

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

KATHRYN R. PERSLEY,

Respondent.

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Supreme Court #SC91200

INFORMANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF JURISDICTION	3
STATEMENT OF FACTS	4
BACKGROUND: CHARGES, STIPULATIONS AND DISCIPLINARY HISTORY	4
COUNT I	5
COUNT II	6
RESPONDENT’S EFFORTS TO IMPROVE.....	7
PREVIOUS DISCIPLINE	7
POINT RELIED ON	8
ARGUMENT	9
VIOLATIONS	9
SANCTION	9
<i>Rule 5.225</i>	10
<i>ABA Sanction Standards</i>	13
<i>Missouri Guidance</i>	16
CONCLUSION	19
CERTIFICATE OF SERVICE	20
CERTIFICATION: RULE 84.06(C)	20
APPENDIX.....	A1

TABLE OF AUTHORITIES

Cases

<i>In re Coleman</i> , 295 S.W.3d 859 (Mo. banc 2009)	8, 13, 17, 18
<i>In re Crews</i> , 159 S.W.3d 355 (Mo. banc 2005)	8, 16
<i>In re Wiles</i> , 107 S.W.3d 228 (Mo. banc 2003)	8, 17, 18

Statutes

Section 484.040 RSMo 2000	3
---------------------------------	---

Other Authorities

ABA <u>Standards for Imposing Lawyer Sanctions</u> (Theoretical Framework) (1992)...	8, 13, 14
Article 5, Section 5 of the Missouri Constitution	3

Rules

Rule 4-1.3	8, 9, 13
Rule 4-1.4	8, 9, 13
Rule 4-1.15	8, 9, 13
Rule 4-5.5	8, 9
Rule 5.225	8, 9, 10, 16

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: Charges, Stipulations and Disciplinary History

Kathryn R. Persley, Respondent, was licensed to practice law in Missouri in 1995. She currently has a general practice in Kansas City, Missouri, **App. 3 (T. 4)**, and recently began focusing on a bankruptcy practice. **App. 6 (T. 13)**. She has also been licensed in Kansas, but allowed that license to lapse. **App. 5 (T. 10)**. For some time, she did not engage in a full-time practice, but instead acted as a part-time Human Resources Officer for the Kansas City School District. **App. 4 (T. 6)**. Respondent did not carry malpractice insurance at the time of the Disciplinary Hearing Panel hearing on April 27, 2010. **App. 5 (T. 10-11)**.

This case consists of allegations of professional misconduct in two independent representations. Count I involves poor recordkeeping in Respondent's trust account, in violation of Rule 4-1.15. Count II involves Respondent's failure to take care of a client's traffic tickets and her representation of that client in Kansas courts while her Kansas license was inactive, in violation of Rules 4-1.3 and 4-5.5.

Informant and Respondent stipulated to facts, conclusions, and a recommended sanction. Under the agreement, Respondent's license would be suspended, and she would be placed on probation under Rule 5.225. In April 2010 a Disciplinary Hearing Panel conducted a hearing to determine whether to accept the stipulation. The Panel accepted the stipulated facts and conclusions, but rejected the recommendation for probation. Instead, the Panel recommended that Respondent's license be suspended,

without probation. Respondent rejected the Panel's recommendation, so the case is ripe for this Court's de novo review and disposition.

In February 2005, Respondent accepted two admonitions issued by the Region IV Disciplinary Committee. In one case she was admonished for violating Rule 4-1.1 (Competence) and Rule 4-1.3 (Diligence). In the second case, she was found to have violated Rule 4-1.3 (Diligence) and 4-1.4 (Communication). **App. 58-59.**

Count I

During late 2008 and 2009, Respondent suffered from emotional and other health problems. **App. 6 (T. 15).** Her practice, at that time, mostly consisted of handling traffic tickets. **App. 8 (T. 21-23).** She acknowledged that she did not keep accurate trust account records. **App. 6-7 (T. 16-17); 34 (T. 127); 56-70.** She told the Panel that she lost track of whose money was whose and how it got spent, but said that "every client's traffic matter was taken care of." **App. 7 (T. 17).** Written fee agreements were not a routine part of her traffic ticket practice at that time. **App. 7 (T. 19).** She did not maintain an operating account for her office; instead she used only a trust account and her personal account. **App. 7-8 (T. 20-21).**

Between November 2008 and April 2009, Respondent's trust account reflected seven deposits and eight checks. **App. 76.** In November 2008, she received a fee from a Bankruptcy Trustee for her work in a bankruptcy case. She deposited that \$493.00 check into her trust account. **App. 35 (T. 129); 76.** She also received a \$50.00 fee, from another client, and soon wrote a check for \$525.00 to 'Cash' to pay herself those fees, **App. 35 (T. 129-130); 76,** leaving a small balance in the account. After paying \$193.50

to a municipal court for another client, her trust account reflected a negative balance of - \$168.00. Within a week, a new client, Syniara Tombs, delivered \$328.50, which was deposited into Respondent's trust account. Of that amount, \$193.00 was to be paid as court costs on Ms. Tombs' behalf. **App. 76.** Instead of being paid into the court as costs, Ms. Tombs' funds were depleted by two checks. **App. 42 (T. 157-159).** Respondent wrote one check for \$175.00 to herself and another for \$225.00 to "Cash". **App. 76.** Respondent partially replenished the account by leaving a \$310.00 earned fee in the account and then, months later, by depositing another \$200.00 into the account. **App. 76.** Informant did not discover evidence that Respondent was acting with the intent to steal when she wrote those checks. Instead, Informant accepts Respondent's explanation that she failed to accurately maintain trust account records and failed to understand the need to keep separate ledgers for each client. **App. 34-35 (T. 127-131).**

The parties stipulated that Respondent violated Rule 4-1.15(c) by using client funds for herself, for depositing her own money in her trust account, and by failing to maintain adequate records in her trust account.

Count II

In December 2008, Respondent agreed to represent Ronald Thomas on several traffic tickets in Missouri and Kansas. Mr. Thomas paid Respondent, and she gathered some information on his behalf. But, during her emotional and physical difficulties, she missed a court appearance in Kansas. **App. 12 (T. 37-40); 32-33 (T. 117-123); 42-43 (T. 159-161).** Her failure to appear caused a warrant to be issued for Mr. Thomas. Upon confrontation by Mr. Thomas, she agreed to reimburse him, but then did not complete the

reimbursement. **App. 27-29 (T. 97-105); 37-38 (T. 139-142).** At the time of her representation of Mr. Thomas in the Kansas case, her Kansas license was not in good standing because she had failed to pay her professional dues.

The parties stipulated that Respondent violated Rule 4-1.3 (Diligence) and 4-1.4 (Communication) by failing to appear on Mr. Thomas' behalf and by failing to inform him of that. Also, the stipulation establishes that Respondent violated Rule 4-5.5(a) by accepting fees to represent Mr. Thomas in Kansas when she was not licensed to do so.

Respondent's Efforts to Improve

The Disciplinary Hearing Panel questioned Respondent at length about her practice methods and her efforts to improve. The Panel discussed a self-audit undertaken by Respondent during the pendency of this case. **App. 40 (T. 149-152).** They asked her about trust accounting, **App. 35-36 (T. 130-135); 41-42 (T. 156-157),** and she described her plan to hire a bookkeeper. **App. 36 (T. 134); 41 (T. 153).** And, they discussed her business plan, **App. 43-44 (T. 161-166),** and her current caseload. **App. 45-46 (T. 170-174).**

Previous Discipline

In 2005, Respondent accepted two admonitions from the Region IV Disciplinary Committee. Both admonitions involved Respondent's failure to act diligently on behalf of her clients and her failure to adequately communicate with them. **App. 56-70.**

POINT RELIED ON

**RESPONDENT’S LICENSE SHOULD BE SUSPENDED; SHE
SHOULD BE PLACED ON PROBATION IN ORDER TO IMPROVE
HER PRACTICE AND PROTECT HER FUTURE CLIENTS.**

In re Coleman, 295 S.W.3d 859 (Mo. banc 2009)

In re Wiles, 107 S.W.3d 228 (Mo. banc 2003)

In re Crews, 159 S.W.3d 355 (Mo. banc 2005)

ABA Standards for Imposing Lawyer Sanctions (Theoretical Framework) (1992)

Rule 4-1.3

Rule 4-1.4

Rule 4-1.15

Rule 4-5.5

Rule 5.225

ARGUMENT

**RESPONDENT'S LICENSE SHOULD BE SUSPENDED AND
PLACED ON PROBATION IN ORDER TO IMPROVE HER
PRACTICE AND PROTECT HER FUTURE CLIENTS.**

Violations

Violations of Rules 4-1.15, 4-1.3, 4-1.4, and 4-5.5 are established by stipulation. In conducting a hearing, the Disciplinary Hearing Panel further developed facts and found the violations as stipulated.

Although the parties stipulated to a particular sanction, suspension with probation, the Panel rejected that sanction. Instead, they recommended that Respondent's license be actually suspended, without probation.

Sanction

The remaining and central issue is whether probation is a fitting resolution to the case. Three questions may help the Court address that issue:

- A. Can Rule 5.225 (Probation) be properly applied?
 - B. Do the ABA Sanction Standards recommend probation in cases of this nature, considering aggravating and mitigating circumstances?
 - C. Do previous Missouri Supreme Court decisions support probation?
- And, more specifically, will probation meet the well established purposes of lawyer discipline cases; that is, will probation protect the public and maintain the integrity of the legal profession?

Rule 5.225

- (a) Eligibility. A lawyer is eligible for probation if he or she:
 - (1) Is unlikely to harm the public during the period of probation and can be adequately supervised;
 - (2) Is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; and,
 - (3) Has not committed acts warranting disbarment.

Probation shall be imposed for a specified period of time in conjunction with a suspension. The suspension may be stayed in whole or in part.

The period of probation shall not exceed five years unless an extension is granted upon motion by either party. A motion for an extension must be filed prior to the conclusion of the suspension period.

An order of probation is an order of discipline.

Rule 5.225(a).

The Office of Chief Disciplinary Counsel (Informant) and Respondent stipulated that Rule 5.225 could be applied to these facts, and that probation would be appropriate. Informant maintains that view. Contrary to the parties' stipulation, the Disciplinary Hearing Panel rejected probation, expressing concern as to whether Respondent could establish office systems to protect her clients while simultaneously restarting her practice. **App. 145.** The Panel expressed frustration with Respondent's responses to several of their questions. They noted that she couldn't recall the facts underlying her two previous

admonitions (both issued in 2005 for diligence and communication violations). **App. 143.**

They noted her employment as a human resources consultant for the Kansas City School District and her receipt of unemployment compensation since being terminated from that position. They noted, as a positive factor, the business relationship she has with her attorney, which includes free rent and partially covered office expenses. That arrangement would allow her to start her practice without those costs. But, the Panel was concerned about Respondent's "on-going problems with financial management, including informal engagements, cash received for fees, without appropriate engagements or accounting for client funds, which she proposes to correct by limiting acceptance of cash fee payments, and hiring a bookkeeper." **App. 144.** They also appeared frustrated that Respondent's own effort to self-audit her practice has languished. And, the Panel was concerned that "Respondent was unable to provide any concrete information on appropriate financial planning for her re-start in the practice ..." Finally, they noted her recent financial problems, including an unpaid 2010 judgment. They were concerned about the judgment, along with "significant start-up expenses" "... including malpractice insurance, equipment and management software, accounting and administrative staffing, and an uncertain income stream." **App. 145.** The Panel found those concerns present an "unreasonable risk that Respondent will be unable to maintain an income which will meet her anticipated expenses." **App. 145.** The Panel's **Conclusion** summarizes their concerns:

We conclude that it is in the best interest of the public (i.e. potential clients of the Respondent) that Respondent not practice law for a period of time. This would allow her to focus on putting in place systems and procedures conducive to an ethical, efficient legal practice. Given our impressions after a three hour hearing, the panel does not believe Respondent can do this, while at the same time practicing law.

App. 145.

Informant recognizes those concerns and appreciates the Hearing Panel's perspective. But, given the nature of Respondent's misconduct, her level of intent in that misconduct, and the extent of the stipulated terms and conditions in the probation proposal, Informant believes that probation can be successful.

Checking the remaining prerequisites to probation, the following is apparent: First, this is not a case in which disbarment is warranted. Second, because her violations do not appear to be intentional or egregious, and her prior discipline is not extensive, probation will not cause the courts or profession to fall into disrepute. So, the unanswered questions are: whether Respondent is unlikely to harm the public during probation and whether her practice can be adequately supervised. **App. 167-168.** Again, Informant is willing to take those risks. With the conditions and terms set out in the Stipulation, including monitoring by the Office of Chief Disciplinary Counsel, coordination with a mentor, employment of a law practice management consultant, attendance at Ethics School, and her current arrangement for free rent and office support, probation has a good chance to succeed.

ABA Sanction Standards

The Court routinely relies on the ABA Standards for Imposing Lawyer Sanctions for guidance in determining appropriate discipline. *In re Coleman*, 295 S.W.3d 859, 869 (Mo. banc 2009). At the outset, the ABA's guidelines consider the lawyer's duties, mental state, and the injury or actual injury. Upon the completion of that analysis, aggravating and mitigating circumstances should be considered. ABA Standards for Imposing Lawyer Sanctions (Theoretical Framework) (1992).

In this case, as in the *Coleman* case, the lawyer failed to maintain good financial records, leading to misuse of client funds. Like *Coleman's*, Respondent's conduct was not purposeful.

The duties violated in this case were primarily duties to her clients. She violated Rule 4-1.3 (diligence) by failing to appear in court or take other protective action on behalf of Ronald Thomas. And, she violated Rule 4-1.4 (communication) when she failed to notify him of her decision not to appear. Then, by failing to keep adequate trust account records and inadvertently using client money as her own, she violated another duty to her client Syniara Tombs. (Rule 4-1.15). Respondent's unauthorized practice in Kansas, while her Kansas license was inactive, violated a duty to the legal system.

Turning to the harm or potential harm caused to her clients, it is apparent that Mr. Thomas was potentially harmed by Respondent's failure to appear on his behalf, but the record does not indicate that he was arrested upon the issuance of a warrant for his arrest. In Count I, however, Respondent's poor trust accounting practices led to at least temporary harm to her client, Syniara Tombs. Although Respondent eventually

replenished the account with her own funds, clients are harmed and their funds are at high risk of loss when attorneys commingle their own funds with clients and keep records so woefully inadequate that they don't know whose funds are in the trust account.

These ABA Sanction Standards appear to apply:

Standard 4.13

Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

Respondent's trust accounting procedures did not comply with the Rules. Without assuring whose funds were in the account, she used a client's funds to pay herself.

Standard 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.

Respondent told the Panel that she knew about Mr. Thomas' court date but could not appear because she was ill. She did not contact either the court or Mr. Thomas. That conduct constituted a serious neglect of her duty to her client.

Standard 9.22(a)

Factors which may be considered in aggravation.

Aggravating factors include:

- (a) prior disciplinary offenses.

Respondent received two admonitions in 2005. Both were for diligence and communication violations.

Standard 9.32

Factors which may be considered in mitigation. Mitigating factors include:

- (b) absence of a dishonest or selfish motive.

The record does not support a finding that Respondent acted dishonestly or selfishly.

Standard 9.32

Factors which may be considered in mitigation. Mitigating factors include:

- (c) personal problems.

Respondent described extensive personal, emotional, and physical problems during the time period of these violations.

Standard 2.7

Probation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be imposed alone or in conjunction with a reprimand or an admonition; probation can also be imposed as a condition of readmission or reinstatement.

Commentary

Probation is a sanction that should be imposed when a lawyer's right to practice law needs to be monitored or limited rather than suspended or revoked.

In the instant case, application of these factors supports suspension with probation. As long as the conditions and terms of probation are explicit and designed to improve Respondent's practice so that her clients are protected, probation is a fitting sanction under the ABA Sanction Guidelines.

Missouri Guidance

This Court has repeatedly described the dual purposes of attorney discipline as public protection and maintenance of the professional integrity. *In re Crews*, 159 S.W.3d 355, 360 (Mo. banc 2005). Informant believes those goals can be met by suspending Respondent's license and then staying the suspension while she is placed on strict terms and conditions of probation.

The probation rule (Rule 5.225) has been effective since 2003. In that time, its applicability has not been the subject of many opinions from the Court. (Although the Office of Chief Disciplinary Counsel often stipulates to probation, these two reported decisions came in cases where the Office of Chief Disciplinary Counsel opposed probation.) The Office of Chief Disciplinary Counsel firmly supports the concept of retraining lawyers while on probation, and often stipulates to probation with the belief that strict probationary conditions are, in many cases, more likely to improve a lawyer's practices (and thereby protect the public) than either admonitions or reprimands. The

case before the Court seems to be a classic example of a case where probation is likely to help an attorney improve her practice and protect her future clients.

The two reported decisions applying probation should be considered. In the first case, the Court ordered probation for Missouri attorney Stanley Wiles. *In re Wiles*, 107 S.W.3d 228 (Mo. banc 2003). Attorney Wiles had been previously admonished for four diligence violations, five communication violations, one safeguarding client property violation, and one violation for engaging in conduct prejudicial to the administration of justice. *Wiles*, at 229. And, he had received two more admonitions from Kansas disciplinary authorities. *Wiles*, at 229. The opinion did not describe the new conduct that led to discipline, other than noting that Mr. Wiles had been censured in Kansas. *Wiles*, at 228.

The more recent decision involving probation provides additional guidance. In that 2009 opinion, the Court granted probation to Missouri attorney Larry Coleman. *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009). Mr. Coleman had been admonished in 1990 for violations involving communication and unreasonable fees. Later, in 1999, he was admonished for diligence and communication violations. Finally, in 2008, the Court publicly reprimanded him for “violations regarding diligence, unreasonable fees and conduct prejudicial to the administration of justice.” *Coleman*, at 859. In the 2009 case leading to probation, the Court found that Mr. Coleman violated these Rules:

- Mr. Coleman violated Rule 4-1.2 by preparing a retainer agreement giving him “exclusive right to when and for how much to settle” his client’s case. And, he

violated that Rule by actually agreeing with his client's opponent to settle her case against her specific direction. *Coleman*, at 864.

- Mr. Coleman violated Rule 4-1.15(c) by commingling his own funds with client funds in his trust account and by failing to keep adequate trust account records. *Coleman*, at 866.
- Mr. Coleman violated Rule 4-1.16 by failing to notify his client at the time of his withdrawal from her case and by failing to take steps to mitigate his withdrawal. *Coleman*, at 866-867.
- That misconduct also led to a finding that Mr. Coleman violated Rule 4-8.4 in that it wasted judicial resources and was prejudicial to the administration of justice. *Coleman*, at 868.
- Upon application of the ABA Sanction Standards, the Court determined that a suspension was an appropriate sanction. *Coleman*, at 869-871.

The *Coleman* and *Wiles* decisions support the use of probation in this case.

CONCLUSION

Informant asks the Court: (a) to find that Respondent violated the Rules of Professional Conduct as set out in the Stipulation; (b) to suspend attorney's license indefinitely with no leave to apply for reinstatement until after six months; (c) to order probation for two years in conformity with the Stipulation, (d) to establish as the terms and conditions of probation those contained in the Stipulation, and (e) to 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 28th 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

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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 3,715 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.

Sam S. Phillips

TABLE OF CONTENTS - APPENDIX

TABLE OF CONTENTS	A1
TRANSCRIPT OF DISCIPLINARY HRG. - APRIL 27, 2010	A2 - A51
INFORMATION	A52 - A55
STIPULATION AS TO FACTS, CONCLUSIONS OF LAW AND	
RECOMMENDATION	A56 - A70
DISCIPLINARY HEARING PANEL APPOINTMENT	A71 - A73
NOTICE OF HEARING	A74 - A75
EX. 1 - TRUST ACCOUNT SPREADSHEET	A76
EX. 2 - DOCKET SHEET	A77 - A78
EX. 3 - THOMAS COMPLAINT FILE	A79 - A134
EX. 4 - RESPONSE TO OVERDRAFT COMPLAINT	A135 - A139
DISCIPLINARY HEARING PANEL DECISION	A140 - A147
LETTER FROM SARA RITTMAN	A148
LETTER OF REJECTION FROM RESPONDENT	A149
RULE 4-1.3	A150 - A151
RULE 4-1.4	A152 - A153
RULE 4-1.15	A154 - A162
RULE 4-5.5	A163 - A166
RULE 5.225	A167 - A168