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December 20, 2010

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Suite 350
605 West 47th Street
Kansas City, Missouri 64112

**In re: Kathryn R. Persley
Supreme Court No. SC91200**

Dear Mr. Wirken:

This is to advise that respondent's brief was filed with service in the above-entitled cause on December 17, 2010.

Yours very truly,

THOMAS F. SIMON

Kathy K. Fletchall
Deputy Clerk, Court en Banc

cc: Mr. Sam S. Phillips
Ms. Kathryn R. Persley

SCANNED

IN THE SUPREME COURT
STATE OF MISSOURI

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IN RE:

KATHRYN R. PERSLEY,

Respondent.

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Supreme Court #SC91200

FILED

DEC 17 2010

Thomas F. Simon
CLERK, SUPREME COURT

RESPONDENT'S BRIEF

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SCANNED

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

Other Authorities

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

Rules

Rule 4-1.3

Rule 4-1.4

Rule 4-1.15

Rule 4-5.5

Rule 5.225

STATEMENT OF JURISDICTION

Kathryn R. Persley, Respondent, agrees with the statement of jurisdiction over attorney discipline matters established by Article 5, Section 5, of the Missouri Constitution, Supreme Court Rule 5, the Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Background: Charges, Stipulations and Disciplinary History

Kathryn R. Persley, Respondent, agrees with paragraph one(1), of Informant's Brief, found on page four(4).

Kathryn R. Persley, Respondent, agrees to paragraph two (2), with clarification, of Informant's Brief, found on page four(4).

Kathryn R. Persley, Respondent, agrees to paragraph three (3), of Informant's Brief, found on page four(4).

Kathryn R. Persley, Respondent, agrees to paragraph four(4), of Informant's Brief, found on page five(5).

Count I

Kathryn R. Persley, Respondent, agrees the language contained in paragraph one(1), page five(5) is accurate according to the transcript.

Kathryn R. Persley, Respondent, agrees with paragraph four(4) Informant's Brief under Count I, found on page six(6).

Count II

Kathryn R. Persley, Respondent, denies paragraph one(1) of Count II, of Informant's Brief found on page six(6). The Respondent's failure to appear did not cause a warrant to be issued for Mr. Thomas' arrest.

Kathryn R. Persley, Respondent, agrees with the remainder of Count II as this is

the same language included in the stipulation.

Respondent's Efforts to Improve

Since the stipulation between the parties, Respondent has continued to make efforts to improve her practice methods and client services by implementing some of the proposed recommendations in the Stipulation Agreement. Specifically, Respondent has done the following:

(1) attended a continuing education class on trust accounting; (2) attended the 2010 Solo and Small Firm Conference; (3) retained the services of a human resources and business consulting firm to provide guidance with an internal audit of files and existing office systems; (4) obtained the services of two full-time interns during the Summer of 2010 through a federally-funded program to assist in implementing initial recommendations from the business consultant; (5) hired an experienced paralegal consultant to assist with supervision and training of Summer Interns and revisions to office policies and procedures; (4) retained the ongoing services of one part-time intern; (6) provided training for a paralegal consultant and interns using materials obtained from the MO Bar Law Practice Lending Library; (7) obtained personal copies of practice management materials available on the MoBar website; (9) attended an 8-hour bankruptcy practice CLE; (10) purchased and studied current bankruptcy practice materials and reviewed current bankruptcy case law; (11) undertaking contract bankruptcy work for other attorneys including attending 341 meetings, court hearings and preparing documents; (12) purchased practice development materials from the ABA including, but limited to: Flying

Solo; (13) and audited all client files for completeness and scanned all documents onto secured server so that client files are always accessible via internet.

In addition, Respondent has opened a business bank account in the name of Persley Law Firm¹ in order to keep her personal finances completely separate from those related to her law practice.

Previous Discipline

Kathryn R. Persley, Respondent, believes that the Panel's frustration with her responses mentioned on pages 10 - 11 of Informant's Brief, were because she could not recall all the details of Disciplinary Complaints that were made against her.

Kathryn R. Persley, Respondent, and her counsel, agree, that as counsel discussed with Ms. Persley, prior to the hearing and as the transcript reflects on pages 115 - 116, "that if you do not remember the details, be honest with the panel and tell them that you don't remember." The transcript reflects this information, as follows: "maybe the best part of candor is 'I don't remember' as well."

¹Respondent is currently in the process of negotiating the sale and/or transfer of the name "SOS Legal Services" so an account was not opened in that name.

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

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

Other Authorities

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

Rules

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.

Kathryn R. Persley, Respondent, agrees with page nine (9), as it is substantially the same as the Informant's Brief.

Kathryn R. Persley, Respondent, agrees with **Rule 5.225**, on page ten (10), of Informant's Brief.

Kathryn R. Persley, Respondent, agrees that the last paragraph of page ten(10) is accurate regarding the description of the hearing panel decision.

Kathryn R. Persley, Respondent, agrees with the top of page eleven(11), of Informant's Brief. The bottom half of page eleven(11) are addressed under the Additional Arguments Section.

Kathryn R. Persley, Respondent, denies paragraph one(1) of page twelve(12), that her efforts to improve and facts are not in record. She supports **Rule 5.225** for probation.

Kathryn R. Persley, Respondent, agrees with paragraph two (2) of page twelve (12), of Informant's Brief.

Kathryn R. Persley, Respondent, agrees with paragraph (3) of page twelve (12), and refers the Court to the comments contained in argument regarding rent and office support.

Violations

Respondent has stipulated to the violations of Rules 4-1.15, 4-1.3, 4-1.4, and 4-5.5.

Sanction

The issue before the Court is whether probation is a fitting resolution to this case. As stated by Informant, there are three questions that may help the Court address this 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).

Informant, the Office of Chief Disciplinary Counsel, and Respondent stipulated that Rule 5.225 could be applied to the facts of this case and that probation would be appropriate. Though the Disciplinary Hearing Panel disagreed, both Informant and Respondent still support this view.

The Disciplinary Hearing Panel's recommendation was based in part on:

(1) whether Respondent could establish office systems to protect her clients while simultaneously restarting her practice; (2) that Respondent was unable to provide any concrete information on appropriate financial planning for re-start in her practice; and (3) a recent judgment against respondent, along with "significant start-up expenses" . **App.**

145

Respondent acknowledges the concerns expressed by the Disciplinary Hearing Panel regarding financial planning, start-up expenses (e.g., malpractice insurance, equipment and management software, accounting, administrative staffing and an uncertain income stream). However, Respondent has maintained her own office almost constantly during the 15-years she has practiced law, and more specifically since the

inception of this current issue on April 27, 2010. Respondent has owned office equipment and maintained an office and off-site storage since the inception of her law practice. As a result, Respondent did not have to incur any initial start-up costs for furniture, equipment or software in April 2010 to rebuild her practice.

Respondent believes that her decision to hire a bookkeeper will assist her in maintaining accurate, up-to-date business records, including tracking client funds. Respondent acknowledges her ethical obligation and personal responsibility for the management of her practice; however, Respondent believes that delegating this responsibility to a person experienced in bookkeeping while retaining oversight of the individual's work is in the best interests of her practice.

During the Disciplinary Hearing Panel Hearing, Respondent described her plans to build her practice by accepting bankruptcy cases based on her past success in this practice area and the current economic climate. **App. 6, (T. 14)**. In response to the Panel's inquiry regarding Respondent's expectations regarding her stated financial projections, Respondent discussed the historical patterns of when bankruptcy cases are filed and that she intended to use the intervening three months to "do more of the administrative part of monitoring her practice" **App. 45 (T. 170-171)**.

As of the date of Respondent Brief, Respondent has successfully closed approximately five Chapter 13 bankruptcy cases that had been opened since 2005. Since April, 2010, Respondent has taken the following actions to increase her knowledge and skills in bankruptcy law: (1) attended 6.9 hours of bankruptcy continuing education; (2)

purchased and studied current bankruptcy practice materials and reviewed current bankruptcy case law; (3) performed contract bankruptcy work for other attorneys including attending 341 meetings, court hearings and preparing documents. Respondent has also been invited to attend regular weekly meetings beginning in January 2011 with other bankruptcy attorneys to discuss current trends in the bankruptcy laws.

Since the beginning of October 2010, Respondent has signed agreements to file ten (10) new bankruptcy cases which is very close to the projection given to the Disciplinary Hearing Panel in April 2010. **App. 45 (T. 170)**. In addition, Respondent has been hired on an as-needed basis by a local attorney to appear before the Chapter 13 bankruptcy trustee and in bankruptcy hearings. Respondent has taken advantage of this opportunity so that she can work closely with an experienced bankruptcy attorney and to increase Respondent's revenues. To increase Respondent's own bankruptcy practice, Respondent has negotiated with a local radio station to air advertisements for debt relief. These advertisements are scheduled to begin in January 2011. In addition, Respondent anticipates that additional revenue will be generated by making court appearances for other bankruptcy attorneys on an "as-needed" basis.

With regard to the administrative management of her practice, Respondent has done the following since April 2010: (1) attended a continuing education class on trust accounting; (2) attended the 2010 Solo and Small Firm Conference; (3) retained the services of a human resources and business consulting firm to provide recommendations for an internal file audit and updates to existing office systems, policies and procedures;

(4) obtained the services of two full-time interns during the Summer of 2010 through a federally-funded program to assist in implementing initial recommendations from the business consultant; (5) hired an experienced paralegal consultant to assist with supervision and training of interns and revisions to office policies, procedures and systems; (6) retained the ongoing services of one part-time intern; (7) provided training for a paralegal consultant and interns on Rules of Professional Conduct using existing training materials and materials obtained from the MO Bar Law Practice Lending Library; (8) obtained personal copies of practice management materials available on the MoBar website; (9) purchased practice development materials from the MO Bar, the ABA and other legal publishers; (10) implemented consultants recommendations on auditing client files and office policies. The Hearing Panel's decision was not mailed until July 30, 2010, however, Respondent had completed or initiated most of the items enumerated above prior to that date.

Respondent also acknowledges the Hearing Panel's concerns about the outstanding judgment and her ability to provide for her personal expenses. Respondent's current ongoing living expenses are minimal, e.g. only paying utility costs. As a result, Respondent is anticipating that future earnings will be available to operate her practice, pay the costs associated with this action, and provide an income sufficient to pay her ongoing financial obligations, including payment of the outstanding judgment.

Given the nature of Respondent's admitted misconduct, her level of intent in that misconduct and the extent of the stipulated terms and conditions as stated in the parties

Stipulation, Respondent believes that probation is appropriate and that she can be successful in completing it.

A review of the remaining prerequisites of Rule 5.225, demonstrate that this is not a case in which disbarment is warranted. In addition, because of the nature of the Respondent's violations do not appear to be intentional or egregious, and she does not have an extensive history of prior discipline, probation will not cause the courts or profession to fall in disrepute. The remaining questions to be answered are: (1) whether Respondent is unlikely to harm the public during probation, and (2) whether Respondent's practice can be adequately supervised? **App. 167-168.**

During the pendency of these proceedings, Respondent has demonstrated remorse and has taken steps to improve her practice and her personal life. Respondent initiated a self-audit from Mo Bar Law Practice Management Materials prior to the disciplinary hearing. Respondent independently sought out mentors to address practice management issues, and in particular in the designated area of law in which she intends to practice. Respondent has sought out a practice consultant and begun implementing recommendations to improve office systems. Respondent has utilized available community programs to avail herself of administrative support staff at no cost to Respondent. Respondent has established her own office and is progressing to establishing the practice goals discussed with the Hearing Panel.

Respondent sincerely wants to continue the practice of law and agrees with Informant's view that probation is the appropriate sanction in this case. The concerns of

the Disciplinary Hearing Panel that Respondent would be unable to establish office systems to protect her clients while restarting her practice have already been addressed by Respondent and such systems are implemented and underway. Respondent believes that she can successfully complete the terms and conditions of probation as set forth in the Stipulation.

Respondent's initial plan was to continue sharing office space with an attorney for a period of one year before obtaining separate office space. However, due to circumstances beyond Respondent's control, on September 29, 2010, Respondent was given 30-days notice that she would need to obtain her own office space. The unanticipated office move cost Respondent approximately \$1,700 and depleted funds that had been set aside to pay the annual premiums for malpractice, health and workers comp insurance. Respondent is currently seeking to replenish those funds in order to meet anticipated expenses for insurance and office overhead for the coming months.

ABA Sanction Standards

According to *In re Coleman*, 295 S.W.3d 859, 869 (Mo. banc 2009), the Court routinely relies on the ABA Standards for Imposing Lawyer Sanctions for guidance in determining appropriate discipline. The ABA's guidelines initially consider the lawyer's duties, mental state and the injury or actual injury. The guidelines then take into consideration aggravating and mitigating circumstances. ABA Standards for Imposing Lawyer Sanctions (Theoretical Framework) (1992).

Respondent has stipulated that she violated Rule 4-1.3 (diligence) and Rule 4-1.4

(communication) in her representation of Ronald Thomas and acknowledged that she violated her duty to the legal system by engaging in the unauthorized practice of law while her license was inactive in Kansas. In addition, Respondent has stipulated that she violated Rule 4-1.15 (safekeeping client property) by failing to keep adequate trust account records in her representation of Syniara Toombs.

In this case, as in the *Coleman* case, the lawyer failed to maintain good financial records, leading to a misuse of client funds. The *Coleman* case also addressed issues related to his communications with a client. In that case, the attorney was suspended from the practice of law, with execution of the suspension stayed, subject to the attorney's completion of a one-year term of probation in accordance with the conditions imposed by the Court. The conditions imposed by the Court included attendance at the ethics school conducted by OCDC, participation in law practice management education and mentoring, preparation of an office management plan that is approved by OCDC, filing of quarterly responsibility reports, submission to periodic financial audits, employment of a qualified consultant, maintenance of adequate trust account records and commission of no other violations of the rules of professional conduct.

The conditions imposed by the Court in *Coleman* are substantially the same as the conditions and terms contained in the Stipulation signed by the parties in this matter. Respondent and Informant concur that probation is a fitting form of discipline in this case under the ABA Standards.

The 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 admits that her accounting procedures did not comply with the Rules.

Standard 4.42

Suspension is generally appropriate when:

- (a) a lawyer knowing 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 Informant and the Panel that she knew about Mr. Thomas's court date but did not appear because she was ill. Respondent's efforts to contact Mr. Thomas about her inability to appear were unsuccessful and Respondent did not contact the court about her absence which resulted in a neglect of her duty to her client and injury 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 health-related 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.

Application of the above standards supports the position that Respondent's license be suspended and that she be placed on probation. Probation is a fitting sanction under the ABA Sanction Guidelines so long as the conditions and terms of probations are explicit and designed to improve Respondent's practice so that her clients are protected.

Missouri Guidance

The fundamental purpose of an attorney disciplinary proceeding is to protect the public and maintain the integrity of the legal profession." *In re Crews*, 159 S.W.3d 355, 360 (Mo. banc 2005). Informant believes that the stated 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. Respondent concurs with Informant's recommendation.

It should be noted that in both *Crews* and *Coleman*, the Office of Chief Disciplinary Counsel opposed probation. In both of those cases, the Missouri Supreme Court ultimately suspended the attorney's license, stayed the suspension and placed the attorney on probation with strict terms and conditions.

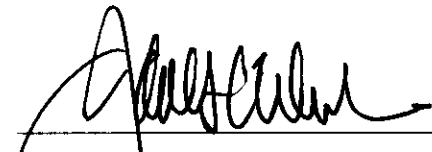
In this case, the Office of Chief Disciplinary Counsel believes that probation is warranted and that Respondent can be successfully retrained and that Respondent can improve her legal practice and procedures. Informant asserts that this is a classic example of a case where probation can help an attorney improve their practice and protect future clients. Respondent concurs that the proposed terms and conditions set forth in the Stipulation signed by the parties will meet the fundamental purposes of attorney discipline. Respondent respectfully requests that this Court consider her efforts she has

already initiated to improve her practice and protect her clients and outline that the court will allow her to continue practicing law under the terms of probation outlined in the stipulation entered into by the Informant and Respondent.

CONCLUSION

Respondent asks the Court: (a) to find that Respondent violated the Rules of Professional Conduct as set out in the Stipulation; (b) to suspend Respondent's attorney license indefinitely, with no leave to apply for reinstatement for at least six months; (c) that the suspension be stayed and that Respondent be placed on two years probation under Rule 5.225 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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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2010, two copies of Respondent's Brief and a diskette containing the brief in Microsoft WordPerfect have been sent via first-class mail to:

Sam S. Phillips
Deputy Chief Disciplinary Counsel
3335 American Avenue
Jefferson City MO 65109

ATTORNEYS FOR INFORMANT




James C. Wirken

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 3781 words, according to Microsoft WordPerfect which is the word processing system used to prepare this brief; and
4. That Microsoft Vista software was used to scan the disk for viruses and that it is virus free.



James C. Wirken

APPENDIX

Kathryn R. Persley, Respondent, adopts the appendix of the Informant.