IN THE SUPREME COURT
STATE OF MISSOURI

IN RE: LARRY DELANO COLEMAN,	**)**	
MISSOURI BAR NO. 27575,	**)**	**Supreme Court No.: SC -89849**
	)	
Respondent.	**)**	

BRIEF OF THE RESPONDENT LARRY D. COLEMAN

LARRY DELANO COLEMAN, ESQ.
Larry D. Coleman, Mo. #27575
Eastern District of Missouri #15108
U.S. District Court of Kansas #70434
District of Columbia Bar #310763
8801 East 63rd Street, Suite 208
Raytown, Missouri 64133
816.737.3840
816.737.3177 Facsimile
E-Mail: LCole81937@aol.com
Pro Se

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POINTS RELIED ON

FIRST COUNTER POINT RELIED ON

The Regional Hearing Panel erred only in concluding that Respondent "settled" his client's case without her consent, in that there was never a "settlement," as the client refused to execute the settlement documents; the Federal Court refused to enforce the second agreement, which gave Respondent the "exclusive right" to settle the claim for the $20,000 conditionally offered by the Attorney General; thus, there was no violation of Rule 4-1.2, as the client was not injured, and there was no settlement, ever, as a matter of law.

SECOND COUNTER POINT RELIED ON

The Informant's reliance upon cases and authorities outside Missouri, instead of statutes and authorities within Missouri, deny Respondent Due Process of Law, as the attorney is accountable for conformance to laws in forty-nine other jurisdictions in which he is not licensed, for an alleged conduct violation committed in Missouri.

STATEMENT OF FACTS

PART A: VERA DAVIS

The Respondent and Vera Davis, his client, entered into three written contracts, for three different cases, pursuant to which Vera Davis would pay undersigned counsel's hourly rate. Each of these contracts were executed at different times and for different retainer amounts.

Respondent undertook the representation of Vera Davis, and proceeded to file three separate lawsuits on her behalf. As these lawsuits worked their way through the courts, Vera Davis paid, pursuant to the agreement, faithfully and diligently.

One case involved a discrimination lawsuit involving employment i.e. harassment in the workplace due to race, against Western Missouri Mental Health Center, a state agency. (LF A120). A second lawsuit involved medical malpractice/wrongful death, against certain physicians and healthcare providers in Kansas City, Missouri. (LF A119). The third case involved a private hospital which provides psychiatric services from which Ms. Davis had been discharged, according to her petition, wrongfully, due to race. (LF A142).

In due course, Ms. Vera Davis stopped paying the Respondent. (LF A149).

The Respondent and Vera Davis, accordingly, entered into new contracts for each case. Those contracts provided a contingent fee arrangement in each one. Under the terms of the arrangement, the past due amounts would be waived in their entirety. (LF A141-A143).

No additional attorney's fees would accrue at all. In consideration for his services, however, the Respondent would be paid 33% of any recovery. In addition, the contract provided that the client would convey to the Respondent the exclusive right to determine when, and for how much to settle each of the three cases, in consideration of his greater knowledge and his experience and so that he would not be held hostage to a case that was repugnant to him owing to the client's perception of propriety. (LF A141-A143).

That contract was mailed to Ms. Davis on or about September 12, 2006, and she signed and returned all three contracts to the Respondent on or about October 1, 2006. (LF A141-A143).

Shortly thereafter, the Respondent, faced with a deadline from the Assistant Attorney General to settle the case in light of the pending trial, (LF A144) attempted to settle the case pursuant to his agreement with his client on October 12, 2006. (LF A145). Immediately thereafter, he wrote to his client and advised that he had, "in fact" settled the case for $20,000.00. (LF A146). However, in actuality, the case had not been settled, because as a condition of settlement, the Attorney General required (1) that the Plaintiff, Vera Davis, execute all settlement documents, (LF A147) something she adamantly refused to do. (LF A148). (2) In addition, the Assistant Attorney General required that she return certain documents which she had procured while employed at Western Missouri Mental Health Center, which she did not do.

Even so, given the pendency of the trial date in Federal Court before the Honorable Fernando Gaitan, a former Circuit Court and Court of Appeals Judge in the State of Missouri, both counsel advised the court that they had arrived at a "settlement".

When it appeared that no written proof of the settlement could be produced, the Respondent filed a motion with the court to enforce the

settlement pursuant to his agreement with his client, who had granted him exclusive right to determine when and for how much the case was to be settled.

After briefing, the Court denied that motion. (LF A153; A164-A165).

After the Court denied that motion, undersigned counsel sought leave to withdraw from representation, which the Court sustained. (LF A158-A160; A165).

In the meantime, Ms. Davis had requested and received the return of her files from undersigned counsel. Moreover, the Respondent had also, after writing his client and advising her, sought leave to withdraw in the remaining two cases, reasoning, that if it were such difficulty in one case where the client was not paying him, was not following his advice, and was no longer communicating with him, that was his last remaining option. (LF A149-A150).

Therefore, in all three cases, the respective Judges granted undersigned counsel leave to withdraw. (LF A167-A168; A170; A164-A165).

Judge Gaitan granted Vera Davis an extension of time to either, settle the case herself, represent herself, or get new counsel. She did neither. Thus, in December 2007 the Federal Court dismissed her lawsuit. (LF A169).

Rather than accept the $20,000, in the Western Missouri case, which she had previously rejected and which the efforts of the Respondent had procured, Ms. Davis opted to receive nothing. The Respondent, likewise, received nothing beyond the "approximately $6,700," (LF A146) she had already paid him, Respondent having waived the past indebtedness of $9,647.94. (LF A143).

In the interim, Vera Davis filed a Bar Complaint with the Office of Chief Disciplinary Counsel. (LF A171-A172).

In due course, that matter went up for hearing before the Regional Hearing Panel, which entered a decision, absolving Respondent of all except one sub-count involving Vera Davis. (LF A203-A212).

That one sub-count involved the clause in the contract that she had executed in the Western Missouri case which reserved unto undersigned counsel the exclusive right to decide when and for how much to settle. The Regional Hearing Panel concluded that clause violated Rule 4-1.2 for which it recommended a professional reprimand. (Lf A204-A205).

PART B. IOLTA CHECK

While the case was pending before the Office of Chief Disciplinary Counsel, and before its hearing before the Regional Hearing Panel, another count was added in the amended information against the Respondent. (LF A75-A77). That count related to Respondent's check written to the Supreme Court of the State of Missouri in the amount of $1457.25, (LF A197), representing fees, costs and expenses for a previous reprimand in an unrelated case in which undersigned counsel had been prosecuted by the Office of Chief Disciplinary Counsel involving a previous client in which this Court did not write an opinion but entered an Order concurring with the recommendation of the Office of Chief Disciplinary Counsel of public reprimand. (LF A197, A202).

While the Court's Order in that case was handed down in April 2008, it was not until June 2008, that undersigned counsel, a struggling sole practitioner, was able to pay that sum. (A197). That payment derived from a settlement he had reached in another of his cases. The settlement in that case, involving his client Patricia Johnson-Rushing, involved a $10,000 settlement, 1/3 of which belonged to the Respondent. The Respondent deposited that check into his IOLTA account on June 3, 2008. The bank placed an eight day hold on the account. On the eighth day, June 11, 2008, undersigned counsel, wrote a check to his client in the precise amount of her percentage of the settlement, $6,666.66. (LF A197). Thereafter, from the residue, undersigned counsel wrote a check to the Clerk of Missouri Supreme Court for the aforesaid fees and expenses in the amount of $1,457.75 pursuant to this Court's Order. Thereafter, the remaining portion, he transferred to his own personal checking account. (LF A197).

All of the checks cleared.

However, an ensuing complaint came from the Office of Chief Disciplinary Counsel claiming that the Respondent had "commingled funds"

contrary to the Missouri Rules of Professional Conduct. (LF A181-A182, A183-A184).

They directed him to send in the Bank Statements from his IOLTA account for six months including January through June, 2008. (LF A183). Undersigned counsel did so. (LF A185-A197).

When this matter was heard, undersigned counsel explained that as soon as he gets his client's money, and it becomes good funds, he immediately gets rid of it by paying the client. (Tr. 150). He states that after the client is paid that the only thing left in the account is his own funds. (Tr. 146). In other words, there are no client funds in his IOLTA account after his client is paid. He will either transfer those funds to his checking account or pay directly out of his IOLTA account as there are no other funds in his IOLTA account, except his. In that regard, that explains what happened with regard to the Supreme Court check which resulted in another disciplinary complaint being filed against Respondent. (LF A185).

The Regional Hearing Panel found that undersigned counsel had not violated any of the court's rules with regard to co-mingling. (LF A211-A212).

PART C: MYRTLE CANADY

While the Office of Chief Disciplinary Counsel filed a complaint against Respondent based upon allegations of Myrtle Canady, the Regional Hearing Panel found the allegations to be utterly devoid of merit and found that Ms. Canady lacked credibility. (LF A207-A211).

Thus, even though the Respondent was twice placed on his guard to defend himself against those fruitless allegations, once at the Divisional level and secondly at the Regional Hearing Panel level, the Office of Chief Disciplinary Counsel, in its Brief has abandoned its claim under Myrtle Canady based upon the finding and ruling of the Regional Hearing Panel. (Informant's Brief, pg. 6, note 1)

CONCLUSION

All together, Respondent was charged with twenty one counts of disciplinary misconduct. He was found by the Regional Hearing Panel, after extensive testimony and documentation to have only violated one and, that, as a matter of law related to the exclusivity of counsel's right to determine settlement in a contract which his client had executed. The Regional Hearing Panel found that it violated the rules of the Missouri Supreme Court. (LF A204). Undersigned counsel had set forth that Missouri statutes enabled him to execute such a contract, both at the hearing and as part of his amended answer. (LF A83-A84).

The Regional Hearing Panel recommended reprimand, for that one violation. The Office of Chief Disciplinary Counsel has appealed the Regional Hearing Panel's decision as to both the matter involving the IOLTA check and all other Vera Davis matters except relating to the Vera Davis exclusivity of settlement provision, which the hearing panel found to be violative of the rules.

Respondent, herein, challenges the adverse findings from the Regional Hearing Panel, and the recommendations for a reprimand, based upon the exclusivity provision.

THE FIRST ARGUMENT

The Regional Hearing Panel erred only in concluding that Respondent "settled" his client's case without her consent, in that there was never a "settlement," as the client refused to execute the settlement documents; the Federal Court refused to enforce the second agreement, which gave Respondent the "exclusive right" to settle the claim for the $20,000 conditionally offered by the Attorney General; thus, there was no violation of Rule 4-1.2, as the client was not injured, and there was no settlement, ever, as a matter of law.

The Disciplinary Hearing Panel decision (LF A203-A212) with respect to the amended information (LF A68-A78) properly acquitted the Respondent of all except one subpart of one charge. With regard to that subpart, this Court, as a matter of law, should find that under the relevant Missouri Statutes, Respondent violated no rule of professional conduct. Similarly, the Court should find that under the Rules of this Court no rule of professional conduct was violated either, as to that one particular charge.

It is to be noted that the Respondent faced seven charges under Count I (LF A72), ten charges under Count II (LF A74-75) and four charges under Count III (LF A77). Altogether then, Respondent faced twenty one charges.

Having been duly tried, he was found to have engaged in misconduct with only respect to one out of twenty-one. The one charge relates to a clause in a contingent fee agreement which undersigned counsel entered into with his client, Ms. Vera Davis. That clause stated that "you agree I shall have the exclusive right to determine when and for how much to settle this case." (LFA143)

The panel found that clause was "in direct conflict with the clear mandate contained in Rule 4-1.2(a)." (LF A204). Rule 4-1.2(a) "Scope of Representation", provides in relevant part "all lawyers shall abide by a client's decision whether to accept an offer of settlement of a matter."

However, R.S.Mo. 484.140 (2008) provides:

> "In all suits in equity and in all action or proposed actions at law, whether arising ex contractu or ex delicto it shall be lawful for an attorney at law either before suit or action is brought, or after suit or action is brought, to contract with his client for legal services rendered or to be rendered him for a certain portion or percentage of the proceeds of any settlement of his

> client's claim or cause of action, either before the institution of suit or action, or at any stage after the institution of suit or action, …"

In the letter dated September 12, 2006, which was executed by Vera Davis on October 1, 2006, Respondent set forth the exactly the state of affairs, which his client read at her leisure, executed at her leisure, and returned by mail to undersigned counsel, signifying a new agreement. That new agreement gave undersigned counsel the exclusive right to settle the case in consideration of (1) forgiving a past due balance of $9647.94; (2) forgoing an hourly rate in consideration of 1/3 of any recovery; (3) in consideration of counsel's superior understanding and experience in matters of this nature with regards to civil rights litigation, the client deferring to his judgment to assure that she will receive a "fair and reasonable recovery," in light of the circumstances. (LF A143).

The rationale for the attempted settlement is set forth in undersigned counsel's letter to his client dated October 12, 2006. (LF A146). In that letter, undersigned counsel indicates that he has been paid $6,700 approximately by his client for the case which he attempted to settle. He indicates she will receive 2/3 of any recovery. He explained to her that there is no "back pay at issue whatsoever" and that was because "when we filed

the lawsuit you may recall, you were still employed with Western Missouri." Thus, the only matter at issue was emotional distress damages. (LF A146).

In settling the case, therefore, for $20,000 under the new agreement, when his client was no longer willing or able to pay, the Respondent was doing no more than that which is set forth in Rule 4-2.1 "Advisor". (LF A83). That section provides:

> "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."

Respondent sought to exercise his independent judgment as to what was best for his client. She thought she knew best, though. Technically speaking, however, the case was never "settled" notwithstanding undersigned counsel's attempt to do so, because such a settlement, if any, would have had to have been approved by the United States District Court, Judge Fernando Gaitan, given the client's resistance.

Undersigned counsel sought enforcement of the proposed settlement from the Judge. (LF A164-A165). Judge Gaitan denied the motion to enforce settlement and sustained Respondent's motion to withdraw owing to

"irreconcilable differences" between Ms. Davis and Mr. Coleman. (LF A164). Rule 4-1.16(b)(4) and (5) enabled an attorney to withdraw if the client insists on taking action that the lawyer considers repugnant.

Judge Gaitan perceived no breach of ethics as he stated "The Court is not in a position to mediate disputes between attorneys and their clients that is a function which is best served by the Missouri Bar." (LF A164-A165). A mediation is a far cry from a disciplinary complaint.

The Missouri Bar does have a mediation program. Be that as it may, the point is that undersigned counsel never did "settle" Vera Davis's case. That is because the settlement was never "approved" by the Court. Neither did the Attorney General of the State of Missouri recognize a settlement because Ms. Davis did not sign a notarized settlement agreement. (LF A145, A148). Nor was Vera Davis paid, owing to her rejection.

Undersigned counsel pleaded with his client to come in so that they could resolve their differences in all three cases. (LF A149, A150). Confronted with a dilemma, undersigned counsel let his client know that he

would withdraw by a letter dated February 16, 2007, from all three cases "given the level of hostility," (LF A153) and lack of communication.

So, there was never a "settlement". There was conditional agreement to settle. But it was contingent upon Ms. Davis' agreement to sign the Attorney General's documents which she refused to sign. The district Court's refusal to enforce settlement further destroyed the illusion of settlement. Of course, Ms. Davis' decision to forfeit $20,000 which Respondent's efforts engendered; rather than to retain new counsel to represent her; represent herself in court or settle for what was on the table, was the final coup de grace.

So, far from contracting to "circumvent" the Rules promulgated by the Missouri Supreme Court, Respondent merely sought to execute his "independent professional judgment" (LF A83) as to what would be best for his client, in light of this experience, considering "moral, economic, social and political factors that may be relevant to the client's situation," when he proposed, and the client signed, the second agreement dated September 12, 2006, which she signed October 1,2006. (LF A143) (Tr. 25).

Vera Davis, a registered nurse, is not illiterate (Tr. 6). Neither was she without resources to pay another lawyer to help her. (Tr. 10, 13).

Because, in fine, there was no settlement, there as no violation of the Rule. Neither did counsel do anything except to help his client, which she rejected to her detriment and to his. In fine, respondent helped his client. He did not hurt her. She was not injured by a settlement.

Respondent abides and rests upon the well-reasoned decision of the Regional Hearing Panel, which acquitted him of the other charges in the amended petition.

In the absence of a settlement, there was no injury and in the absence of an injury there was no violation of Rule 4-1.2(a). (LF A72).

THE SECOND ARGUMENT

The Informant's reliance upon cases and authorities outside Missouri, instead of statutes and authorities within Missouri, deny Respondent Due Process of Law, as the attorney is accountable for conformance to laws in forty-nine other jurisdictions in which he is not licensed, for an alleged conduct violation committed in Missouri.

The Informant relies heavily upon cases from outside of Missouri, in order to establish an alleged violation of Missouri's Rules Regulating Professional Misconduct for its Attorneys. As such, the Office of Chief Disciplinary Counsel would make Missouri attorneys beholden to the law of all fifty states with respect to disciplinary matters not exclusively to that of Missouri. However, as this Court has recognized in Re: *First Escrow, Inc.*, 840 S.W. 2d 839 (Mo. 1992), when determining what constitutes the unauthorized or authorized practice of law, the states differ. "Other courts differ on whether closing activities are the practice of law. Some hold they are not---others classify these activities as the practice of law and then grant non-attorneys limited authority to engage in them---we agree with the latter

Courts that the preparation of closing documents is the practice of law and as such is subject to this Court's inherent regulatory authority and continuing supervision---" Id. 843 (citations omitted).

Therefore, it is unreasonable to expect undersigned counsel or any other Missouri attorney to stay abreast of what constitutes a violation in forty-nine foreign jurisdictions of the Rules of Professional Conduct. Undersigned counsel is not a member of the Bars of those states. Likewise, Respondent is not a member of the American Bar Association and its advisory rules certainly do not displace this Court's authority under Article 5, Section 1 of the Missouri Constitution. Neither does the American Bar Association Rules nor the rules of any foreign jurisdiction trump, override, or qualify Missouri Statutes, enacted by the Missouri legislature with regard to the practice of law. R.S.Mo. 484.010 et seq.

In particular, R.S.Mo. 484.040 "Power to Admit to Practice Vested in Supreme Court" states:

> The power to admit and licenses persons to practice as attorneys and counselors in the courts of record in this state, or in any of them, is hereby vested exclusively in the Supreme Court and shall be regulated by rules of that court."

The Missouri Statutes further provide, R.S.Mo. 484.190 "Power to Suspend or Remove,"

> "Any attorney or counselor at law may be removed or suspended from practice in the courts of this state for any of the following reasons: (1) if he be convicted of any criminal offence involving moral turpitude; (2) if he unlawfully retained his clients money or if he is guilty of any malpractice, fraud, deceit or misdemeanor whatsoever in his professional capacity; (3) if he shall have been removed, suspended, or disbarred from the practice of law in any other state or jurisdiction and shall fail to disclose such fact in his application for license to practice law in this state."

The Office of Chief Disciplinary Counsel seeks the suspension of Respondent's license even though he does not fit into any of the aforesaid categories nor does his conduct.

Apparently, the Office of Chief Disciplinary Counsel finds the statutes of the State of Missouri to be anathema. They do not cite them at all in their Brief. They do, however, acknowledge their existence in their Jurisdictional Statement.

Undersigned counsel respectfully submits that the Statutes enacted by the Missouri Legislature and signed into law by the Governor are at least as authoritative as this Court's Rules, given the co-equal branches of government. See, *Cf. Roberts v. Sweitzer*, 733 S.W. 2d 444 (Mo. 1987).

Just as this court can "harmonize" facially repugnant statutes to effect the intent of the legislature, *State ex rel. Riordan v. Dierker*, 956 S.W. 2d 258 [6] (Mo. 1997), it may also lower the recommendation of a Disciplinary Hearing Panel, based on its inherent power to regulate the practice of law. In Re: *Buford*, 577 S.W. 2d 809 (1979)

CONCLUSION

The suspension of the license sought by the Informant is overbroad and unwarranted. The public reprimand that was previously issued to undersigned counsel was itself previously called into question when the United States Supreme Court handed down its decision in *Richlin Security Service Company v.Michael Chertoff, Secretary of Homeland Security*, 128 S. Ct. (2007). This was brought up at the hearing before the Regional Hearing Panel. (Tr. 154-155). None of the Respondent's conduct warrants such a draconian remedy. That is because undersigned counsel, acting as an independent advisor, was doing what he thought best for his client and there was never a settlement imposed upon her.

Undersigned counsel had nothing to do, subsequent to his being granted leave to withdraw by Judge Gaitan, with Ms. Davis' refusal to retain new counsel, to settle the case in her own regard, or to represent herself at trial. She simply let $20,000 go down the drain then filed a Bar Complaint against the attorney who had procured it for her through the dint of his labors.

With regard to the IOLTA issue, that client was paid as soon as the eight day hold on her check was lifted. That was the very settlement from which the Supreme Court Clerk was paid for the previous case for which counsel was reprimanded. Apart from the fact it may be anomalous that counsel endeavoring to pay a fine imposed by the Court can become the subject of another disciplinary complaint, there is no provision, anywhere, which says how those fines and fees are to be paid. Moreover, all the checks cleared, even the Court's. There was never any evidence of commingling.

With regard to the remaining charges involving Vera Davis, no evidence was presented on them as the focus of her complaint clearly related to settlement. All in all, it must be said that the Informant, the Office of Chief Disciplinary Counsel, has failed to sustain its burden of proof with regard to any aspect of this case and it must be ruled against that entity. By the same token, Respondent's record should be cleared and the remaining defect obliterated with regard to a finding that he "settled the case" when there was no settlement, and thus no injury.

Therefore, the Court is urged to affirm the finding of the Regional Hearing Panel with regard to everything except the one charge involving

exclusivity of the right to settle. With regard to that charge, the Respondent requests that the Court reverse the Regional Hearing Panel and strike the recommendation for reprimand.

Respectfully Submitted,

LARRY DELANO COLEMAN, ESQ.

_____

Larry D. Coleman Mo. #27575
Eastern District of Missouri #15108
U.S. District Court of Kansas #70434
District of Columbia Bar #310763
8801 East 63rd Street #208
Raytown, Missouri 64133
816.737.3840
816.737.3177 Facsimile
E-Mail: LCole81937@aol.com
Pro Se

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 84.06(b), I certify that the foregoing Brief consists of 4341 words.

As required by Rule 84.06(g), and Local Rule XXXIII(b), Appellant states that the name and version of the word processing software program used to prepare the Brief is Microsoft Word.

The diskette filed with the foregoing Brief, containing a copy of this Brief, has been scanned for viruses and is virus-free.

_____

Larry D. Coleman, Esq.

CERTIFICATE OF MAILING

I hereby certify that two (2) copies of the above and foregoing ***Brief***, and one (1) diskette (scanned pursuant to Rule 84.06(g) as virus-free) was mailed, via U.S. Postal Mail, this **27th** day of **February, 2009**, to the below-named attorneys for Informant-Appellant:

Shannon L Briesacher
Alan D. Pratzel
Office of Chief Disciplinary Counsel
3335 American Ave.
Jefferson City, MO 65109-1079
573/635-7400 (Telephone)
573-635-2240 (Facsimile)

_____
Larry D. Coleman

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APPENDIX TO BRIEF OF THE RESPONDENT LARRY D. COLEMAN

LARRY DELANO COLEMAN, ESQ.
Larry D. Coleman, Mo. #27575
Eastern District of Missouri #15108
U.S. District Court of Kansas #70434
District of Columbia Bar #310763
8801 East 63rd Street, Suite 208
Raytown, Missouri 64133
816.737.3840
816.737.3177 Facsimile
E-Mail: LCole81937@aol.com
Pro Se

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