, Mr. Coker sent a written request to Respondent for return of his file. There was delay in the transmittal of parts of Mr. Coker's file to his subsequent lawyer. **App. 5-6**. Although Mr. Coker hired replacement counsel who obtained a settlement for him in his workers' compensation case, his experience with Mr. Merryman left Coker feeling disgusted with the legal profession. **App. 31 (T. 66-67)**.

Susan Merritt

Ms. Merritt paid Respondent $750.00 to file a bankruptcy for her. **App. 38 (T. 94)**. Respondent told her he would not start working on the bankruptcy for her until she had paid him the full amount of his fee, which she did on November 18, 2002. **App. 38 (T. 96), 39 (T. 99-100)**.

Mr. Merryman performed no legal services for Ms. Merritt after November 18, 2002. **App. 38 (T. 96), 39 (T. 99-100)**. Respondent did not return any of Ms. Merritt's calls asking about the status of her case. **App. 6**. Respondent was unaware that Ms.

Merritt's wages were being garnished. **App. 39 (T. 99), 69 (T. 20)**. In March or April of 2003, Ms. Merritt discovered through her own efforts that Respondent had not filed her bankruptcy case. **App. 6**. Ms. Merritt filed a complaint against Respondent in April of 2003 and requested refund of the $750.00. Respondent refunded the $750.00 to Ms. Merritt in late December of 2004. **App. 6, 38 (T. 95)**.

Dale Mort

Mr. Mort hired Respondent to file a bankruptcy for him in October of 2002. Mr. Mort paid Respondent $1,000.00. Respondent does not know what happened to Mr. Mort's money, i.e., it was not deposited in a client trust account. **App. 41 (T. 106-107)**. Mr. Merryman performed no legal services for the $1,000.00. **App. 41 (T. 107)**. From January of 2003 through April or May of 2003, Respondent failed to respond to Mr. Mort's requests for information about his matter. **App. 8**.

Respondent repaid Mr. Mort's money to him by way of payments, with some interest. The payments were sent to Mr. Mort in April of 2004, December of 2004, and September of 2006. **App. 8**. If Respondent had had the money to return to Mr. Mort any sooner, he would have done so. **App. 41 (T. 108)**.

As of the time of the disciplinary hearing, Respondent had returned to Merritt and Mort the advance and unearned fees they had paid him.

Practicing Law While Non-CLE Compliant

Respondent did not report compliance with Rule 15 (Continuing Legal Education) for reporting years 2000-2001, 2001-2002, 2002-2003, and 2003-2004. Respondent's name was on the lists the Missouri Bar sent to the Office of Chief Disciplinary Counsel

reporting the non-compliant lawyers for those reporting years. **App. 7**. Respondent practiced law in 2002, 2003, 2004, and 2005. **App. 7, 44, 84-92**.

Evidence Relative to Respondent's Physical Health and Alcoholism

Respondent came to the realization that he was an alcoholic in 1998. **App. 49 (T. 138)**. He began attending Alcoholics Anonymous meetings that year. **App. 49 (T. 138)**. Respondent's AA sponsor since the mid-1990s, Mr. Mays, is aware that Respondent has relapsed a number of times. **App. 20 (T. 24)**. Respondent relapsed away from abstinence in the fall of 2002. **App. 22 (T. 32), 48-49 (T. 137-138)**. Mr. Mays is aware of several instances when Respondent relapsed in 2005, and that Respondent relapsed early in 2006. **App. 20 (T. 22, 24)**. If Mr. Merryman told him about the DWI that Respondent got in early 2006, Mr. Mays had forgotten that he did so at the time Mr. Mays gave his testimony at the disciplinary hearing. **App. 23 (T. 34-35)**.

In May of 2002, Respondent was diagnosed with bladder cancer. The treatment for the bladder cancer was very painful. **App. 47 (T. 132-133)**.

After failing to show up for Mr. Coker's hearing on January 10, 2003, because he was intoxicated, Respondent met with some individuals from the Missouri Lawyers Assistance Program. They convinced him he should enter into residential care treatment for his alcoholism. **App. 45 (T. 123), 49 (T. 139)**. On January 14, 2003, Respondent checked himself into Welcome House, a residential treatment facility for men recovering from drug and alcohol addiction. **App. 19 (T. 20), 38 (T. 96), 39 (T. 98)**. At Welcome House, Respondent underwent addiction and recovery counseling. He was required to perform assigned chores. Had the staff ever detected any use of alcohol by Respondent,

he would have been immediately discharged from the program. Respondent rarely left the facility the first three or four months he was there. **App. 19 (T. 21), 49-50 (T. 140-143), 93, 94**.

After checking into Welcome House, Respondent did very little to contact his clients to let them know where he was or how to contact him. It would have been difficult, if not impossible, for his clients to have contacted him after he checked into Welcome House, even if they had known where Mr. Merryman was. **App. 53 (T. 156)**. Respondent did not notify the clerk of the Missouri Supreme Court of his address change after he moved into Welcome House. **App. 54 (T. 158)**. His first priority at the time was getting himself well. **App. 39-40 (T. 101-102), 53 (T. 156)**.

Mr. Merryman checked out of Welcome House on January 12, 2004. At the time he was considered one of the program's rare success stories. **App. 94**.

Respondent lacked health insurance and could not pay $300,000.00 in medical bills, so in 2005 Respondent filed for personal bankruptcy. **App. 40 (T. 105)**.

In early 2006, Respondent was hospitalized for treatment of a bacterial infection in his lower extremities. **App. 47 (T. 133)**.

Subsequent to his release from the hospital in January of 2006, Respondent was stopped while driving in an intoxicated state. **App. 51 (T. 146-147)**. Respondent was charged on March 28, 2006, with the class C misdemeanor of driving while intoxicated. Respondent had a previous DWI from about 30 years ago. **App. 54 (T. 160-161)**. Respondent pled guilty to the charge in November of 2006 and was given a suspended

imposition of sentence. **App. 51 (T. 147)**. Respondent reported the DWI and his guilty plea to disciplinary authorities in November of 2006. **App. 68 (T. 16)**.

Pursuant to the guilty plea, Respondent was placed on probation for two years, i.e., from November of 2006 until November 22, 2008. An interlock device to detect the presence of alcohol was placed on the ignition of Respondent's vehicle. **App. 67 (T. 10)**. Respondent's probation required him to attend victim impact and alcohol safety impact programs and to report to his probation officer as directed. **App. 51 (T. 148), 67-68 (T. 10-14)**. Additionally, Respondent's driving privilege was suspended from February of 2006 through February of 2007, although he acknowledged driving himself to the disciplinary hearing conducted on January 10, 2007. **App. 54 (T. 161)**.

Tests done after Respondent was hospitalized in January of 2006 revealed, in March of 2006, that Respondent had colon cancer. **App. 48 (T. 134-135)**. Respondent underwent surgery to treat the colon cancer on May 18, 2006. **App. 48 (T. 135)**. The surgeon incorrectly reattached the colon causing a herniation. As a consequence, Respondent had to undergo emergency surgery five days after the initial surgery. Respondent was left with a hole in his stomach that is healing slowly. **App. 48 (T. 136)**.

Respondent denies that he experienced any professional problems prior to checking into Welcome House. **App. 45 (T. 123)**. Mr. Merryman insists that the only time his alcoholism negatively impacted his law practice was during the first three months of his treatment at Welcome House. **App. 53 (T. 157), 54 (T. 161), 55 (T. 162, 164-165)**. Respondent believes he has given more to the profession in his thirty-year career than he has taken from it. **App. 55 (T. 162), 95-99**.

Disciplinary History

Mr. Merryman accepted six admonitions issued by regional disciplinary committees in Kansas City between 1994 and 2001. **App. 100-113**. Respondent was admonished in 1994 for violation of the rule prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation (Rule 4-8.4(c)), because Respondent recorded telephone conversations without revealing to or obtaining consent from the individual whose conversations he was recording. **App. 101-103**.

Mr. Merryman was admonished in 1997 for violations of the diligence (4-1.3) and communication (4-1.4(a)) rules in his representation of a client. **App. 104-105**.

Respondent accepted an admonition in 1999 for violation of the safekeeping property rule (Rule 4-1.15(c)). The committee concluded Mr. Merryman was involved in an agreement made between his client and a healthcare provider regarding a portion of settlement funds held by him, then failed to advise the provider of his receipt of the funds in contravention of the agreement. **App. 106-107**.

In 2000, Mr. Merryman accepted an admonition for violation of the diligence rule (4-1.3) and the communication rule (4-1.4), in his representation of a client. **App. 108-109**.

In February of 2001, Respondent accepted two separate admonitions. The first was issued for violation of the diligence rule (4-1.3), in that Respondent failed to do anything for a client for over a year. The admonition letter recognized "the health concerns with which you were faced [at the time of the delay], but the Rules of

Professional Conduct were designed, in part, to protect clients even when there are adverse circumstances." **App. 110-111**.

The other admonition issued in 2001 was for violation of the safekeeping property rule (4-1.15), in that Mr. Merryman failed, at a client's request, to promptly return the client's file to the client. **App. 112-113**.

Disciplinary Proceeding

All the complaint files that resulted in misconduct findings against Respondent were opened in 2003. Mr. Merryman became aware of the complaints in the summer of 2003. **App. 54 (T. 159)**. Respondent was granted extensions of time to respond to the complaints. **App. 54 (T. 160), 114**. Mr. Merryman thereafter retained counsel to represent him. **App. 66 (T. 6)**. OCDC and Respondent's counsel thereafter attempted to reach a stipulation in the case. **App. 6 (T. 8-9), 71-72 (T. 28-30), 116**.

The information was served on Respondent on November 10, 2005. **App. 117-134**. Respondent's answer was filed with the advisory committee on December 15, 2005. **App. 58**. The advisory committee chair appointed a panel to hear the case in a letter dated December 20, 2005. **App. 135**. By notice dated February 10, 2006, the presiding officer set the matter for hearing on April 6, 2006. **App. 139-140**. Respondent's counsel was unable to continue representing Respondent. On March 9, 2006, Respondent filed with the advisory committee an application for appointment of counsel. **App. 141-143**. The advisory committee appointed counsel to represent Respondent by letter dated March 24, 2006. **App. 144**. On March 30, 2006, Respondent applied for a continuance of the

April 6 hearing, citing the need for treatment of the colon cancer that had been diagnosed that morning. **App. 145-146**.

By notice dated April 14, 2006, the panel's presiding officer reset the case for hearing on June 9, 2006. **App. 147-148**. By notice dated April 26, 2006, the hearing was reset to occur on July 13, 2006. **App. 149-150**. A panel member, on May 8, 2006, made written request to be excused from the panel. **App. 151**. By letter dated May 11, 2006, the advisory committee chair appointed a replacement panel member. **App. 152**.

On July 10, 2006, Respondent applied for a continuance of the hearing on the grounds of ongoing health concerns. **App. 153-157**. The case was thereafter reset for hearing on September 27, 2006. **App. 158-159**.

In late August, the panel member appointed in May as a replacement asked to be excused from serving on the panel due to illness. By letter dated August 29, 2006, a replacement was named. **App. 160-161**.

Respondent moved for continuance of the hearing previously scheduled to occur on September 27, 2006. The request was based on Respondent's continuing poor health. **App. 164-166**. In late September of 2006, the continuance was granted, with the matter reset for hearing on January 10, 2007. The hearing convened on January 10, 2007, and was concluded on February 13, 2007.

The panel (the parties agreed to go forward with a two member panel when the third appointed member failed to appear for the January 10 hearing date) issued its decision on June 18, 2007. **App. 167-188**. As noted above, the panel concluded that Respondent committed 12 rule violations: Rule 4-1.1 (competence), Rule 4-1.3

(diligence – three separate violations), Rule 4-1.4 (communication – three separate violations), Rule 4-1.15(a) (hold client's property separate from lawyer's property), Rule 4-1.15(b) (delay in returning client property), Rule 4-1.16(d) (delay in returning unearned fee – two separate violations), and Rule 4-5.5 (practicing while not CLE compliant).

After an extensive analysis of the case under the ABA Standards for Imposing Lawyer Sanctions (1991 ed.), the disciplinary hearing panel recommended that Respondent be suspended with no leave to apply for reinstatement for twelve months. The panel further recommended that an application for reinstatement filed by Mr. Merryman be conditioned on:

1. The Respondent having successfully completed an alcohol treatment program and continuing to attend regularly scheduled meetings of Alcoholic's Anonymous;
2. The Respondent having maintained sobriety for twelve months;
3. The Respondent having successfully completed the terms of his probation arising from his 2006 conviction for driving while intoxicated;
4. The Respondent obtaining and maintaining malpractice insurance in an amount not less than Two Hundred Fifty Thousand Dollars ($250,000.00) per

occurrence and Five Hundred Thousand Dollars ($500,000.00) in the aggregate; and

5. The Respondent paying the costs of this action.

App. 186-187. Respondent did not concur in the panel's recommendation for sanction, necessitating the filing of the record with this Court pursuant to Rule 5.19.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE HAS ADMITTED, AND HAS BEEN FOUND TO HAVE COMMITTED, TWELVE RULE VIOLATIONS IN THAT HE AGREED TO REPRESENT CLIENTS COKER, MERRITT, AND MORT AND THEREAFTER ABANDONED THE REPRESENTATIONS WITHOUT TAKING ANY OF THE STEPS REQUIRED BY THE RULES TO PROTECT HIS CLIENTS' INTERESTS, AND PRACTICED LAW FOR FOUR YEARS WHEN NON-CLE COMPLIANT.

In re Vails, 768 S.W.2d 78 (Mo. banc 1989)

In re Shelhorse, 147 S.W.3d 79 (Mo. banc 2004)

Rule 4-1.1

Rule 4-1.3

Rule 4-1.4

Rule 4-1.15

Rule 4-1.16(d)

Rule 4-5.5

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR TWELVE MONTHS BECAUSE HE KNOWINGLY DISREGARDED MULTIPLE CLIENTS' INTERESTS AND BECAUSE OF THE PRESENCE OF MULTIPLE AGGRAVATING FACTORS IN THAT RESPONDENT HAS MANY PRIOR ADMONITIONS, HE IS GUILTY OF MULTIPLE RULE VIOLATIONS, THE CLIENTS HE ABANDONED WERE PARTICULARLY VULNERABLE, AND RESPONDENT HAS SUBSTANTIAL EXPERIENCE PRACTICING LAW.

In re Frank, 885 S.W.2d 328 (Mo. banc 1994)

In re Tessler, 783 S.W.2d 906 (Mo. banc 1990)

In re Lavin, 788 S.W.2d 282 (Mo. banc 1990)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE HAS ADMITTED, AND HAS BEEN FOUND TO HAVE COMMITTED, TWELVE RULE VIOLATIONS IN THAT HE AGREED TO REPRESENT CLIENTS COKER, MERRITT, AND MORT AND THEREAFTER ABANDONED THE REPRESENTATIONS WITHOUT TAKING ANY OF THE STEPS REQUIRED BY THE RULES TO PROTECT HIS CLIENTS' INTERESTS, AND PRACTICED LAW FOR FOUR YEARS WHEN NON-CLE COMPLIANT.

It is impossible to read the record in this case and not feel compassion for Mr. Merryman as he battled his way past a daunting myriad of serious health problems and struggled with alcoholism. Fortunately, Respondent has taken advantage of the assistance available to Missouri lawyers through the Missouri Bar's lawyer assistance program. He has also availed himself of the support provided by Alcoholics Anonymous and even successfully completed a twelve month stint at a residential substance abuse treatment facility. The hard facts remain, however, that Mr. Merryman took money from clients at a time when he was in no shape to do so, then left them to their own devices as he sought treatment. Mr. Merryman relegated his professional responsibilities to a far back seat on the careening bus that had become his life. And, his record of relapse provides no reassurance for the future.

The Rules of Professional Conduct stand as the first line of defense to protect clients, the public, and the profession from what happened in this case. The disciplinary hearing panel carefully considered the evidence and concluded Respondent committed 12 separate rule violations. Review of the facts underlying those violations illustrates how Mr. Merryman's disregard for his ethical responsibilities led to the spread of his personal problems over many other vulnerable lives.

It is undisputed that Mr. Merryman agreed, in July and October of 2002, to file bankruptcies on behalf of Ms. Merritt and Mr. Mort, even though Mr. Merryman acknowledged that he started drinking heavily again that fall. Ms. Merritt paid Respondent $750.00 (final payment on November 18, 2002); and Mr. Mort paid Respondent $1,000.00 in October. Respondent admits that he did no work for either of them after he was paid the fees, resulting in two separate violations of the diligence rule (4-1.3).

On January 14, 2003, Respondent checked himself into a residential treatment facility, where it was difficult, or by his own admission, almost impossible, for outsiders to communicate with him. More to the point, Respondent admits he did next to nothing to let his clients know where he was and what he was doing, thereby violating his duty to communicate (Rule 4-1.4) with Merritt and Mort.

Once Mr. Mort and Ms. Merritt figured out where Respondent was and that he had not filed their bankruptcy matters, they understandably wanted their files and money back. Mr. Merryman did not know where Mr. Mort's money had gone, because he had not done what Rule 4-1.15 and its accompanying comments require – deposit the client's

money in a trust account until earned or spent on costs. See Comment to Rule 4-1.15 (client's money must be kept separate from lawyer's property in a trust account). Finally, Mr. Merryman did not repay these bankruptcy clients, to whom the fees undoubtedly represented a large amount of money, until some two years after he entered the treatment facility, thereby violating the rule requiring the return to clients of advance fees not earned. Rule 4-1.16(d). See *In re Vails*, 768 S.W.2d 78, 79 (Mo. banc 1989) (Respondent accepted fee, then failed to perform promised work).

With respect to Mr. Coker, a client of Merryman's of some longstanding, Respondent did the unthinkable – he failed to show up, because he was intoxicated, for an adversarial hearing at which his client's legal claim to workers' compensation was to be decided. And, it was not even the first time Respondent was a no show on Mr. Coker's behalf. A letter sent to Mr. Merryman from one of his opposing counsel in Mr. Coker's case references a special mediation the previous November for which Respondent failed to appear. Additionally, Mr. Coker testified that Respondent "passed out" drunk after a deposition was taken in the case. See **App. 30 (T. 62-63)**. There was evidence that both Mr. Coker and opposing counsel's repeated attempts to telephone Respondent frequently went unanswered, and that Respondent was, on several occasions, "unavailable" for scheduled appointments with Coker. Respondent's conduct violated the competency rule (4-1.1), the diligence rule (4-1.3), and the communication rule (4-1.4). Then, there was delay in transferring Mr. Coker's file to his subsequent counsel, a violation of Rule 4-1.15(b) (promptly deliver client's property as directed by the client).

The remaining rule violation occurred over the four year period both preceding and following Respondent's relapse in the fall of 2002. Mr. Merryman has conceded that he consistently practiced law throughout a four year period of non-compliance with Rule 15, a violation of Rule 4-5.5. "As a condition of retaining his or her privilege of practicing law in Missouri, an attorney must comply with rules of professional conduct," including the continuing legal education reporting rule. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004).

Respondent admitted eight of the twelve violations cited by the disciplinary hearing panel in its decision. The four not admitted, competence and communication with respect to the Coker representation, failure to return unearned fees to Ms. Merritt at termination of her representation, and failure to safeguard Mr. Mort's money by depositing it in a trust account, were established by the overwhelming weight of the evidence. Twelve rule violations is a lot. Respondent failed his clients and tarnished the profession and should, therefore, be sanctioned.

ARGUMENT

II.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR TWELVE MONTHS BECAUSE HE KNOWINGLY DISREGARDED MULTIPLE CLIENTS' INTERESTS AND BECAUSE OF THE PRESENCE OF MULTIPLE AGGRAVATING FACTORS IN THAT RESPONDENT HAS MANY PRIOR ADMONITIONS, HE IS GUILTY OF MULTIPLE RULE VIOLATIONS, THE CLIENTS HE ABANDONED WERE PARTICULARLY VULNERABLE, AND RESPONDENT HAS SUBSTANTIAL EXPERIENCE PRACTICING LAW.

The disciplinary hearing panel recommended that the Court suspend Respondent's license with no leave to apply for reinstatement for 12 months, and suggested specific "special conditions for reinstatement," Rule 5.28(b)(3), designed to assure Respondent's fitness to resume practice, i.e., successful completion of the DWI probation, and providing some safeguards for the public, i.e., securing malpractice insurance, should he be reinstated. Disciplinary counsel joins in the panel's sanction recommendation to the Court. It is an appropriate sanction under both the ABA Standards for Imposing Lawyer Sanctions (1991 ed.) and disciplinary cases previously decided by this Court.

The ABA Standards establish a model through which the facts unique to each disciplinary case may be analyzed as an aid in the sanction analysis process. It is

submitted that the Standards model, as applied to this case, would produce the following analysis. The most serious instances of misconduct, and the ones therefore used in the model, would be Respondent's knowing disregard for, or abandonment of, his clients' interests in violation of the diligence and communication rules (4-1.3 and 4-1.4). The duties to exercise diligence and maintain communication are duties the lawyer owes to clients, which are duties the Standards assume to be the lawyer's most important. Standards, at p. 5.

The next step in the model is discernment of the lawyer's mental state. It is submitted that Mr. Merryman's abandonment of his clients' interests was, at a minimum, knowing. Respondent has acknowledged his alcoholism since 1998, so he has been aware of his addiction for a long time. And, this case is not the first time Respondent's health has been raised by Respondent in defense of disciplinary charges. It is telling that the regional disciplinary committee that admonished Respondent in February of 2001 for violation of the diligence rule specifically warned Mr. Merryman that while the "Committee understands the health concerns with which you were faced, … the Rules of Professional Conduct were designed, in part, to protect clients even when there are adverse circumstances" (emphasis added). **App. 110**. Thus, Respondent had been previously expressly warned not to allow his personal afflictions to interfere with his professional responsibilities to clients. Still, knowing he had relapsed in the fall of 2002, Mr. Merryman took Mr. Mort's and Ms. Merritt's money and continued to represent Mr. Coker. It should also be remembered that when asked what steps he took, upon entering Welcome House, to protect his clients' interests, Respondent candidly testified that his

"practice came kind of to a stand still. … And when I mean stand still, I put getting, achieving and hopefully going onto sobriety as the number one goal in my life." **App. 39-40**. Implicit in Respondent's statement is his recognition that, in order to make recovery his first priority, Respondent chose to knowingly abandon his clients' interests. Respondent did not advise his clients about what was going on, he did not arrange for other counsel to cover for him, he did nothing to protect his clients while he tended to his admittedly daunting personal problems.

The next step in the ABA Standards analysis is consideration of the harm that resulted from Respondent's misconduct. The harm suffered by Mr. Merryman's clients is palpable. There was evidence that Ms. Merritt's wages were being garnished as she expectantly waited for the relief that initiation of a bankruptcy case would bring. Both the bankruptcy clients went without reimbursement of the money they had given to Respondent for lengthy periods of time – Respondent held Ms. Merritt's money for more than two years, and did not start reimbursing Mr. Mort until 18 months had passed from the time Mort paid Respondent the advance fee. Both Merritt and Mort's many calls to Respondent went unanswered – they determined on their own that he had not filed their cases. Then, Respondent was responsible for delay in getting the clients' paperwork where the clients needed it to go in order to get their legal work done.

Mr. Coker suffered the anxiety of finding Mr. Merryman too drunk to meet with him the day before his hearing. That anxiety could only have increased exponentially the next morning when his advocate failed to appear on his behalf for the hearing itself, and opposing counsel moved to dismiss Coker's case altogether as a consequence. The harm

flowing from Respondent's non-appearance was not limited to Mr. Coker – Respondent wasted the time and resources of all those who were present and prepared for the hearing that morning: the administrative law judge, numerous witnesses, and opposing counsel.

Consideration of aggravating and mitigating factors is the final step in Standards sanction analysis. Standard Rule 9.0. It is submitted that the aggravating circumstances in Mr. Merryman's case far outweigh those offered in mitigation.

First and foremost is Respondent's disciplinary history. Respondent accrued six admonitions in an approximately eight year period preceding the misconduct underlying the instant case. It is noted that of the six different rules violated (three were violated multiple times) in this case, Respondent had been previously admonished for violating three of them (4-1.3 (diligence), 4-1.4 (communication), and 4-1.15 (safekeeping property)). Respondent's repetitive violation of the same rules puts to lie his several claims during the hearing that his misconduct was confined to the first three months of his in-house treatment at Welcome House. Respondent's misconduct is not an isolated act confined to the first three months of 2003.

Further, the sheer number of Rule violations establishes two additional aggravating factors – Respondent's conduct evidences a pattern of misconduct and constitutes a multiplicity of offenses. Standard Rule 9.2(c)(d). The vulnerability of the clients harmed, also recognized as an aggravating factor, has been discussed earlier under this Point, as has Mr. Merryman's substantial experience practicing law (at least 25 years at the time of the misconduct). Both are aggravating factors.

Mr. Merryman produced a good deal of evidence touching on his physical health problems and his alcoholism. The Standards do recognize personal problems as a mitigating factor. The distinction must be drawn, however, between "personal problems" and Respondent's alcoholism. Shortly after the 1991 edition of the Standards was published, the mitigating factors found at Standard Rule 9.32 were amended to clarify that alcoholism qualifies as a mitigating factor only when:

1) medical evidence establishes the chemical dependency;

2) dependency (alcoholism) caused the misconduct;

3) Respondent has established his recovery from alcoholism by a meaningful and sustained period of successful rehabilitation; and

4) recovery arrested the misconduct and recurrence of the misconduct is unlikely to occur.

Standard Rule 9.32(i) (1992 amendment). Noticeably absent from the record in this case is evidence of a "meaningful and sustained period of successful rehabilitation."

Respondent's AA sponsor testified that he was aware of several instances in 2005 when Respondent relapsed, in addition to the relapse in early 2006. It should be noted that while the AA sponsor was aware of a relapse in 2006, his testimony at least raises the question whether Respondent told his sponsor about the fact that he had been charged in 2006 with a DWI. When asked if he was aware that Respondent had been arrested in 2006 for DWI, the sponsor replied "I don't remember that incident but if it occurred, it occurred." **App. 23 (T. 34-35)**. The fact that Mr. Merryman was charged with DWI is certainly information that a committed participant in the AA program would reveal to his

sponsor. Given Respondent's history of relapse after his participation in the twelve month residential treatment program, it is much too soon to credit Respondent with a "meaningful and sustained period of rehabilitation."

Until such time as the Court can be confident of Respondent's long term recovery, "protection of the public as well as the profession is paramount. Suspension of Respondent from the practice of law will accomplish the latter and not proscribe the former." *In re Houtchens*, 555 S.W.2d 24, 27 (Mo. banc 1977) (per curiam) (lawyer suffering from mental health issues and "excessive use of alcohol" suspended for three years). And, in a case where there was "no doubt" that the lawyer's alcoholism interfered with his law practice, this Court commended the lawyer's submission to Rule 16's Intervention Committee, but also recognized that cooperation with a rehabilitation program "does not exonerate him of responsibility for his actions." *In re Lavin*, 788 S.W.2d 282, 284 (Mo. banc 1990).

Respondent claimed that "delay in the proceedings" should be counted as a mitigating factor. The panel rejected the claim, noting that much of the delay and the multiple extensions of time were granted at Respondent's urging in order to accommodate his ongoing health concerns. Certainly Respondent offered no evidence that any delay impeded his procurement of evidence or witnesses required for his defense. Given the purpose of attorney disciplinary proceedings, i.e., to protect the public and preserve the integrity of the profession, and given the great weight of the evidence demonstrating that delay was largely attributable to Respondent, "delay in proceeding" should not be accorded mitigating status.

The foregoing ABA Standards analysis suggests Standard Rule 4.42 as appropriate to this case. That rule provides:

> 4.42 Suspension is generally appropriate when:
>
> (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or
>
> (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

The Missouri Supreme Court has imposed suspension in a number of disciplinary cases with fact patterns similar to this case. Citing Standard Rule 4.42 (the same Standard Rule Informant believes is applicable in this case), the Court found that the "volume and repeated nature" of the lawyer's failure to communicate with his clients or act with reasonable diligence in expediting their cases, particularly where the lawyer had two prior admonitions for similar misconduct, warranted suspension. *In re Frank*, 885 S.W.2d 328, 334 (Mo. banc 1994). Neglect of client business, delay in returning funds, and failure to keep a sufficient balance in his trust account merited suspension in *In re Tessler*, 783 S.W.2d 906 (Mo. banc 1990). Failure for an extended period to pursue a client's claims for back child support and an increase in child support, a lack of communication with the client, and a failure to protect her interests after termination of the representation, resulted in suspension in *In re Lavin*, 788 S.W.2d 282 (Mo. banc 1990). Failure to draft an agreement he had been hired and paid to prepare, failure to

promptly refund the unearned fee, along with failure to cooperate with the disciplinary process resulted in a suspension in *In re Vails*, 768 S.W.2d 78 (Mo. banc 1989).

Given the severity of Respondent's addiction and his track record of jettisoning his clients' interests when his own intervene, suspension until such time as Respondent can demonstrate a meaningful and sustained period of recovery is necessary to protect the public and the profession.

CONCLUSION

Respondent has repeatedly violated many of the same rules – rules designed to protect the public even when the lawyer faces personal calamity. Only suspension, with no leave to apply for reinstatement for one year, coupled with the special conditions for reinstatement recommended by the disciplinary hearing panel (set forth infra at pages 14-15), will assure the Court that the public and profession will be protected.

Respectfully submitted,

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ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2007, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

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_____
Sharon K. Weedin

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. Complies with the limitations contained in Rule 84.06(b);

3. Contains 6,375 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

_____
Sharon K. Weedin

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