IN THE SUPREME COURT
STATE OF MISSOURI

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

INFORMANT'S REPLY BRIEF

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL

SHARON K. WEEDIN #30526
STAFF COUNSEL
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400

ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

TABLE OF CONTENTS **1**

TABLE OF AUTHORITIES **2**

STATEMENT OF FACTS **3**

POINTS RELIED ON **4**

I. 4

II. 5

ARGUMENT **6**

I. 6

II. 7

CONCLUSION **12**

CERTIFICATE OF SERVICE **13**

CERTIFICATION: RULE 84.06(C) **13**

TABLE OF AUTHORITIES

CASES

In re Crews, 159 S.W.3d 355, 358 (Mo. banc 2005) 10
In re Donaho, 98 S.W.3d 871 (Mo. banc 2003) 5
In re Frank, 885 S.W.2d 328 (Mo. banc 1994) 5
In re Harris, 890 S.W.2d 299, 302 (Mo. banc 1994) 8
In re Kohlmeyer, 327 S.W.2d 249, 252 (Mo. banc 1959) 8
In re Wilson, 391 S.W.2d 914 (Mo. banc 1965) 5

OTHER AUTHORITIES

ABA Standards for Imposing Lawyer Sanctions (1991 ed.) 5

RULES

Rule 15.06(f) 5, 8
Rule 4-5.5(c) 5, 8

STATEMENT OF FACTS

Respondent does not dispute that Informant's brief provides a fair statement of facts derived from the record. His points of disagreement, as stated in the statement of facts section of Respondent's brief, speak to the disciplinary hearing panel's decision, not the statement of facts set forth in Informant's brief.

With that distinction in mind, Informant notes the following with respect to the points made by Respondent in his statement of facts. While Respondent is correct in stating that the stipulation of facts entered into between Informant and Respondent acknowledges that Respondent did ultimately turn over Mr. Coker's files to successor counsel so as to allow for conclusion of his workers' compensation case without prejudice to Coker, it was also stipulated that the delay in doing so "violated Rule [4-] 1.15(b)." Thus, the disciplinary hearing panel correctly noted the rule violation, even if it did confuse the factual basis for it.

Respondent's second point takes issue with the panel's consideration of the vulnerability of clients Merritt and Mort as aggravating factors in sanction analysis. It is suggested that this is an issue more appropriately addressed under the sanction Point Relied On, where Informant has replied to the issue.

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.

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 Donaho, 98 S.W.3d 871 (Mo. banc 2003)

In re Wilson, 391 S.W.2d 914 (Mo. banc 1965)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

Rule 4-5.5(c)

Rule 15.06(f)

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.

Respondent acknowledges the twelve Rule violations explicated, with supporting evidentiary basis from the record, under Informant's first Point Relied On.

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 and Informant are in agreement that the sanction appropriate to protect the public in this case is a suspension with no leave to apply for reinstatement for twelve months. Respondent posits that a reprimand, or alternatively, a stayed suspension with probation, is a more appropriate sanction. Informant's rationale for supporting the twelve month suspension is set forth in Informant's brief and will not be rehashed here. Informant does, however, have the following reply to Respondent's argument for a lesser sanction.

Much of what Respondent points to as conduct that should persuade the Court not to suspend Respondent's license is conduct that the Court, and the profession, should expect from every licensed attorney. This Court has repeatedly reminded members of the

bar that truthful and forthcoming cooperation with disciplinary authorities is required. See *In re Donaho*, 98 S.W.3d 871, 874 (Mo. banc 2003) ("We expect members of the bar to cooperate promptly and candidly with bar committees," quoting from *In re Forge*, 747 S.W.2d 141, 145 (Mo. banc 1988)); *In re Harris*, 890 S.W.2d 299, 302 (Mo. banc 1994) ("Members of the legal profession are required to provide disciplinary counsel with a courteous response and prompt cooperation when a request is made for information regarding a disciplinary complaint.").

Similarly, that Respondent eventually, over a period of several years, returned to former clients money he took from them for services he never performed is no feather in Mr. Merryman's cap. Restitution is, at best, mitigation of the gravity and consequences of the offense, and never a defense to the misappropriation. See *In re Wilson*, 391 S.W.2d 914, 920 (Mo. banc 1965); *In re Kohlmeyer*, 327 S.W.2d 249, 252 (Mo. banc 1959). And, while restitution should be accorded some mitigating weight in this case, it should also be noted that all of the money was paid back (between April 2004 and September 2006) after Mr. Merryman was made aware, in the summer of 2003, that complaints had been lodged against him.

Respondent suggests, at page 7 of his brief, that the amendment of Rule 15.06(f), effective July 1, 2005, providing for the automatic suspension of a non-CLE compliant lawyer's license, somehow cures the fact that Respondent practiced law throughout at least a four year period (2000-2004) when he was not compliant with Rule 15 (CLE reporting rule). Respondent was charged in the information with violating Supreme Court Rule 4-5.5(c). That Rule, in effect throughout the relevant CLE reporting periods,

prohibited non-CLE compliant lawyers from practicing law. Respondent was charged in the information with violating the appropriate rule, and the panel correctly concluded that he did violate it.

It is true, as Respondent points out in his brief, that former clients Mort and Merritt did not offer first hand testimony at the disciplinary hearing. There were facts put into evidence, however, from which the panel could find that the "vulnerability of victim" factor was an appropriate aggravating factor for their consideration. See Standard Rule 9.21(h). The evidence was that both former clients sought help from Respondent in filing for personal bankruptcies. The evidence was that after they paid Respondent the fees he requested, he failed to respond to their calls and performed no work for them. The evidence was that Respondent was unaware that Ms. Merritt's wages were being garnished, and that she finally determined, through her own research, that Respondent had never initiated her bankruptcy filing. The panel correctly considered the "vulnerability of victim" factor in its sanction analysis.

Disciplinary counsel strongly disagrees with Respondent's characterization of his misconduct as "negligence." Mr. Merryman knew he was an alcoholic, he had been expressly warned in a past admonition that he should not allow his personal ailments to interfere with his professional responsibilities, he knew he started drinking heavily again in the fall of 2002, and he admitted that when he checked into Welcome House he effectively walled himself off from his clients (who had paid him money in exchange for services never performed). Mr. Merryman's case is not, as he describes it, one of "negligence in dealing with client property." His mental state was knowing, a mental

state appropriately matched to suspension. *In re Frank*, 885 S.W.2d 328, 334 (Mo. banc 1994) ("Suspension is generally appropriate when a lawyer knowingly fails to provide services for a client, …, and thereby causes injury or potential injury to the client.").

Respondent's history of six prior admonitions, three of which involved Rules violated in this case, are further support for the necessity of actual suspension. The aggravating affect of cumulative admonitions supports the conclusion that actual suspension is needed to address the misconduct.

Finally, and most critical to the sanction analysis in Mr. Merryman's case, is the fact that there has simply been no "meaningful and sustained period of rehabilitation," and therefore, it cannot be said with any degree of assurance to the public, that recovery has arrested the misconduct and recurrence of the misconduct is unlikely to occur. ABA Standard Rule 9.32(3)(4). It simply is not the case, as stated on page 12 of Respondent's brief, that alcoholism "is properly a mitigating factor." The ABA Standards clearly provide to the contrary. To reiterate, the uncontroverted evidence is that Respondent completed a one year residential treatment program for alcoholism in January of 2004. He relapsed on several occasions in 2005, and again in early 2006, when he was stopped while driving in an intoxicated state. There is no assurance to be gleaned from this record that Respondent has recovered from his alcoholism for a meaningful and sustained period of time and poses no threat of relapse to the public.

This Court, of course, reviews the evidence de novo, "independently determining all issues pertaining to the credibility of witnesses and the weight of the evidence, and draws its own conclusions of law." *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005)

(per curiam). There really is very little factual dispute between disciplinary counsel and Respondent. The point of disagreement is the level of sanction. The twelve month suspension recommended by the disciplinary hearing panel, and concurred in by disciplinary counsel, coupled with the panel's suggested conditions for reinstatement (Informant's brief, page 15-16), is an absolutely necessary step toward assuring the public that Respondent is fit to return to the practice of law.

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,

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel

By: _____
Sharon K. Weedin #30526
Staff Counsel
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400 – Phone
(573) 635-2240 – Fax
Sharon.Weedin@courts.mo.gov

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2007, two copies of Informant's Reply Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

Thomas J. Fritzlen, Jr.
1044 Main Street, #900
Kansas City, MO 64105

Attorney for Respondent

_____
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 1,977 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