

**IN THE SUPREME COURT  
STATE OF MISSOURI**

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**IN RE:**

**MINDY J. MORSE,**

**Respondent.**

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**Supreme Court #SC90983**

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**RESPONDENT'S BRIEF**

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RESPONDENT

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**POINT RELIED ON**

**THE SUPREME COURT SHOULD SUSPEND RESPONDENT FROM THE PRACTICE OF LAW, STAY THE SUSPENSION, AND PLACE HER ON PROBATION FOR EIGHTEEN MONTHS BECAUSE SUSPENSION IS THE APPROPRIATE SANCTION FOR RESPONDENT'S PROFESSIONAL MISCONDUCT AND SHE IS OTHERWISE ELIGIBLE FOR PROBATION UNDER RULE 5.225.**

Rule 4-1.4

Rule 4-1.15

Rule 4-1.16

Rule 4-5.5

Rule 4-7.3

Rule 4-8.1

Rule 4-8.4

Rule 6.05

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

*In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009)

## **ARGUMENT**

**THE SUPREME COURT SHOULD SUSPEND RESPONDENT FROM THE PRACTICE OF LAW, STAY THE SUSPENSION, AND PLACE HER ON PROBATION FOR EIGHTEEN MONTHS BECAUSE SUSPENSION IS THE APPROPRIATE SANCTION FOR RESPONDENT'S PROFESSIONAL MISCONDUCT AND SHE IS OTHERWISE ELIGIBLE FOR PROBATION UNDER RULE 5.225.**

The Respondent submits this brief for two purposes. First, Respondent joins the position of the Office of Chief Disciplinary Counsel (hereafter "OCDC") that the discipline agreed to in the stipulation of the parties is the appropriate sanction in this case. Second, Respondent wishes to make it clear to this Court that Respondent is duly apprised of the gravity of the situation.

Counsel for OCDC is well versed in the authorities that apply to the considerations at hand. Respondent will not attempt to add to his list of authorities. Respondent will offer some additional considerations that Respondent hopes will help convince this court that the stipulated discipline is appropriate.

Respondent practiced law in the State of Missouri with no disciplinary incidents for more than 15 years. Respondent stipulated to five instances of professional misconduct, all occurring during a three-year period from 2006 through 2009. This period of time was very challenging for bankruptcy practitioners because of the demands of the Bankruptcy Reform Act effective October 2005 – in short, more work for the same amount of pay and a steep decline in the number of petitions filed. The professional misconduct Respondent stipulated to includes the following:

- (1) sending client solicitation letters in December of 2006 and April of 2008, that violated Rule 4-7.3(b) because the letters did not incorporate the language and caveats required by the Rule;
- (2) failing to adequately communicate with Mr. Murnane, including Respondent's policies with respect to the retention of fees, during the time period from June 2007 through December 2007, a violation of Rule 4-1.4(a);
- (3) Respondent breached a written agreement to treat fees collected for the benefit of a third party as trust or escrow funds, and failed to promptly deliver such funds to the Institute for Financial Literacy upon demand in November of 2007, thereby violating Rule 4-1.15(b);
- (4) Respondent engaged in the unauthorized practice of law in 2008 and 2009 while under administrative suspension under Rule 15.06(f) in violation of Rules 4-5.5(b)<sup>1</sup>, 4-1.16(a)(1), and 6.05(c); and
- (5) Respondent violated Missouri Supreme Court Rule 4-8.1(b) and Rule 4-8.4(d) in 2009 by (a) failing to cooperate with the regional disciplinary committee in connection with its investigations; and (b) failing to comply with lawful requests for information from a disciplinary authority regarding.

None of this conduct warrants disbarment.

#### Letters, CLE and Cooperation with OCDC

For the majority of the incidents of misconduct under consideration in this proceeding, a reprimand is the customary and appropriate sanction. Reprimand is generally appropriate when a

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<sup>1</sup>The Stipulation incorrectly cited a violation of Rule 4-5.5(a). However, reference to Rule 4-5.5(b) was more likely intended.

lawyer negligently engages in conduct that is a violation of a duty owed to the profession, such as the failure to cooperate with disciplinary authorities, the unauthorized practice of law while administratively suspended and inadequate disclaimers in connection with the written solicitation of clients. See ABA *Standards for Imposing Lawyer Sanctions* 7.3 (1991 ed.). See also *In re Shelhorse*, 147 S.W.3d 79 (Mo. banc 2004) (failure to comply with CLE requirements and failure to respond to inquiries from disciplinary authorities warranted public reprimand). The stipulated discipline in this case is much more severe with a suspension for 12 months stayed only by a lengthy period of probation and significant conditions involving education and supervision.

#### Rule 4-1.15

All lawyers know any violation of Rule 4-1.15 is serious. However, Respondent did not withhold trust funds from a client. Client did not misuse for her own benefit funds belonging to a client. The clients from whom fees were collected received the service they paid for. Respondent did not have a fiduciary relationship with the Institute for Financial Literacy (hereafter “Institute”). Respondent did not have any choice about the terms of the agreement drafted by the Institute to become the collector and bookkeeper for the benefit of the Institute. The contract was entered in November 2005, just after the major reforms of the Bankruptcy Act of 2005 became effective. The services offered by the Institute were newly required by this change in law. Respondent may have chosen more wisely what company to refer clients to for the required services. No bankruptcy practitioner would readily agree to extra duties and responsibilities with no compensation in the practice environment that followed the Bankruptcy Reform. The difficult time consuming invoicing process utilized by the Institute resulted in a fee dispute involving approximately 15 client matters and less than \$1,500.00. The American Bar

Association's *Standards for Imposing Lawyer Sanctions* use three mental states: intent, knowledge and negligence. *In re Coleman*, 295 S.W.3d 857, 869 (Mo. banc 2009). Applying the ABA *Standards* to the misconduct herein it is appropriate to conclude that the circumstances of the conduct do not show a conscious objective or purpose to misappropriate trust funds so as to suggest the more culpable mental states recognized in the ABA *Standards*.

Client Communication – Rule 4-1.4(a)

Policies and practices concerning retention of pre-paid legal fees are a matter of public concern. Mr. Murnane and Respondent entered a contract for legal representation. The agreed upon fee of \$2,000.00 was a fee set by Local Rule 2016-1 of the Bankruptcy Court of the Western District of Missouri as a fee that did not require judicial review. The written agreement provided client need only pay one half of the fee, court costs and credit counseling before attorney would file his petition. **App. 71.** Mr. Murnane paid the minimum required \$1,324.00 while services were being performed and before his petition was filed. Before his petition was filed but after substantial work on his case, Mr. Murnane asked for a complete refund. Mr. Murnane was refunded \$324.00. The accounting Respondent provided to Mr. Murnane was admittedly incomplete in that it did not record all time spent on his behalf. Bankruptcy services are frequently offered on a fixed or flat fee basis. The advantage to the client is the fee is almost always less than the fee would be on an hourly rate. The advantage to the attorney is he or she is freed from the need to keep detailed time records and submit them to the client and court before the funds are available for use of the attorney. The fee in this case was the approved fee provided in Local Rule 2016-1 of the United States Bankruptcy Court for the Western District of Missouri. In the event of a termination of the attorney client relationship before services are complete, as in this case, the attorney must be able to justify time spent in order to retain any part



of the fee. The attorney must balance the advantage of the arrangement of “no time keeping” requirement with the need to be able to explain to the client why it is fair for the attorney to retain all part of fees paid. In this case Respondent stipulated and agrees that the time record keeping fell short of the mark.

### Mitigating and Aggravating Factors

The misconduct in this involved multiple offenses over a period of several years. However, the majority of the offenses are appropriately sanctioned with a reprimand. The stipulated discipline is much more severe. Respondent's conduct has not suggested any lack of competence in her practice field. Respondent's conduct is further mitigated by her cooperative attitude in the formal disciplinary hearing, which outweighs her prior lack of cooperation with the regional disciplinary committee, the absence of dishonest or selfish motive; and Respondent's remorse. Respondent is eligible for probation under Rule 5.225(a). See *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009) (one-year suspension for various instances of professional misconduct, including violation of Rule 4-1.15); *In re Reza*, 743 S.W.2d 411 (Mo. banc 1988) (six-month suspension for unauthorized practice of law, failing to respond to communications from disciplinary authority and neglect of client matter); *In re Crews*, 159 S.W.3d 355 (Mo. banc 2005) (one-year suspension for multiple instances of professional misconduct); *In re Frank*, 885 S.W.2d 328 (Mo. banc 1994) (two-year suspension for multiple disciplinary offenses); *In re Vails*, 768 S.W.2d 78 (Mo. banc 1989) (six-month suspension for multiple instances of misconduct involving failure to cooperate and failure to refund fee when ordered to do so). Respondent is eligible for probation because the facts in the present case satisfy the criteria for probation set forth in Rule 5.225(a). See *In re Coleman*, 295 S.W.3d 857, 871 (Mo. banc 2009)

(probation is appropriate when conduct can be corrected and the attorney's right to practice law needs to be monitored or limited rather than revoked).

### **CONCLUSION**

For the reasons set forth above, Respondent respectfully requests that this Court:

- (a) find that Respondent violated Rules 4-7.3(b); 4-1.4(a); 4-1.15(b); 4-5.5(b); 4-1.16(a)(1); 6.05(c); 4-8.1(b); and 4-8.4(d);
- (b) suspend Respondent from the practice of law with no leave for reinstatement until the expiration of twelve months, stay the suspension, and place Respondent on probation pursuant to Rule 5.225 for a period of eighteen months, with the conditions for probation recommended by the disciplinary hearing panel as set forth in the Stipulation along with any other conditions deemed necessary and appropriate by this Court; and
- (c) tax all costs in this matter to Respondent, including the \$1,000 fee pursuant to Rule 5.19(h).

Respectfully submitted,

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RESPONDENT

## CERTIFICATE OF SERVICE

I hereby certify that on this 30<sup>th</sup> day of December, 2010, one copy of Respondent's Brief has been sent via telefax to 573 635 2240 and two copies and a diskette containing the brief in Microsoft Word format have been sent via US First Class Mail to:

Alan D. Pratzel  
Office of Chief Disciplinary Counsel  
3335 American Avenue  
Jefferson City, Missouri 65109

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Mindy J. Morse

### **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 1,774 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

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Mindy J. Morse