IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
MINDY J. MORSE,	**)**	**Supreme Court #SC90983**
	)	
Respondent.	**)**	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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STATEMENT OF JURISDICTION

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

STATEMENT OF FACTS

Background

Respondent Mindy J. Morse was licensed as an attorney in Missouri in 1990. **App. 25.** Respondent is a sole practitioner with an office in Kansas City, Missouri. **App. 25.** Respondent primarily practices bankruptcy law on behalf of individual or consumer debtors. **App. 25.** Respondent received no discipline during the first fifteen years of practice as a Missouri attorney. **App. 25, 32.** On November 28, 2007, Respondent received an admonition for violation of Rule 4-1.5 (retaining an unreasonable fee) and Rule 4-8.1(b) (failure to cooperate with disciplinary authorities). **App. 32, 43-44.** The admonition was issued after Respondent's unsuccessful participation in a diversion agreement with the Office of Chief Disciplinary Counsel. **App. 43.** The conduct which was the subject of the admonition occurred in 2005. **App. 43.** In addition, Respondent's license was administratively suspended for a brief period in 2008 and again in 2009 for delinquency in completing and/or reporting CLE hours. **App. 29.** The misconduct addressed herein arose in 2006 through 2009. **App. 25-32.**

Procedural History

On November 13, 2009, Informant and Respondent entered into a "Joint Full Stipulation of Facts, Conclusions of Law and Recommendation for Discipline" (the "Stipulation"). **App. 24-44.** The Stipulation was presented to the disciplinary hearing panel on November 16, 2009, whereupon the panel made a short record in lieu of an evidentiary hearing. **App. 48, 46-54.** On or about April 7, 2010, the disciplinary hearing

panel adopted the Stipulation. **App. 55, 55-77.** In adopting the Stipulation, the disciplinary hearing panel recommended a twelve-month suspension from the practice of law in Missouri, with said suspension stayed for a probationary period of eighteen months in accordance with Rule 5.225. **App. 33.** The conditions of probation recommended were (a) no further violations of the Rules of Professional Conduct; (b) participation in the OCDC / Missouri Bar Practice Management Course; and (c) payment of $1,000 pursuant to Rule 5.19(h). **App. 33-34.** The OCDC and Respondent accepted the panel's decision. The Court rejected the proposed discipline and activated a briefing schedule.

Professional Misconduct

The parties' Stipulation in this case identified five instances of professional misconduct: (a) violation of the rule regulating direct mail client solicitation letters; (b) a failure to adequately communicate with her client; (c) a failure to promptly deliver trust funds to a third party; (d) the unauthorized practice of law during two brief periods of administrative suspension; and (e) the failure to cooperate with disciplinary authorities. **App. 25-32.**

A. Direct Mail Client Solicitation Letters—Rule 4-7.3(b)

In December of 2006, Respondent sent a letter to Terry Murnane soliciting representation for a bankruptcy. **App. 25, 36.** On or about April 30, 2008, Respondent sent a nearly identical letter to Valerie Wales soliciting representation for a bankruptcy.

Neither letter was marked "ADVERTISEMENT" at the top of the page as required by Rule 4-7.3(b)(1). **App. 26, 37.** In addition, neither letter included the required statement set forth in Rule 4-7.3(b)(3). **App. 25-26, 36 -37.**

B**.** Inadequate Client Communication—Rule 4-1.4(a)

In or about January of 2007, Mr. Murnane met with Respondent for an initial consultation. **App. 26.** In February of 2007, Mr. Murnane hired Respondent to represent him in connection with a Chapter 13 bankruptcy by executing an attorney-client agreement. **App. 26-27, 38-40.** The agreement provided that the total attorney fees, costs and related fees would be $2,324. **App. 27, 38.** Respondent advised that $1,324 was the amount necessary to commence the bankruptcy filing with the balance of $1,000 to be collected after the filing. **App. 27.** The attorney-client agreement provided that fees paid to Respondent "will remain the property of the Attorney should the Client decide not to file bankruptcy." **App. 27, 38**. The agreement further stated: "Unless the fee retained would be unconscionable except as provided below, the fee will be earned in full and no portion of it will be refunded once any services are performed, including the initial office visit." **App. 27, 38.**

Over the next several months, Mr. Murnane made partial payments to Respondent for the bankruptcy filing. **App. 27.** By June of 2007, Mr. Murnane had paid $1,324 to Respondent, the amount necessary to commence the bankruptcy. **App. 27.** In January of 2008, Mr. Murnane terminated the attorney-client relationship with Respondent, and requested the return of his file and a full refund. **App. 27.** In January of 2008,

Respondent returned the file, but offered to refund only $324 to Mr. Murnane. **App. 27.** Respondent claimed that she had earned $1,000 in fees. **App. 27**. Respondent provided Mr. Murnane with an incomplete written accounting of her time spent on the matter. **App. 27, 41.** Respondent does not keep complete time records with respect to bankruptcy cases handled on a flat-fee basis. **App. 27, 28.** **A**ccording to the document provided to the client, Respondent claimed to have earned $620 in fees as of December 20, 2007. **App. 28, 41.** While the document does not demonstrate the time spent on the matter, Respondent believes that she spent several hours in preparation of the petition and related schedules and in meeting with the client. **App. 28, 41.**

C. Failure to Promptly Deliver Trust Funds to a Third Party—Rule 4-1.15(b)

A consumer debtor in bankruptcy must participate in a credit counseling session as a prerequisite to relief. **App. 28.** Similarly, an additional credit counseling session is required prior to discharge. **App. 28.** In November of 2005, Respondent entered into a written contract with The Institute for Financial Literacy (the "Institute") whereby the Institute agreed to provide credit counseling to Respondent's clients. **App. 28, 42.** Under the contract, Respondent agreed to collect a fee (roughly $50 per session) from her clients for the counseling, and Respondent further agreed to hold such money in trust for the benefit of the Institute upon completion of the counseling by the debtor. **App, 28, 42.** Respondent routinely collected a fee of $50 from each bankruptcy client for credit counseling. **App. 28-29.**

The Institute provided monthly invoices to Respondent. **App. 29**. Beginning in November 2007, the Institute made repeated demands upon Respondent for overdue and delinquent payments. **App. 29.** As of June 2008, the Institute claimed it was owed $1,460 for completed counseling sessions. **App. 29.** Respondent denies this claim, but has been unable to reconcile her records with the records of the Institute. **App. 29.** Although having collected the counseling fees from her clients, Respondent failed to remit an undetermined amount of fees to the Institute. **App. 29.**

D. Unauthorized Practice of Law While Administratively Suspended—Rule 4-5.5(b)

Respondent was suspended from the practice of law in Missouri from March 2, 2009 to about April 1, 2009 for delinquency in completing and/or reporting CLE hours for the 2007 - 2008 reporting period. **App. 29.** Respondent was also administratively suspended for failing to comply with MCLE reporting requirements from approximately March 4, 2008 until April 17, 2008 for the 2006 - 2007 reporting period. **App. 29.**

During these brief periods of suspension, Respondent continued to practice law from her office in Kansas City, Missouri by preparing and filing new bankruptcy petitions for her clients; by attending creditors' meetings; and by preparing and filing a response in opposition to a motion in a bankruptcy matter. **App. 29-31.**

E. Failure to Cooperate with Disciplinary Authorities—Rule 4-8.1(b)

By letter dated March 24, 2008, Respondent was notified of Mr. Murnane's complaint by the Region IV special representative. **App. 31.** The letter requested a response from Respondent. **App. 31**. The special representative sent a second letter

dated April 14, 2008, via certified mail, requesting Respondent's cooperation. **App. 31.** Although the letter was sent to Respondent's official address on file with the Missouri Bar, Respondent failed and refused to claim the certified mail letter. **App. 31.** Respondent did not submit a response to the complaint. **App. 31.** By letter dated June 26, 2008, Respondent was notified of the complaint involving the Institute for Financial Literacy by the Region IV special representative. **App. 31.** The letter requested a response from Respondent. **App. 31.** The special representative sent a second letter requesting Respondent's cooperation dated July 22, 2008, which Respondent received by certified mail on July 31, 2008. **App. 31.** Respondent did not submit a response to this complaint either. **App. 32.**

Aggravating and Mitigating Factors

In the Stipulation, the parties agreed that the following are aggravating factors pertinent to this matter: (a) multiple offenses; (b) substantial experience in the practice of law; and (c) prior disciplinary offense. **App. 32.** In the Stipulation, the parties also agreed that the following constitute mitigating factors: (a) Respondent exhibited a cooperative attitude towards this proceeding as evidenced in part by the stipulation, which outweighs her prior lack of cooperation with the regional disciplinary committee; (b) absence of dishonest or selfish motive; and (c) Respondent is remorseful with respect to her professional misconduct. **App. 32-33.**

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.

Respondent has acknowledged five instances of professional misconduct, all occurring during a three-year period from 2006 through 2009. The professional misconduct includes the following violations:

(1) In sending the client solicitation letters in December of 2006 and again in April of 2008, Respondent violated Rule 4-7.3(b) because the solicitation letters did not incorporate the language and caveats required by the Rule;

(2) In 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, Respondent violated Rule 4-1.4(a);

(3) Respondent breached her written agreement to treat the fees earmarked for credit counseling as trust 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)[1], 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 investigation of the Murnane and Institute complaints; and (b) failing to comply with lawful requests for information from a disciplinary authority regarding the two complaints.

None of this conduct warrants disbarment. The most serious misconduct in the present case is Respondent's failure to promptly remit trust funds in violation of Rule 4-1.15(b). 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). The circumstances of the conduct do not show a conscious objective or purpose to misappropriate trust funds, so as to suggest the most culpable mental state recognized in the ABA *Standards*. Respondent's failure to promptly remit trust funds to a third-party vendor does not rise to the level of a knowing conversion of those funds. Cf. *Standards for Imposing Lawyer Sanctions* 4.11 (1991 ed.) (disbarment is generally appropriate when a lawyer knowingly converts client property).

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

In the present case, Respondent signed a contract agreeing to treat a portion of fees received from clients as trust funds for application to services rendered by the Institute of Financial Literacy to those clients at $50 a session. The facts suggest something more blameworthy than mere negligence, particularly since the violation involves the handling of trust funds and a written agreement signed by Respondent. Under the circumstances of the present case, "knowledge" is the most applicable of the three mental states recognized in the ABA *Standards*. "Knowledge is shown when the lawyer acted with conscious awareness of the nature or attendant circumstances of his or her conduct but without the conscious objective or purpose to accomplish a particular result." *In re Coleman*, 295 S.W.3d 857, 870 (Mo. banc 2009). Having signed the agreement, Respondent was aware of and readily accepted the special duties in handling the credit counseling sessions. Having accepted such responsibilities, Respondent was required to keep track of those funds so as to reconcile her records with those of the Institute, which would have enabled prompt remittance.

Analysis of the mitigating and aggravating factors does not substantially alter the sanction in the present case. On the one hand, the conduct in the present case is aggravated by the (a) multiple offenses over a three-year period; (b) Respondent's substantial experience in the practice of law; and (c) the prior disciplinary offense reflected in the admonition. On the other hand, the misconduct is mitigated by (a) Respondent's cooperative attitude in the formal disciplinary hearing, which outweighs her prior lack of cooperation with the regional disciplinary committee; (b) the absence of dishonest or selfish motive; and (c) Respondent's remorse.

Examination of the injury caused by the misconduct is appropriate under the ABA *Standards for Imposing Lawyer Sanctions*. *In re Coleman*, 295 S.W.3d 857, 870 (Mo. banc 2009). Respondent's professional misconduct resulted in injury to her client, a third party and to the profession as a whole, as follows:

- Respondent's client Murnane received only a partial refund of the fee paid and no accounting to justify the fee retained and allegedly earned by Respondent;
- The Institute failed to receive all retained funds held in trust by Respondent and also failed to receive an accounting of Respondent's collections on its behalf;
- Respondent harmed those within the disciplinary system, many of whom are volunteers, who rely on attorneys to cooperate in disciplinary investigations;
- Respondent harmed the legal profession and the system of mandatory CLE, and the vast majority of attorneys who are diligent in their compliance with annual CLE requirements; and
- Respondent has also harmed the public interest by failing to comply with well-established requirements imposed by the Rules of Professional Conduct on those members of the bar who choose to send written solicitations to those believed to be in need of legal services.

Mr. Murnane received a refund of a portion - but not all - of his advance payment to Respondent. The exact amount of refund owed to Mr. Murnane was not determined,

but would have involved significantly less than $1,000 in light of the few hours of work performed by Respondent to earn a portion of the advanced fee. There is no evidence in the record that Mr. Murnane pursued a refund by legal action against Respondent. Likewise, the exact amount owed to the Institute for credit counseling was not determined, but would have involved less than $1,500. There is no evidence in the record that the Institute pursued collection of the fees by legal action against Respondent, or otherwise sought to liquidate the amount due on the account. It is also relevant that no client suffered actual harm as a result of the stipulated misconduct involving the unauthorized practice of law, the failure to respond to disciplinary authorities or the non-compliant solicitation letters.

Suspension is generally appropriate when a lawyer knows or should know that she is dealing improperly with client property.[2] ABA *Standards for Imposing Lawyer*

[2]A reprimand may have been the appropriate sanction for the remaining misconduct, at least for each instance standing alone. A reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession, such as (a) the failure to cooperate with disciplinary authorities; (b) the unauthorized practice of law while administratively suspended; and (c) 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).

Sanctions 4.12 (1991 ed.). In consideration of Respondent's mental state, the harm caused by Respondent's conduct, and the respective aggravating and mitigating factors, these circumstances create a situation in which the removal of Respondent from the practice of law for at least one year would otherwise be appropriate if not for Respondent's eligibility 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). Respondent is able to continue to perform legal services for individuals in bankruptcy-related matters. The facts in the present case do not demonstrate any concern with Respondent's competence in practicing bankruptcy law. Nor do the facts of the present case demonstrate conduct which involves dishonesty or lack of integrity. For the first

fifteen years of Respondent's experience as a Missouri lawyer, Respondent received no discipline. Probation will not cause the courts or profession to fall into disrepute. Probation will give Respondent an opportunity to rectify the harm to the profession.

It is not likely that Respondent will harm the public during the period of probation since Respondent will be supervised by the Office of Chief Disciplinary Counsel. Probation is appropriate where the misconduct can be remedied by education and supervision. *In re Coleman*, 295 S.W.3d 857, 871 (Mo. banc 2009). The inadequate written solicitation of clients, the inadequate client communications, the improper handling of advance fee payments, and the inadequate reconciliation and handling of third party trust funds all demonstrate needed improvements in Respondent's law practice management skills. Respondent will have an opportunity to address law practice management deficiencies by participation in the Practice Management Course. Supervision will also include monitoring of CLE compliance, which should help to avoid a repeat instance of administrative suspension. Respondent's written acknowledgment of the misconduct, her remorse for the misconduct, and her attendance at the disciplinary hearing demonstrates Respondent's ability to overcome any past problems in cooperating with disciplinary authorities. In sum, Informant believes that Respondent is eligible for probation under Rule 5.225(a).

CONCLUSION

For the reasons set forth above, the Chief Disciplinary Counsel 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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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2010, 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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Alan D. Pratzel

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 3,637 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Trend Micro software was used to scan the disk for viruses and that it is virus free.

_____
Alan D. Pratzel

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