MISSOURI ETHICS AND PROFESSIONALISM UPDATE

Boone County Bar Association

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Topics:

- **Subpoena for documents from a third party**
- **Professionalism – reporting pro bono service**
- **Selected cases related to Supreme Court Rule 4, the Rules of Professional Conduct**

SUBPOENA FOR DOCUMENTS FROM THIRD PARTY

PREVIOUS PROBLEMS

Prior to the recent changes to discovery rules, you did not have a way to use a subpoena to obtain documents from a third party without requiring the third party to appear and produce the documents at a deposition, hearing, or trial. You were misusing the subpoena if you used it just for production of documents, even if a deposition would be held later.

The subpoena, by its own terms, was only for the records to be produced at the deposition. By using it to obtain the records in advance of the deposition, you were depriving the opposing party of the opportunity to object to actual production of the records at the deposition. The Missouri rules simply did not provide for a production of documents from a third party procedure. If the third party received the subpoena and just sent you the documents, without any action or encouragement on your part or anyone else on your side of the case, you would not violate the rules. However, if you canceled the deposition for this reason, you were required to inform opposing counsel of the reason, since opposing counsel would also have been entitled to obtain the documents at the deposition.

State ex rel. Crowden v. Dandurand, 970 S.W.2d 340, 343 (Mo. Banc 1998) "It is professional misconduct for a requesting attorney to review or otherwise use privileged records that a provider mails contrary to a subpoena requiring production of documents at a deposition."

CURRENT SOLUTIONS

With the adoption of a new version of Rule 57.09 and a completely new Rule 58.02, these situations have been addressed. It is still impermissible to subpoena a third party to a deposition and unilaterally waive the deposition in exchange for production of the documents. However, there is now a specific procedure for a waiver: "With the agreement of all parties, the non-party may be excused from appearance at the deposition and may produce the subpoenaed items to the party responsible for issuance and service of the subpoena, who shall then offer to all other parties the opportunity to inspect or copy the subpoenaed items."

It is no longer necessary to have a deposition, hearing, or trial scheduled to subpoena documents from a third party. Rule 58.02 establishes a procedure to use a subpoena to simply compel production of documents by a third party without any ancillary proceeding, such as a deposition. Rule 58.02 also provides for a waiver of the formal production: "With the agreement of all parties, the non-party may be excused from appearance at the location specified for document production and may produce the subpoenaed items to the party responsible for issuance and service of the subpoena, who shall then offer to all other parties the opportunity to inspect or copy the subpoenaed items."

In both instances, the attorney or party seeking production has certain duties in connection with a waiver. In both instances, it is possible to make the production process more convenient for all involved, if no one sees a need for the formal process. However, it will still be a violation of the Civil Procedure Rules and therefore the Rules of Professional Conduct (*See* Rule 4-3.4(b)), if one attorney or party seeks to use a subpoena to unilaterally obtain documents from a third party.

Effective 1-1-12

57.09 SUBPOENA FOR TAKING DEPOSITION

(a) For Attendance of Witnesses; Form; Issuance. Every subpoena for a deposition shall:

(1) Be issued by the officer or person before whom depositions may be taken as designated in Rule 57.05 or Rule 57.06 or by the clerk of the court in which the civil action is pending;

(2) State the name of the court and the style of the civil action;

(3) State the name, address and telephone number of all attorneys of record and self-represented parties; and

(4) Command each person to whom it is directed to attend and give testimony at a time and place therein specified.

(b) For Production of Documents and Things. In conjunction with a deposition properly noticed under Rule 57.03, a subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein. The court may:

(1) Quash or modify the subpoena if it is unreasonable or oppressive, or

(2) Require the party who issued and served the subpoena to advance the reasonable cost of producing the books, papers, documents, or tangible things.

(c) Subpoena to a Non-Party. A subpoena to a non-party pursuant to Rule 57.09 for the production of documents and things shall be served not fewer than 10 days before the time specified for compliance. The party serving a subpoena on a non-party shall provide a copy of the subpoena to every party as if it were a pleading. A party objecting to the subpoena may seek a protective order under Rule 56.01(c).

A party or attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a non-party subject to the subpoena.

With the agreement of all parties, the non-party may be excused from appearance at the deposition and may produce the subpoenaed items to the party responsible for issuance and service of the subpoena, who shall then offer to all other parties the opportunity to inspect or copy the subpoenaed items. The party responsible for issuance and service of the subpoena is responsible for obtaining the agreement of all parties and advising the non-party in writing of the agreement, with a copy to all attorneys of record and self-represented parties. Absent such an agreement, the subpoenaed items shall only be produced at the deposition.

Upon request by any party, the non-party shall also produce with the subpoenaed items a business records affidavit of the custodian of records.

A non-party commanded to produce and permit inspection and copying may serve the party who issued and served the subpoena with a written objection to inspection and copying of any or all of the designated items. The objection shall state specific reasons why the subpoena should be quashed or modified.

The objection shall be served on all parties to the action within 10 days after service of the subpoena or before the time specified for compliance, whichever is earlier.

If a timely and specific objection is made, the party who issued and served the subpoena shall not be entitled to inspect or copy the subpoenaed items except pursuant to an order of the court.

Upon notice to the non-party commanded to produce, the party who issued and served the subpoena may move at any time for an order to compel production.

(d) Service. A subpoena may be served by:

(1) The sheriff or a sheriff's deputy, or

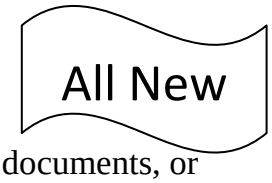
(2) Any other person who is not a party and is not less than 18 years of age.

Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to that person the fees and mileage the witness would have been entitled to receive for attending court pursuant to subpoena.

(e) Authorization to Issue Subpoena. Proof of service of a notice to take a deposition as provided in Rules 57.03 and 57.04 is sufficient to authorize the issuance of a subpoena for taking a deposition.

(f) Contempt. Any person who without adequate excuse fails to obey a subpoena served upon the person may be held in contempt of the court in which the civil action is pending.

58.02 SUBPOENA TO NON-PARTY FOR PRODUCTION OF DOCUMENTS AND THINGS



(a) Scope. A party may serve a subpoena on a non-party to:

(1) Produce and permit inspection and copying of any designated documents, or

(2) Permit inspection, copying testing, or sampling of any tangible things that constitute or contain matters within the scope of Rule 56.01(b) and that are in the possession, custody or control of the non-party.

(3) Every such subpoena for document production and things shall:

(A) Be issued by the clerk of the court in which the civil action is pending;

(B) State the name of the court and the style of the civil action;

(C) State the name, address, and telephone number of all attorneys of record and self-represented parties.

(b) Time. A subpoena to a non-party shall be served not fewer than 10 days before the time specified for compliance.

(c) Notice to Parties. The party serving a subpoena on a non-party pursuant to Rule 58.02(a) shall provide a copy of the subpoena to every party as if it were a pleading. A party objecting to the subpoena may seek a protective order under Rule 56.01(c).

(d) Response. With the agreement of all parties, the non-party may be excused from appearance at the location specified for document production and may produce the subpoenaed items to the party responsible for issuance and service of the subpoena, who shall then offer to all other parties the opportunity to inspect or copy the subpoenaed items. The party responsible for issuance and service of the subpoena is responsible for obtaining the agreement of all parties and advising the non-party in writing of the agreement, with a copy to all attorneys of record and self-represented parties. Absent such an agreement, the subpoenaed items shall only be produced at the place, date and time specified by the subpoena for all parties to inspect or copy.

The non-party shall appear and produce the subpoenaed items for copying and inspection by all parties at the place, date, and time specified by the subpoena. However, if all parties agree in writing, a non-party may comply with the subpoena by producing the subpoenaed items pursuant to that written agreement. The party responsible for issuance and service of the subpoena is responsible for advising the non-party, in writing, of the agreed upon directions, with a copy to all attorneys of record and self-represented parties. Absent such agreement, the subpoenaed items shall only be produced at the place, date, and time specified by the subpoena for all parties to inspect and copy.

Upon request by any party, the non-party shall also produce with the subpoenaed items a business records affidavit of the custodian of records.

(e) Protection of Non-Party.

(1) A party or attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a non-party subject to the subpoena.

(2) A non-party commanded to produce and permit inspection and copying may serve the party who issued and served the subpoena with a written objection to inspection and copying of any or all of the designated items. The objection shall state specific reasons why the subpoena should be quashed or modified. The objection shall be served on all parties to the action within 10 days after service of the subpoena or before the time specified for compliance, whichever is earlier.

(3) If a timely and specific objection is made, the party who issued and served the subpoena shall not be entitled to inspect or copy the subpoenaed items except pursuant to an order of the court.

(f) Contempt. Any person who without adequate excuse fails to obey a subpoena served upon the person may be held in contempt of the court in which the civil action is pending.

REPORTING PRO BONO SERVICE

RULE 4-6.1: VOLUNTARY PRO BONO PUBLICO SERVICE

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations; by service in activities for improving the law, the legal system, or the legal profession; and by financial support for organizations that provide legal services to persons of limited means.

COMMENT

[1] The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation, and the administration of justice. This Rule 4-6.1 expresses that policy but is not intended to be enforced through disciplinary process.

[2] The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules, and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

[3] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the

individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

(Adopted September 28, 1993, eff. July 1, 1995, Rev. July 1, 2007)

Missouri Bar Pro Bono Webpage

http://www.mobar.org/probono.htm

The need is great, the responsibility profound.

Many lawyers feel a profound sense of responsibility to do pro bono work and most find they gain great personal satisfaction from doing so. The great majority of lawyers provide pro bono service of some nature. The need for more involvement, especially in helping those who cannot afford legal representation, is great. This page offers information and resources to help Missouri lawyers fulfil their professional obligation to render public interested legal services.

Missouri Bar Asks Lawyers to Report Pro Bono Hours Annually

Help Track Our Legal Profession's Commitment for Justice to All

Many Missouri lawyers generously help ensure that justice extends to those less fortunate by making pro bono work an integral part of their practices. However, this honorable commitment often lacks the recognition it deserves within the legal profession and is for the most part unknown to the general public.

The Missouri Bar hopes to change this by asking lawyers to voluntarily report the number of hours they commit to pro bono work annually. This reporting will provide valuable information about the collective and individual pro bono efforts of Missouri lawyers, help the Bar better recognize these efforts and inspire other lawyers to perform pro bono services. You will play a vital role in this effort by annually reporting your pro bono hours using this site. We have made it quick and easy to do. Just log in with your members-only bar number and pin and complete the brief form.

SELECTED RECENT CASES RELATED TO

SUPREME COURT RULE 4

DISCIPLINE

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010).

Excerpt from unofficial Summary of SC90652, In re: Renae Ehler

The attorney violated five ethics rules, including using money she owed to clients to pay personal expenses. Given aggravating circumstances, including the previous discipline and failure to improve while on probation, disbarment is the appropriate sanction.

OPINION:

PATRICIA BRECKENRIDGE, Judge.

The Office of Chief Disciplinary Counsel (OCDC) seeks to discipline the law license of Renae Lynn Ehler for multiple violations of the rules of professional conduct in her representation of a client in a dissolution proceeding and another client in an unrelated civil case. The preponderance of the evidence proves Ms. Ehler violated Rule 4-1.1, Competence, by failing to correctly calculate and deliver the amount of money owed to a client and an opposing party and by failing to provide opposing counsel with requested discovery information to avoid a default judgment against her client; Rule 4-1.3, Diligence, by failing to pay money owed to a client and an opposing party in a timely fashion and by failing to provide opposing counsel with discovery information to avoid a default judgment against her client; Rule 4-1.4, Communication, by failing to communicate with clients and opposing counsel; Rule 4-1.15, Safekeeping Property, by misappropriating and mishandling client funds and by failing to properly maintain a client trust account; and Rule 4-8.4, Misconduct, by violating other rules of professional

[319 S.W.3d 445]

conduct and by engaging in conduct involving deceit and misrepresentation.[1]

The Court previously suspended Ms. Ehler's license for six months for prior violations of the rules of professional conduct that were of the same nature as her current violations. It stayed her suspension and imposed a two-year term of probation. She committed some of the current acts of professional misconduct while she was on probation. The effort to educate Ms. Ehler and assist her in modifying her professional behavior to comply with the rules of professional conduct has failed. In light of the severity of her acts of misconduct and this Court's progressive application of discipline, disbarment is appropriate. Therefore, Ms. Ehler is disbarred.

Factual and Procedural Background

Ms. Ehler was licensed to practice law in Missouri in October 1997. In October 2005, this Court disciplined Ms. Ehler for the following rule violations: [2]

• Rule 4-1.3, Diligence, for failing to act on behalf of clients and failing to return money owed to them in a timely fashion after express request by clients;

• Rule 4-1.4, Communication, for failing to communicate with clients regarding their cases' status;

• Rule 4-1.15, Safekeeping Property, by failing to properly maintain a client trust account and failing to deliver money when due;

• Rule 4-1.16, Declining or Terminating Representation, for failing to refund unearned fees and unused costs to former clients in a timely manner following withdrawal from representation.

• Rule 4-8.1, Bar Disciplinary Matters, for failing to reasonably respond to the OCDC.

The Court suspended her license for six months but stayed that suspension and placed her on probation for a term of two years. As a condition of her probation, Ms. Ehler was required to consult with a practicing attorney from Columbia who was a law office practice management consultant. That attorney worked with her regularly over the two-year period on how to handle her office practices and manage her client trust account. The probation terms also required her to consult with a Moberly attorney who served as a mentor for Ms. Ehler. Ms. Ehler's term of probation ended January 28, 2008.

The present disciplinary action arises out of complaints regarding Ms. Ehler's representation of R.K. in a dissolution proceeding and her representation of C.G. in a lawsuit for unpaid water bills.

The Dissolution

In 2007, R.K. hired Ms. Ehler to represent her in a dissolution action against H.M. Ms. Ehler filed the dissolution action as counsel for R.K. Another attorney represented H.M.

The parties reached a settlement on the day the dissolution was to be tried, January 16, 2008, and that settlement was approved

[319 S.W.3d 446]

by the trial court after a hearing that day. As part of the settlement, the couple's real and personal property was to be sold and the net proceeds divided equally between the parties after the payment of all debts. The court also ordered that R.K.'s name be changed. Ms. Ehler was to receive the proceeds of the sales of property, pay the parties' debts and then distribute the net proceeds to them. She also was to file a proposed dissolution decree.

R.K. expected to receive her dissolution decree within six weeks. When she did not receive it, she repeatedly called Ms. Ehler to inquire about the delay. Finally, R.K. obtained the assistance of Bobby Wheeler, another lawyer, and he took her over to the courthouse to get a copy of the decree. It had not been filed. The proposed dissolution decree was filed only after the court issued an order to Ms. Ehler to appear and show cause why she should not be held in contempt for failure to provide the proposed judgment. After the dissolution decree was filed, Mr. Wheeler procured a copy for R.K. It contained a scrivener's error; it misstated R.K.'s first name. Mr. Wheeler filed a motion to correct the judgment, and

the corrected judgment was issued July 10, 2008, almost seven months after the hearing at which the court approved the settlement and directed Ms. Ehler to file the proposed dissolution decree.

Following the dissolution settlement, Ms. Ehler received several checks from the sales of the marital property and income tax refunds and deposited the checks into her trust account. On February 19, 2008, she deposited into the trust account two federal income tax refund checks totaling $1,225.63. On June 6, 2008, she deposited a check in the amount of $52,481.22 for the net proceeds from the sale of marital real property. On July 7, 2008, she deposited a check in the amount of $13,832.66 for the net proceeds from the sale of the marital personal property. The sum total of those checks is $67,539.51.

On June 25, 2008, Ms. Ehler sent a letter to H.M.'s attorney outlining her distribution plan for the marital assets. She listed several creditors, including herself for attorney's fees, who needed to be paid before any money could be distributed to the parties. The sum total of the debt was $18,380.41, although Ms. Ehler's letter erroneously listed the amount as $18,636.64. In July 2008, Ms. Ehler paid herself and the creditors.

At this point, the remaining balance should have been $49,159.10 for equal distribution to H.M. and R.K. However, during the dissolution proceeding, H.M. and R.K. each paid bills to creditors. Because of the difference in payment, R.K. should have received $24,782.31 from the net proceeds and H.M. should have received $24,376.79. In September 2008, Ms. Ehler mailed a $20,460.44 check to R.K. H.M. did not receive his portion of the proceeds. H.M.'s attorney repeatedly contacted Ms. Ehler in an effort to acquire his client's money. As of January 29, 2009, Ms. Ehler still owed R.K. $4,321.87 and H.M. $24,376.79.

R.K. recognized a discrepancy between the amount she received and the amount she was owed. She contacted Ms. Ehler and requested an accounting of the parties' marital funds. Ms. Ehler never provided R.K. with the requested accounting. R.K. then filed a complaint with the OCDC.

The C.G. Representation

C.G. and his wife, D.G., hired Ms. Ehler to represent C.G. in the defense of a lawsuit involving a claim for unpaid water

[319 S.W.3d 447]

bills.[3] C.G. wished to assert the defense that he had not lived at the property where the water bills had been generated during the relevant time period because he was living in Iowa at the time. C.G. had his wife, D.G., deliver to Ms. Ehler his employment and tax records, his son's school records, and rental receipts as documentary evidence that he had lived in Iowa during the relevant time period for which the water bills were generated. After Ms. Ehler received the documents, C.G.'s only contact with her was a telephone conversation when she told him a court date had been continued and that she would contact him with the new court date.

Prior to that time, Ms. Ehler told C.G. that the opposing party had interrogatories he needed to answer and read the questions to him over the phone. He told her he easily could answer the questions,

and it was agreed that Ms. Ehler would send the interrogatories to him that he was required to complete. She never did so.

Ms. Ehler appeared in court July 28, 2008, to respond to a motion filed by the plaintiff water district seeking sanctions for C.G.'s failure to respond to its discovery requests. In court, Ms. Ehler did not use the documentary evidence received from C.G. Ms. Ehler told the court C.G. had not provided her with the information necessary to respond to the interrogatories. As a sanction for failing to comply with discovery requests, the court entered a judgment by default against C.G. in the amount of $1,900. C.G. did not appear for the hearing when the motion for sanctions was heard because he did not know that the motion had been filed or that there was a court date. Additionally, Ms. Ehler did not inform C.G. of the default judgment entered against him, and he found out about the judgment through a Case.net search conducted by his wife. As a result of the default judgment, C.G.'s wages were garnished and his credit rating was damaged. C.G. filed a complaint against Ms. Ehler with the OCDC.

OCDC Investigation

After receiving complaints from R.K. and C.G., the OCDC investigated Ms. Ehler's law practices and audited her trust account for 2007-2008. The audit revealed Ms. Ehler made 12 payments for her personal and office utility bills out of the trust account. In 2007, there were over $2,000 in utility payments withdrawn from the account. In 2008, $1,120.20 was withdrawn from the account. As of January 29, 2009, Ms. Ehler's trust account balance was $26,847.58; $253.74 of that amount was subject to an IOLTA lien. The trust account balance was $2,104.82 less than the amount due to H.M. and R.K.

After the audit, the OCDC directed Ms. Ehler to pay H.M. and R.K. the balance owed to them. The OCDC staff went with Ms. Ehler to her bank, where she obtained a cashier's check made payable to R.K. for $3,066.70 and a cashier's check made paying to H.M. for $23,527.14. She still owes H.M. and R.K. $2,104.82.

The OCDC filed an information against Ms. Ehler. A disciplinary panel heard the matter and, on November 12, 2009, found R.K., H.M., and C.G. to be credible witnesses. In regard to R.K.'s complaint, the panel found Ms. Ehler violated the following rules of professional conduct:

• Rule 4-1.1, Competence, by failing to correctly calculate the money owed to H.M. and R.K. and by failing to deliver the correct amount to them;

[319 S.W.3d 448]

• Rule 4-1.3, Diligence, by failing to timely deliver the money owed to H.M. and R.K.;

• Rule 4-1.4, Communication, by failing to communicate with R.K. about the money owed and by failing to communicate with H.M. and his attorney about the money owed;

• Rule 4-1.15, Safekeeping Property, by failing to properly maintain a client trust account and failing to deliver funds to H.M. and R.K., and, instead, utilizing portions of that money for other purposes;

• Rule 4-8.4, Misconduct, by engaging in conduct involving deceit and misrepresentation.

In regard to C.G.'s complaint, the panel found Ms. Ehler violated the following rules of professional conduct:

• Rule 4-1.1, Competence, by failing to provide to opposing counsel the information requested in discovery so as to avoid a judgment against her clients;

• Rule 4-1.3, Diligence, by failing to provide to opposing counsel the information requested in discovery so as to avoid a judgment against her clients.

The panel found that aggravating factors were present, including a prior disciplinary offense, a dishonest or selfish motive, a pattern of misconduct, multiple offenses, and an indifference to making restitution. It also found the presence of mitigating factors, including Ms. Ehler's personal and emotional problems due to her ongoing divorce and her cooperation with the OCDC in the proceedings. The panel recommended disbarment.

Ms. Ehler filed her rejection of the panel's recommendation, which brings the matter before this Court.

Standard of Review

"Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed." In re Crews, 159 S.W.3d 355, 358 (Mo. banc 2005). This Court reviews the evidence de novo, independently determines all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. In re Belz, 258 S.W.3d 38, 41 (Mo. banc 2008). The panel's findings of fact, conclusions of law, and the recommendations are advisory and, this Court may reject any or all of the panel's recommendations. In re Coleman, 295 S.W.3d 857, 863 (Mo. banc 2009).

Violation of Rule 4-1.1 Competence

Rule 4-1.1 requires a lawyer to represent a client competently. Competent representation includes "the legal knowledge, skill, thoroughness, and preparation reasonably necessary to complete the representation." Crews, 159 S.W.3d at 359. Ms. Ehler's conduct in R.K.'s dissolution and her representation of C.G. demonstrates a lack of competence for which discipline is appropriate.

The evidence shows Ms. Ehler has violated rule 4-1.1 by failing to correctly calculate the money owed to H.M. and R.K. and by failing to deliver the correct amount to them from the proceeds of their sale of marital property. After selling the couples' marital property, Ms. Ehler was directed by the circuit court to collect the proceeds of the sale and appropriately dispense the proceeds. Ms. Ehler's failure to properly calculate the amount due the parties and then disperse the proper amount to the parties was incompetent representation of R.K. by Ms. Ehler.

Ms. Ehler claims that no one ever suggested that her calculations were incorrect and that, if anyone did, she would have checked her calculations and made the correction.

[319 S.W.3d 449]

This claim is directly contradicted by R.K.'s testimony that she noticed a discrepancy in the amount paid to her and requested an accounting from Ms. Ehler, which Ms. Ehler failed to give her.

In regard to C.G.'s representation, Ms. Ehler's actions also show incompetence. Ms. Ehler failed to give C.G. the interrogatories that he was required to complete and return to opposing counsel. Her incompetence caused a default judgment to be entered against C.G. Ms. Ehler incompetently represented C.G.

Violation of Rule 4-1.3 Diligence

Rule 4-1.3 states, "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Ms. Ehler failed to timely deliver the money owed to H.M. and R.K., thereby violating Rule 4-1.3. In July 2008, Ms. Ehler's client trust account contained a substantial amount of money that belonged to R.K. and H.M. Ms. Ehler presented R.K. with a check for the incorrect amount in September 2008. H.M. was not paid his portion of the proceeds until the OCDC directed Ms. Ehler to pay him in January 2009. The untimely delivery of client funds shows Ms. Ehler's lack of diligence and amounts to a violation of Rule 4-1.3.

The diligent representation of a client is particularly important because "[a] client's interests often can be adversely affected by the passage of time or the change of conditions[.]" Rule 4-1.3, comment 3. In some instances, "the client's legal position may be destroyed." Id. Ms. Ehler's lack of diligence caused C.G. to lose the ability to defend against the lawsuit. Her failure to give the interrogatories to C.G. denied him the opportunity to put forth a defense. Her conduct "destroyed" C.G.'s legal position. By failing to provide opposing counsel with discovery, C.G. was not allowed to present what may have been a meritorious defense, and a default judgment was entered against him as a sanction pursuant to Rule 61.01(b)(1). Ms. Ehler's representation of C.G. and her handling of R.K.'s dissolution show a lack of diligence and violate Rule 4-1.3.

Violation of Rule 4-1.4

Communication with a client is essential to maintain a productive attorney-client relationship. Rule 4-1.4 requires a lawyer to keep a client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information. Ms. Ehler violated this rule throughout her representation of R.K.

R.K. repeatedly contacted Ms. Ehler seeking information about her dissolution decree. She also repeatedly requested information about the sale of the marital property and when she would be receiving her portion of the proceeds. Ms. Ehler also failed to communicate with H.M.'s lawyer when he inquired about the proceeds from the marital property sales. "When a client makes a reasonable request for information, Rule 4-1.4[ ] requires prompt compliance with the request...." Rule 4-1.4, comment 4. When a prompt response is not feasible, the attorney or the attorney's support staff must acknowledge the information request and inform the client when he or she can expect a thoughtful response. Id. Ms. Ehler has violated Rule 4-1.4.

Violation of Rule 4-1.15

The OCDC alleges Ms. Ehler has violated Rule 4-1.15, Safekeeping Property, by failing to properly maintain a client trust account, failing to deliver funds to H.M. and R.K. and, instead, utilizing portions of that money for her own purposes. Rule 4-1.15(c) requires a lawyer to keep all client property or third-party property in the lawyer's possession separate from

[319 S.W.3d 450]

the lawyer's own property. This rule also requires that complete records of the client trust account be maintained and preserved for a period of at least five years, and an accounting must be completed promptly on a client's request. Additionally, Rule 4-1.15(f) requires a lawyer, on receipt of client funds, to promptly notify the client and deliver the funds to the client.4

The evidence shows that Ms. Ehler failed to properly maintain her client trust account. She admits to not regularly balancing her trust account. She admits she lost all of her financial records because of a crashed computer hard drive and that, during her probation, the consulting attorney instructed her to create a data backup system, which Ms. Ehler did not do. Ms. Ehler also did not assist the OCDC in reconstructing her financial records. Moreover, when asked by R.K. for an accounting of her trust account, Ms. Ehler did not prepare or provide the accounting.

The record also shows that Ms. Ehler mishandled client funds by failing to timely deliver funds to R.K. and H.M. Ms. Ehler received proceeds from the auction of the couple's marital property in July 2008. Ms. Ehler first paid herself, along with other creditors, in July 2008. R.K. received her first installment in September 2008. At that time, H.M. did not receive his portion of the proceeds. Although Ms. Ehler claims she sent H.M. a check that was not cashed, she did not reissue a check, present any evidence of such a check or make any effort to stop payment of any check, despite repeated requests from H.M.'s attorney that H.M. be paid. Ms. Ehler only paid R.K. and H.M. the remaining money in her client trust account after the OCDC directed her to pay them in January 2009. Ms. Ehler failed to promptly deliver client funds, thereby violating Rule 4-1.15.

Ms. Ehler has also misappropriated client funds by paying her personal bills with funds from her client trust account. The OCDC's audit of the client trust account shows that in 2007-2008, Ms. Ehler had 12 withdrawals from the account to pay personal utility bills and office utility bills. The audit additionally shows that, as of January 2009, there should have been $2,104.82 in her trust account available to pay to H.M. and R.K. Paying personal expenses from a client trust account clearly is prohibited by Rule 4-1.15.

Ms. Ehler has not held her client's property “with the care required of a professional fiduciary.” Rule 4-1.15, comment 1. She has mishandled her client trust account and misappropriated client funds. Her repeated Rule 4-1.15 violations alone warrant discipline.

Violation of Rule 4-8.4

Rule 4-8.4 defines professional misconduct for which an attorney may be disciplined. Rule 4-8.4(a) states that “[i]t is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct.” By violating rules of professional conduct, Ms. Ehler “has necessarily violated Rule 4-8.4(a).” In re Caranchini, 956 S.W.2d 910, 916 (Mo. banc 1997).

Ms. Ehler also has violated Rule 4-8.4(c) in the handling of her client trust account. Rule 4-8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Ms. Ehler knowingly used client funds to pay

[319 S.W.3d 451]

for her personal expenses directly from her client trust account. Converting client funds necessarily involves deceit and misrepresentation. Therefore, she has violated Rule 4-8.4(c).

Appropriate Discipline

This Court finds by a preponderance of the evidence that Ms. Ehler has committed the above violations of the rules, amounting to multiple acts of professional misconduct. Having determined that Ms. Ehler has committed multiple acts of professional misconduct, the remaining issue is the appropriate disciplinary sanction.

The purpose of attorney disciplinary proceedings is "to protect the public and maintain the integrity of the legal profession." Coleman, 295 S.W.3d at 869. In imposing discipline, this Court considers the ethical duty violated, the attorney's mental state, the extent of actual or potential injury caused by the attorney's misconduct, and any aggravating or mitigating factors. Id. This Court looks to the ABA Standards for Imposing Lawyer Sanctions for guidance when imposing attorney discipline but considers the ABA Standards advisory. Id.

"The most important ethical duties are those obligations which a lawyer owes to clients." ABA Standards for Imposing Lawyer Sanctions 423 (1992). Those duties include safekeeping of client property, Rule 4-1.15; the duty of diligence, Rule 4-1.3 and Rule 4-1.4; the duty of competence, Rule 4-1.1; and the duty of candor, Rule 4-8.4(c). Id. Ms. Ehler knowingly has violated all of these rules, and her ethical violations have caused financial harm and hardship to her clients, R.K. and C.G., and to an opposing party, H.M., who had a settlement agreement with her client. Furthermore, "[m]isconduct involving subterfuge, failing to keep promises, and untrustworthiness undermine[s] public confidence in not only the individual but in the bar." In re Donaho, 98 S.W.3d 871, 874 (Mo. banc 2003). To protect the public and maintain the integrity of the profession, a substantial discipline must be imposed in these circumstances. Id.

When this Court finds an attorney has committed multiple acts of misconduct, "the ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among the violations." Coleman, 295 S.W.3d at 870 (internal citations omitted). Ms. Ehler's most egregious act of misconduct is her misappropriation of client funds and mishandling of her client trust account. Disbarment is appropriate for misappropriation of client funds. Belz, 258 S.W.3d at 41; see also ABA standards 4.11 ("Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client."). In addition, "[d]isbarment is generally appropriate when a lawyer engages in a pattern of neglect with respect to client matters and causes serious are potentially serious injury to the client." ABA Standards 4.41(c). Under these legal principles, disbarment would be the appropriate discipline for Ms. Ehler. Nonetheless, this Court will consider mitigating and aggravating factors. Belz, 258 S.W.3d at 42.

Factors suggested by the ABA Standards that may be considered in aggravation relevant to Ms. Ehler's conduct are prior disciplinary offenses, dishonest or selfish motive, a pattern of misconduct, multiple offenses, and an indifference to making restitution. ABA Standards 9.22. Ms. Ehler has prior disciplinary offenses of violating the rules governing diligence, communication, safekeeping of property, terminating representation and bar disciplinary

[319 S.W.3d 452]

matters. Her current offenses involve violation of three of the ethic rules for which she previously was disciplined.

Another aggravating factor is that Ms. Ehler's behavior shows a dishonest and selfish motive. She repeatedly converted client funds for her own personal use. Her current violations also evidence a pattern of misconduct and involve multiple offenses. She repeatedly has behaved with a lack of diligence and failed to provide competent representation to her clients. Regarding her representation of R.K., her failure to respond to the inquiries of her client and counsel for the opposing party shows a pattern of failure to communicate. Finally, her mishandling and misuse of her trust fund during 2007 and 2008 show a pattern of failure to properly maintain her trust account and deliver funds to clients promptly.

Ms. Ehler also has shown an indifference to making restitution, which is another aggravating factor. Ms. Ehler has known that she owes over $2,000 to H.M. and R.K. since she met with an attorney and investigator from the OCDC on January 29, 2009. As of oral arguments, 15 months later, she has made no effort to make restitution. While she claims personal financial problems preclude her from paying her clients their money, it is because of her misuse of her client funds that she lacks the money to pay her clients.

Ms. Ehler argues her personal problems should mitigate the severity of the punishment. Mitigating factors do not constitute a defense to a finding of misconduct. Belz, 258 S.W.3d at 42. Rather, these factors constitute “factors that may justify a reduction in the degree of discipline to be imposed.” ABA Standards 9.31. Although this Court acknowledges that Ms. Ehler's ongoing, acrimonious divorce and single parenting could tax her emotionally and financially, these facts do not excuse or condone Ms. Ehler's misappropriation of client funds. Her cooperation with the OCDC regarding the current violations is commendable, but, again, cooperation does not minimize the gravity of her offenses or the fact that she committed repeated and multiple violations of the rules of professional conduct that were very similar in nature to those for which her license was suspended and she was placed on a two-year term of probation. Consideration of the aggravating and mitigating circumstances weigh in favor of disbarring Ms. Ehler.

Moreover, the sanction of disbarment is also consistent with a progressive disciplinary scheme, which is recommended by the ABA Standards and applied by this Court previously. See generally ABA Standards. Ms. Ehler's license was suspended by this Court in 2005, her suspension was stayed, and she served a two-year term of probation. The purpose of probation is to educate, rehabilitate, and supervise the attorney in order to enable the attorney to modify his or her professional behavior. See Coleman, 295 S.W.3d at 871. Consistent with that general purpose, Ms. Ehler's two-year probation was intended to

teach her how to manage her law practice-particularly, how to manage her client trust account. Ms. Ehler had the opportunity to be trained by a law management consultant and to have the advice and support of a mentor. Instead of learning from these opportunities, Ms. Ehler repeated the same acts of misconduct that warranted her stayed suspension and placement on probation. Most egregiously, Ms. Ehler withdrew money from her client trust account to pay personal expenses while she still was on probation for violating the same ethical rules for which she now is being disciplined.

Conclusion

In 2005, Ms. Ehler received a six-month license suspension, which was stayed, and

[319 S.W.3d 453]

a two-year term of probation for mishandling client funds and for lacking diligence in representing of clients. During her probation, she participated in law practice management training, which included instruction on how to manage her client trust account. Although not discovered during the term of her probation, she mishandled her client trust account and misappropriated client funds while on probation. Additionally, Ms. Ehler regrettably still does not understand the basics of competent and diligent representation. Under a progressive disciplinary scheme, Ms. Ehler's inability to improve her legal practice, her now habitual acts of professional misconduct, and the severity of those acts warrant disbarment. To protect the public and restore integrity to the profession, Ms. Ehler is disbarred.

All concur.

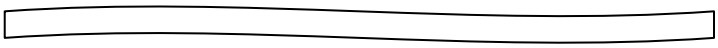
Notes:

1. Ms. Ehler's current violations of the rules of professional conduct all occurred before December 31, 2008. Ms. Ehler's trust account violations occurred from January 2007 to December 2008, so they are governed by the version of Rule 4-1.15 in effect from January 1, 2007, to December 31, 2008. Therefore, unless otherwise indicated, all citations are to the 2009 Missouri Supreme Court Rules and Rules of Professional Conduct, which contain the text of the rules in effect at the time of Ms. Ehler's conduct. The subsequent amendments to the rules do not change the essence of the rules.

2. The 2005 Missouri Supreme Court Rules and Rules of Professional Conduct applied to this disciplinary action.

3. C.G. currently is married to D.G. C.G. was married to V. at the times relevant to the water bill dispute.

4. Rule 4-1.15 was amended in 2009. The content of Rule 4-1.15(f) now is found in Rule 4-1.15(i).



In re: Byron G. Stewart, 342 S.W.3d 307 (Mo. banc 2011)

Excerpt from summary:
Under the standards of the American Bar Association for attorney discipline, disbarment is warranted when an attorney's criminal conduct is closely related to the practice of law and poses an immediate threat to the public, whereas suspension is considered appropriate when a lawyer knowingly engages in criminal conduct that is not closely related to the practice of law, does not pose an immediate threat to the public, but that seriously and adversely reflects on the lawyer's fitness to practice law. Aggravating and mitigating factors also are considered in determining appropriate discipline. Here, Stewart's aggravating factors are his four DWI convictions and that he failed to report his criminal conduct to the chief disciplinary counsel when he was admonished for unrelated issues in 2009. His mitigating factors include his limited prior disciplinary history, his remorse, his ongoing struggle with alcoholism and his commitment to sobriety, his participation in extensive inpatient and outpatient treatment and his attendance at numerous Alcoholics Anonymous meetings, and his full compliance with the terms of his criminal probation. As such, suspension is more appropriate than disbarment.

* * * *

That Stewart received a lenient criminal sentence does not diminish the severity of his conduct for the purpose of assessing the proper discipline. The damage caused by drunken drivers is well-documented; this Court must insist that attorneys be keenly aware of the parameters the law places on their conduct. Stewart's repeated disregard for those boundaries cannot be excused.

OPINION:

Attorney Byron Stewart pleaded guilty to his fourth charge of driving while intoxicated, resulting in a felony conviction. The Office of Chief Disciplinary Counsel (OCDC) seeks to discipline his law license for his violation of the rules of professional conduct. In light of Stewart's multiple instances of drunken driving and the seriousness of his felony conviction, he is suspended indefinitely from the practice of law with no leave to apply for reinstatement [342 S.W.3d 309] for six months after the mandate is issued.

I. Background

Stewart was licensed to practice law in Missouri in 1982. His criminal history includes four DWIs in 11 years. He pleaded guilty to his first DWI in 1997, his second in 2004, his third in 2006, and he was arrested for his fourth DWI in November 2008, when he was found "passed out and intoxicated while behind the wheel of a parked vehicle." His fourth DWI was charged as a class D felony1 and resulted in a three-year suspended sentence with supervised probation. His probation terms require alcohol and drug testing and forbid him from driving or consuming alcohol. He was ordered to serve 60 days of shock time in the county jail, but during his shock time he was allowed to leave the facility on work release to practice law.

1 He originally was charged with a class C felony because he was considered an "aggravated offender" due to his three previous DWI convictions, but his second DWI later was removed from the information, reducing the charge to a class D felony. *See* sections 577.010, 577.023. Unless otherwise noted, all statutory references are to RSMo 2000, as amended by Supp.2010.

During Stewart's shock time, OCDC moved this Court to discipline Stewart's law license pursuant to Rule 5.21(c), under which an attorney who has pleaded guilty to a felony is subject to discipline by this Court without the requirement of any other proceeding. OCDC recommends that Stewart's license be suspended without leave to reapply for three years, stayed for a three-year period of probation with terms that mirror those of his criminal probation.

Stewart's only previous discipline involved an April 2009 admonition relating to diligence and communication. Although his fourth DWI was pending at the time of the admonition, OCDC apparently was unaware of his criminal history and the pending felony charge when it issued the admonition.

This Court now considers the discipline warranted by Stewart's felony conviction.2 *See In re Zink*, 278 S.W.3d 166, 169 (Mo. banc 2009) (noting this Court's inherent authority to regulate the practice of law and administer attorney discipline).

2 Stewart declined the opportunity to file a brief or participate in oral arguments.

II. Standard of Review

Each disciplinary case ultimately stands on its own facts, but the ABA Standards for Imposing Lawyer Sanctions provides guidance for appropriate discipline. *In re Madison*, 282 S.W.3d 350, 360 (Mo. banc 2009); *In re Downs*, 363 S.W.2d 679, 691 (Mo. banc 1963). Following the model laid out in ABA Standard 3.0, four factors are considered in determining the appropriate discipline: (1) the duty violated; (2) the lawyer's mental state; (3) the potential or actual injury caused by the lawyer's misconduct; and (4) aggravating and mitigating circumstances.

The guiding principles underlying disciplinary decisions are as follows:

> The purpose of discipline is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession. Those twin purposes may be achieved both directly, by removing a person from the practice of law, and indirectly, by imposing a sanction which serves to deter other members of the Bar from engaging in similar conduct.

In re Kazanas, 96 S.W.3d 803, 807–08 (Mo. banc 2003).

[342 S.W.3d 310]

III. Stewart's Felony Conviction Was A Violation Of Rule 4–8.4(b)

A criminal act by a lawyer that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer is considered professional misconduct under Rule 4–8.4(b). The ABA Standards point out that the injury from such misconduct can include not only harm to clients or the public but also harm to the

legal system and the profession. Nonprofessional misconduct can be just as injurious as professional misconduct. *See In re Conner,* 357 Mo. 270, 207 S.W.2d 492, 495 (1948). When a lawyer engages in criminal conduct that reflects adversely on his or her fitness as a lawyer in violation of Rule 4–8.4, that lawyer's conduct inevitably tarnishes the public image of the profession as a whole. *See In re Shunk*, 847 S.W.2d 789, 791 (Mo. banc 1993).

> In our society, lawyers hold a place of special responsibility as advisors and counselors in the law. A judicial admission that a lawyer [committed a felony] is a matter of grave consequence. Such conduct not only brings the lawyer's judgment and honesty into question but erodes public confidence in lawyers and the courts in general.

Id. Repeated criminal conduct by an attorney, even when it involves only minor offenses, indicates "indifference to legal obligation." Comment 2 to Rule 4–8.4.

Stewart violated Rule 4–8.4(b) by pleading guilty to driving under the influence of alcohol on four separate occasions, including pleading guilty to a felony. His conduct reflects adversely on his fitness as a lawyer and injures the reputation of the legal profession. The full measure of the injury caused by his repetitive conduct cannot be captured by the fact that, mercifully, he avoided causing any injury or property damage. His conduct showed indifference to the law and to public safety. Such conduct undoubtedly undermines the public's confidence in the legal system and the profession at large.

IV. Stewart's Felony Warrants A Suspension

In determining the appropriate sanction in this case, it is necessary to review similar past cases, the disciplinary rules, and the applicable ABA standards.

In *Kazanas*, it was noted that an attorney's conviction for a felony typically would merit disbarment. 96 S.W.3d at 808. And in *In re Frick*, it was stated that "[s]ome acts committed in a non-professional capacity may indicate such a lack of respect for the law and for other members of society that disbarment may be warranted." 694 S.W.2d 473, 480 (Mo. banc 1985). But in *In re Duncan*, this Court found that a suspension was the presumptive sanction for an attorney who had been convicted of a felony. 844 S.W.2d 443, 445 (Mo. banc 1992) (involving an attorney who had failed to file or pay federal income taxes).

Likewise, this Court's Rule 5.21, which details the procedures for suspending attorneys following criminal activities, reflects that the serious nature of a felony conviction justifies suspending an attorney from practice. *See* Rule 5.21(a) (providing that "this Court shall cause to be served on" a lawyer who "has pleaded guilty or nolo contendere to or been found guilty of ... any felony" "an order to show cause why the lawyer should not be suspended from the practice of law pending the final disposition of any disciplinary proceedings based upon [the misconduct]"); *see also* Rule 5.21(c) (allowing an attorney who commits certain criminal activities to "be subject to discipline by this Court without the requirement of any proceeding").

[342 S.W.3d 311] Under the ABA Standards, disbarment is warranted when criminal conduct is closely related to practice and poses an immediate threat to the public. *See* ABA Standard 5.11(a) (providing that disbarment is generally appropriate when a lawyer engages in serious criminal conduct with an element of "intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft"). But a suspension is considered "generally appropriate

when a lawyer knowingly3 engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice." ABA Standard 5.12.

3 The ABA Standards define "knowledge" as "conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result."

Moreover, aggravating and mitigating circumstances are considered in selecting an appropriate discipline. *See* ABA Standard 9.1 (providing that aggravating and mitigating factors may be considered in selecting an appropriate discipline); *Madison*, 282 S.W.3d at 361 (noting that sanctions can be increased based on the presence of aggravating factors); *In re Belz*, 258 S.W.3d 38, 39 (Mo. banc 2008) (noting that this Court always considers mitigating circumstances in determining the correct sanction). Appropriate discipline for an attorney who commits a felony and has substance abuse issues can be affected by mitigating factors, such as the attorney submitting to intensive substance abuse treatment. *See Shunk*, 847 S.W.2d at 792 (noting as mitigating circumstances the attorney's regular attendance at Alcoholics Anonymous and Narcotics Anonymous meetings, his full compliance with his probation terms, and his proper handling of client affairs). Mitigating factors, however, do not necessarily justify a reduced sanction. *See Kazanas*, 96 S.W.3d at 809 ("[E]ven when mitigating factors exist and where it is unlikely that the attorney will repeat the transgression, certain acts by attorneys so impugn the integrity of the legal system that disbarment is the only appropriate means to restore public confidence in it." (internal quotation marks omitted)).

In Stewart's case, the aggravating factors are his *four* DWI convictions. It is also concerning that he failed to report his criminal conduct to OCDC when he was admonished for diligence and communication issues in 2009. On the other hand, mitigating factors include: his limited prior disciplinary history; his remorse; his ongoing struggle with the disease of alcoholism and his commitment to sobriety, shown by his participation in extensive inpatient and outpatient treatment and his attendance at numerous Alcoholics Anonymous meetings; and his full compliance with the terms of his criminal probation. But while this Court recognizes Stewart's commitment to recovery from substance abuse and notes his apparent ability to insulate his practice of law from the effects of his alcoholism, we cannot ignore the deleterious effect of his conduct on the reputation of the legal profession. *See In re Coleman*, 569 N.E.2d 631, 634 (Ind.1991) ("The image of a drunken lawyer driving down the highway"—not once, but four times—"does little to serve the profession.").

Considering this Court's precedent, the disciplinary rules, the ABA standards, and the facts in this case, suspension is the appropriate sanction for Stewart's conduct. His felony conviction represents an indifference to the law that merits a strong disciplinary response. His felony conviction

[342 S.W.3d 312] reflects adversely on his fitness as a lawyer, and the repetitive nature of his behavior defeats any suggestion that he embarked on his course of conduct with less than full knowledge of the nature and consequences of his action.

V. A Stayed Suspension Is Not Warranted

A suspension should be for a period of time no less than six months but not more than three years. ABA Standard 2.3. In Stewart's case, OCDC recommends a three-year stayed suspension with a concurrent

period of probation. It points out that this Court has granted stayed suspensions in three recent disciplinary orders involving lawyers who committed alcohol-related driving offenses. *In re Frahm,* No. SC89822 (Mo. banc 2009); *In re O'Sullivan,* No. SC90235 (Mo. banc 2009); *In re McKeon,* No. SC88868 (Mo. banc 2007).

This Court finds, however, that a stay is not warranted in this case. In contrast to Stewart's case, *McKeon* involved a single count of misdemeanor driving while under the influence. And while *Frahm* and *O'Sullivan* involved multiple felony convictions, those cases involved single instances of criminal misconduct. Further, the felonies of which the attorneys were convicted involved the mental states of recklessness and criminal negligence.4 Stewart, however, was convicted of a felony arising out of his *fourth* DWI during an 11–year period, which implicates ABA Standard 5.12's contemplation of suspension for a lawyer who "knowingly" engages in criminal conduct.

4 Frahm was sentenced to two felony counts of reckless aggravated battery. O'Sullivan pleaded guilty to three counts of second degree assault, a class C felony.

Staying Stewart's suspension for a period of probation would be inconsistent with this Court's previous cases involving felony convictions for multiple DWIs. *Cf. In re Hopkins,* No. SC89163 (Mo. banc 2008) (disbarring an attorney convicted of class C felony DWI who was to be incarcerated for a substantial period of time); *In re Laskowski,* No. SC86555 (Mo. banc 2005) (suspending an attorney without leave to reapply for three years after a conviction of class D felony DWI).5 Like the attorneys at issue in *Hopkins* and *Laskowski*, Stewart's felony charge subjected him to the possibility of incarceration for a substantial period of time. Stewart's good fortune in receiving a lenient sentence does not diminish the severity of his conduct for the purpose of assessing the appropriate discipline in his case.

5 This Court also notes that a suspension is well within the range of sanctions imposed in other states for alcohol-related driving felonies. *See* Danny R. Veilleux, Annotation, *Misconduct Involving Intoxication as Ground for Disciplinary Action Against Attorney,* 1 A.L.R.5th 874 (1992); *see also In re Jones,* 727 N.E.2d 711 (Ind.2000) (six-month suspension warranted for repeat DWI convictions even where attorney voluntarily submitted to treatment for substance abuse and made significant progress in recovery).

In *Shunk,* this Court suspended indefinitely without leave to reapply for six months an attorney who had been convicted of felony narcotics possession but who had no prior disciplinary history, had not mishandled client affairs, and had not harmed other persons or property through his criminal conduct. 847 S.W.2d at 791. In assessing the seriousness of the offense, the court noted:

> In recent years illicit drug traffic has reached epidemic proportions. It threatens not only users with addiction but has blighted entire communities with death and violence. For an attorney who fully comprehends the nature and [342 S.W.3d] consequences of his conduct to become a participant in felony drug trafficking, even as a consumer, is morally reprehensible.

Id.

Stewart's conduct deserves similar censure as the conduct at issue in *Shunk.* The damage wrought in our state every year by drunken drivers is well-documented and need not be repeated here, save to recognize

that its tragic impact reaches into nearly every community. This Court must insist that attorneys be keenly aware of the parameters the law places on their conduct, and Stewart's repeated disregard for those boundaries simply cannot be excused.

VI. Conclusion

For the foregoing reasons, Stewart is suspended indefinitely from the practice of law with no leave to apply for reinstatement for six months after the mandate is issued in this case.
PRICE, C.J., WOLFF, BRECKENRIDGE, FISCHER and STITH, JJ., concur.

TEITELMAN, J., concurs in separate opinion filed.

RICHARD B. TEITELMAN, Judge.

Driving while intoxicated not only poses unacceptable risks to others but it is also, as Mr. Stewart's case illustrates, a serious criminal offense. That said, I write separately only to note that the goals of protecting the public and maintaining the integrity of the profession are served only marginally by disciplining an attorney for conduct that does not relate even tangentially to the representation of clients. Disbarment and lengthy suspensions generally should be reserved for those circumstances in which clients are harmed.

CONFLICTS

State ex rel. Horn v. Ray, 325 S.W.3d 500 (Mo. App. E.D. 2010).

The prosecuting attorney petitioned for a writ of prohibition, requesting that the respondent judge be restrained from denying the State's motion to disqualify counsel from simultaneously representing both the defendant and his alleged victim (collectively "the clients") in the State's prosecution of the defendant for second-degree domestic assault.

Counsel's dual representation of both the defendant and his alleged victim in the prosecution of the defendant for allegedly assaulting the victim constitutes a concurrent conflict of interest, to which a client cannot consent. The victim's role in the case is distinctive from that of a material witness. the interests of the defendant and the victim are necessarily adverse.

Even were the clients' interests not directly adverse, the representation of one client interest may well materially compromise counsel's responsibilities to the other. The attorney's duty of loyalty to multiple clients, even in a non-litigation setting, can severely limit the attorney's ability to advise and advocate for any one client. Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests

Counsel's asserted belief that he can provide competent and diligent representation to both clients simultaneously in the same criminal proceeding against the defendant is patently unreasonable. Such dual representation could compromise the defendant's Sixth Amendment rights and undermines the court's institutional interest in maintaining the integrity of the judicial system and public confidence in the system. The trial judge should have sustained the State's motion to disqualify counsel.

Polish Roman Catholic St. Stanislaus Parish v. Hettenbach, 303 S.W.3d 591(Mo. App. E.D. 2010).

Several members of the parish sued the parish. Their attorneys worked with a former attorney of the parish as co-counsel, although that attorney did not enter an appearance. The parish argues that the attorneys of record for plaintiffs should be disqualified because of the relationship with the former counsel for the parish.

The first issue is whether the parish filed its motion in a timely manner. A "motion to disqualify should be made with reasonable promptness after the party becomes aware of the conflict to prevent the party from using disqualification as a strategic tool to deprive his opponent of counsel of his choice after substantial preparation has been completed." Terre Du Lac Property Owners' Ass'n, Inc. v. Shrum, 661 S.W.2d 45, 48 (Mo.App.E.D. 1983). A party who knowingly refrains from asserting a prompt objection to opposing counsel is deemed to have waived the objection. Id.

The timeliness of a motion to disqualify is not measured by the amount of elapsed time between the occurrence of the professional misconduct or conflict of interest and the filing of the motion to disqualify. See Buckley v. Airshield Corp., 908 F. Supp. 299, 307 (D. Md. 1995). The relevant period is the time between when the moving party either first learned or reasonably should learned of the conflict and the time when the motion to disqualify is filed.

The case is remanded to determine whether the former counsel actually had a conflict. If so, disqualification based on the imputation of a co-counsel's conflict of interest to an attorney is required when the attorney, through his or her relationship with co-counsel, was in a position to receive relevant confidences regarding the party seeking disqualification.

CRIMINAL CONTEMPT

Smith v. Pace, 313 S.W.3d 124 (Mo. banc 2010)

[A related disciplinary case (SC91696) is currently pending.]

A jury found Smith guilty of criminal contempt for written comments he made in a pleading to the court of appeals. Smith was committed to jail. Supreme Court ordered Smith discharged from his jail sentence. To satisfy current constitutional protections for lawyer speech, where an attorney is prosecuted for indirect criminal contempt of court, the state must prove that the attorney's statements were false, that the attorney knew the statements were false or acted with reckless disregard for the truth or falsity

of the statements, and that the effect of the statements constituted an actual or imminent impediment or threat to the administration of justice. Here, the jury was not asked to make such findings, there was a lack of evidence as to these essential elements, and neither the trial court's judgment nor its order of commitment contained any findings of fact as to these essential elements.

Smith filed a motion to quash a subpoena issued for the grand jury and a motion for continuance. The motion to quash was overruled. Smith petitioned for a writ in the court of appeals challenging that decision. On the basis of two paragraphs of Smith's writ petition – alleging bias and criminal conduct against the judge, the county's prosecutor and others in the local court system as well as alleging that the judge, prosecutor and others were using the grand jury to threaten, intimidate and silence others – the judge cited Smith for criminal contempt, noting in his order that Smith's writing "tends to degrade or make impotent the authority of the court or to impede or embarrass the administration of justice." A jury found Smith guilty of criminal contempt, and Smith was committed to 120 days in jail.

First Amendment rights do not bar punishment of contemptuous speech by lawyers but the values and limits of the constitutional right must inform the development of the elements of criminal contempt, especially for cases of indirect contempt, which takes place outside the court's presence. Absent a "clear and present danger," First Amendment protections apply to comments made by non-lawyers about pending court cases, Bridges v. California, 314 U.S. 252, 263 (1941), and to comments made by non-lawyers criticizing specific judges, Craig v. Haney, 331 U.S. 367, 373 (1947).

With respect to lawyers, however, it is not as clear what protection the First Amendment provides. The United States Supreme Court held that states may use a lesser standard than that applied to non-lawyers to decide whether a lawyer should be disciplined for his or her speech, Gentile v. State, 501 U.S. 1030 (1991), and this and other states have disciplined lawyers under state ethics rules where there is some knowledge of falsity or a reckless disregard for whether the false statement was true or false. As such, the disciplinary process may be a more suitable forum than a contempt proceeding for ascertaining a lawyer's knowledge as to the truth or falsity of the lawyer's statements, and monetary sanctions pursuant to Rule 55.03(c) may be more suitable than incarceration.

Even in disciplinary cases, this Court and the United States Supreme Court have recognized that lawyers have First Amendment rights. Before a lawyer can be found guilty of criminal contempt for what is written in his pleadings, there must be a finding that the lawyer's statements were made with actual knowledge of their falsity or that the statements in fact were false and were made with reckless disregard of whether they were true or false.

The First Amendment requires that the threat to the court's authority be real – that the lawyer's statements and attendant conduct actually have interfered with or posed an imminent threat of interfering with the administration of justice. This is the standard in cases of direct contempt, and there is no logical reason to have a more relaxed standard for indirect contempt of court for written pleadings. Smith's actions did not interfere with the grand jury and that the judge did not rule differently or fail to take any action with regard to the grand jury based on Smith's actions. There is no evidence that Smith's written statements interfered with or posed an imminent threat of interfering with the administration of justice.

FEES

Vance v. Griggs, 324 S.W.3d 471 (Mo. App. W.D. 2010).

The fee-sharing agreement at issue in this case was made among lawyers of the same firm, even though the firm subsequently dissolved. The petition is broad enough to include claims relating to firm assets other than attorneys' fees and fees earned for work performed by one or more departing lawyers prior to their separation from the firm. The petition did not have to allege compliance with Missouri Supreme Court Rule 4-1.5(e), which governs fee-sharing agreements among lawyers who are in different firms at the time work is done. The trial court therefore erred in dismissing Vance's petition in that case.

Beck v. Patton, 309 S.W.3d 436 (Mo. App. W.D. 2010).

Beck appealed the summary judgment entered against him and in favor of Patton on an Interpleader action relating to a dispute between attorneys Beck and Patton over entitlement to attorney's fees earned in a personal injury lawsuit. The trial court entered Judgment granting Patton's Motion for Summary Judgment, ordering payment of the interpleaded funds in the amount of $11,111.00 to Patton, and assessing court costs against Beck. However, an insufficient record existed for summary judgment and the case was remanded.

Patton relies upon Rule 4-1.5(e) to assert that under no circumstance could Beck be legally entitled to any portion of attorney's fees received by the law firm because Beck's name was not on the firm's letterhead nor otherwise referenced in client contracts. If Patton's law firm is determined to consist of some sort of contractual partnership agreement or ad hoc partnership arrangement between Patton and Beck, then Rule 4-1.5(e) may be inapplicable to this interpleader action. Rule 4-1.5(e), as it relates to the ethical practice of law, applies only to attorney fee agreements made between associated, yet distinct, attorneys (or law firms) and the client. The rule in no way passes judgment on the legal validity of a law partner's entitlement to a portion of fees received incident to a long-standing or case-by-case partnership agreement between attorneys, particularly if and when both attorneys have expended time and resources on behalf of the particular client.

Welman v. Parker, 328 S.W.3d 451 (Mo. App. S.D. 2010).

The major dispute concerning the dissolution of the law firm partnership involved a pending personal-injury case in which the firm had been representing plaintiff Client, who injured himself while working as a truck driver. Client signed a contingent-fee contract for representation by the Welman law firm in 2002, when Parker was an associate with the firm. Since its inception, Parker was the attorney most closely involved in the case. At the time Parker formally withdrew on December 31, 2004, she was the only attorney at the firm with whom Client had ever communicated about his case. When Parker decided to leave the partnership, Client received a letter from Parker asking whether he desired to stay with the Welman firm or continue to have Parker represent him, and he elected to continue with Parker, eventually signing a contingent-fee contract with Parker's new law firm.

In January 2005, Parker became a partner at another firm. A month later, in February 2005, Parker filed a lawsuit in Client's case, and in January 2006, Parker reached a settlement with the defendant insurance

company in the amount of $362,426.40. Parker and her new law firm received a contingent fee of $119,600.00 from the settlement.

The precise issue in this case—who, as between a withdrawing partner and the former partners, is entitled to the contingent fee from a matter that was pending at the time of the dissolution of the law firm handling it—had not been directly decided by a Missouri appellate court.

Two Supreme Court of Missouri decisions lead to the conclusion that once the firm's contingent-fee contract is terminated by the client by entering into a subsequent contingent-fee contract with another law firm, even if that firm includes the withdrawn partner, the only asset of the dissolved law firm is its right to recover the reasonable value of its services rendered.

If a law firm is retained by a client on a contingent-fee basis and the client elects to hire a different law firm after the first firm dissolves and before judgment or a settlement has been reached on his or her case, the dissolved law firm is only entitled to recover the reasonable value of the services it provided. This amount cannot exceed the original contracted fee and is payable only upon the occurrence of the contingency. The contingent fee achieved from eventual judgment or settlement is not an asset of the dissolved firm.

Clients are free to discharge the law firm or attorney who represents them at any time and hire new counsel; requiring them to pay a double contingent fee would hinder this freedom. Allowing the full contingency to the dissolved firm would unduly impinge upon the client's perceived freedom to change attorneys without cause and could have a "'chilling effect'" upon the choice of that option by the client.

A withdrawing partner is entitled to have the "client discharge the partnership and hire the partner individually." Clients have a fundamental right to freely choose their counsel. Upon proper notice the client is free to "remain with the law firm, be transferred to the departing attorney, or be transferred elsewhere." Clients are not the "property" of the attorney or law firm who represents their interests; clients are free to discharge their attorney at any time, for whatever reason. If a client terminates a contingent-fee contract with a law firm without cause before the contingency occurs, the law firm can recover only the reasonable value of its services to the client.

PROSECUTOR CONDUCT

State v. Terry, 304 S.W.3d 105 (Mo. banc 2010).

Defendant was convicted of statutory rape. Victim testified that she was pregnant and Defendant was the father because she'd had sex with no one else in the relevant time frame. The prosecution argued that Victim's pregnancy was corroboration in what otherwise would be a he said/she said case. After the child was born, a DNA test showed Defendant was not the father.

The DNA test report result, if accurate, does not exonerate Defendant. It does, however, cast serious doubt on the validity of the conviction. The state acknowledged at oral argument that it has done nothing to investigate whether the DNA test report is accurate.

The ethical norm that the state attorney's role is to see that justice is done—not necessarily to obtain or to sustain a conviction—may suggest that a different course of action may have been appropriate. See Rule 4–3.8. Cf. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

Remanded to circuit court to allow Defendant to file a motion for a new trial.

State v. Greenlee, 327 S.W.3d 602 (Mo. App. E.D. 2010).

Greenlee alleges prosecutorial misconduct related to pretrial publicity. Rule 4-3.6 governs a lawyer's actions with regard to trial publicity. This Rule provides that a lawyer who is participating in the investigation or litigation of a matter "shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." The Rule goes on to list the type of information that a lawyer may state, including "the claim, offense, or defense involved, and, except when prohibited by law, the identity of the persons involved," information contained in a public record, that an investigation of a matter is in progress, and the scheduling or result of any step in litigation.

A newspaper article was written regarding Greenlee's upcoming trial. However, the newspaper article was written by a reporter citing simple information regarding Greenlee's case. Greenlee did not present any evidence regarding misconduct by the prosecutor with regard to the article.

Greenlee also alleged prosecutorial misconduct with regard to a radio broadcast at a radio station. The evidence adduced at the pre-trial hearing showed that the prosecutor participated in monthly radio broadcasts for years. In these broadcasts, the prosecutor discussed basic information about a case, including the date of the trial, the nature of the charges, and the range of punishment. At the pre-trial hearing, the prosecutor testified that she was "extremely careful to abide by the ethical rules of conduct to discuss only what [she is] allowed to under the rules of professional conduct." The prosecutor acknowledged Greenlee's case was mentioned on the radio show a month or two prior to the hearing. Greenlee failed to present any evidence of prosecutorial misconduct by the State. The information discussed in the radio broadcast or mentioned in the newspaper was clearly within the purview of Rule 4-3.6. The only two potential jurors who had previously heard of the case were stricken for cause, leaving a jury panel unfamiliar with any pre-trial publicity.

The record contains no evidence that the prosecutor acted improperly when publicizing any information about Greenlee's case prior to trial.

INEFFECTIVE ASSISTANCE OF COUNSEL

Moore v. State, 328 S.W.3d 700 (Mo. banc 2010).

Moore filed his motion for post-conviction relief from his prison sentence more than four months late appeals the judgment dismissing his motion. The appeals court sent the man a copy of its mandate when it issued, and there are no rare circumstances that justify his failure to file a pro se motion within the 90-day time limit.

Moore was convicted of two counts of first-degree murder and was sentenced to two terms of life in prison with no possibility of parole. At the sentencing proceeding, the court informed Moore he had the right to seek post-conviction relief under Rule 29.15. The court told Moore that if he appealed, his Rule 29.15 motion would be due 90 days after the court of appeals issued its mandate. The court of appeals affirmed his conviction and issued its mandate in October 2008. In March 2009, Moore's appellate counsel sent him a letter advising him that the mandate had issued in the appeal, that the deadline for filing a Rule 29.15 motion had passed two months earlier and that, if he wished to seek post-conviction relief, he should do so as soon as possible. More than two months later – and 218 days after the mandate issued – Moore filed his motion. The circuit court dismissed his motion as untimely.

Legal assistance is not required to file the initial motion under Rule 29.15(b); an unrepresented indigent defendant could do so on his own, and then the circuit court appoints counsel who has the opportunity to file an amended motion. Under Rule 29.15(b), an individual who fails to file a motion for post-conviction relief within the 90-day time limit completely waives the right to seek relief under that rule and completely waives all claims that could be raised in a post-conviction motion.

Two exceptions excuse untimely filings: when post-conviction counsel abandons the individual and when rare circumstances outside the individual's control justify late receipt of the motion. Abandonment traditionally excuses a late filing when post-conviction counsel fails to file an amended motion, depriving the individual of meaningful review of the claims; when post-conviction counsel files an untimely amended claim; or when post-conviction counsel's overt actions prevent the individual from timely filing the original motion. Here, there was no abandonment. Nothing in the record indicates Moore's appellate counsel agreed to inform Moore when the mandate Appellate counsel has no duty to represent an individual in post-conviction proceedings or inform the individual of his post-conviction rights under Rule 29.15 or the issuance of a mandate. issued, the appellate court's docket entries indicate the clerk of the appellate court sent Moore a copy of the mandate the day it issued, and he does not refute that he received the mandate.

Chaney v. State, 323 S.W.3d 836 (Mo. App. E.D. 2010).

Chaney appealed from the motion court's denial of his Rule 24.035 motion for post-conviction relief after an evidentiary hearing. His sole argument is that he should receive post-conviction relief because his guilty plea was entered in an unknowing, involuntary, and unintelligent manner in that his attorney was ineffective for failing to inform him that one of the counts of first-degree child molestation should have been charged as a class C instead of a class B felony.

If an accused has been misled or induced to plead guilty by fraud, mistake, misapprehension, fear, coercion, or promises, the accused should be permitted to withdraw his guilty plea. Samuel v. State, 284 S.W.3d 616, 619 (Mo.App. W.D.2009). This is because such mistakes can affect the voluntariness of the plea, which implicates the pleader's fundamental rights under the Missouri and United States Constitutions. Id.

Chaney was resentenced on the count on which he was improperly charged. He claimed that he would not have made his global plea to multiple charges had he been properly charged on that count originally. The court found his claim lacking credibility. Denial of post-conviction relief was denied.

Hill v. State, 301 S.W.3d 78 (Mo. App. S.D. 2010).

Hill filed for postconviction relief alleging ineffective assistance of counsel. He pled guilty to passing bad checks. He wrote checks on an account that had been closed. He asserted that he did not know the bank had closed his account. He knew he did not have enough funds in his account but thought the checks would be covered by overdraft protection.

Hill's counsel was not ineffective when he relied on the information supplied by the State. The State, as well as other attorneys, are ethically bound by Rule 4-3.4 and it is clear that, generally, there is no error in relying on information provided to a defense attorney by the State.

Rule 4-3.4 provides:

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Frye v. State, 311 S.W.3d 350 (Mo. App. W.D. 2010)

Frye was convicted of felony driving while revoked. Frye alleges ineffective assistance of counsel. As a result of trial counsel's failure to inform him of a plea offer made by the State. The plea offer would have permitted Frye to plead to the amended charge of misdemeanor driving while revoked instead of going to trial on the charge of felony driving while revoked. Frye claims he would have taken the plea offer amending his charge to a misdemeanor had he known about the offer. Frye thus contends that his subsequent entry of an "open" guilty plea to the felony charge of driving while revoked was unknowing, involuntary, and unintelligent.

"Failure of defense counsel to communicate a plea offer ordinarily constitutes deficient performance" of counsel. Members v. State, 204 S.W.3d 210, 212 (Mo.App. W.D.2006) (citing State v. Colbert, 949 S.W.2d 932, 946 (Mo.App. W.D.1997)).

Pursuant to the Rules of Professional Conduct that govern the Missouri Bar, Frye's trial counsel had an absolute duty to keep Frye informed of plea communications. Rule 4–1.4 states: "(a) A lawyer shall: (1) keep the client reasonably informed about the status of the matter; [and] ... (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation." See also In re Crews, 159 S.W.3d 355, 359 (Mo. banc 2005). Pursuant to Rule 4–1.4 comments one and two, counsel is required to keep the client informed of significant developments in the case, and "a lawyer who receives from opposing counsel ... a proffered plea bargain in a criminal case must promptly inform the client of its substance." (Emphasis added).

C.V.E. v. Greene County Juvenile Office, 330 S.W.3d 560, 567 (Mo. App. S.D. 2010).

Mother's parental rights were terminated. On February 3, 2010, at the outset of the termination of parental rights hearing, Mother's counsel reported he had just spoken with his client who expressed to him she was unable to secure transportation to the hearing and it was her desire to consent to termination of her parental rights. Her counsel suggested they consider hearing the evidence, but leave the record open so he could submit Mother's consents to termination. The juvenile division and the parties agreed to proceed with the hearing and leave the record open in order to provide Mother with an opportunity to present evidence or to receive Mother's termination consents.

On February 18, 2010, when the juvenile division reconvened, Mother had not submitted any consent to termination of her parental rights. Counsel announced he had spoken with Mother immediately before the hearing reconvened and she was not going to appear for the hearing. No additional evidence was submitted except on behalf of the Children's Guardian ad Litem, which was a recommendation that termination of Mother's rights was proper and in the best interests of all five children.

Mother appealed on various grounds, including ineffective assistance of counsel. Section 211.462.2, RSMo 1986 provides natural parents the right to counsel in a termination of parental rights proceeding. The failure to appoint counsel to represent the natural parents, or to obtain an affirmative waiver of that right, has been held to be reversible error. In Interest of J.C., Jr. and T.C., 781 S.W.2d 226, 228 (Mo.App. W.D.1989). "This statute implies a right to effective assistance of counsel; otherwise the statutory right to counsel would become an 'empty formality.' " Id. "In Missouri, the test is whether the

attorney was effective in providing his client with a meaningful hearing based on the record." In Interest of J.M.B., 939 S.W.2d 53, 56 (Mo.App. E.D.1997).

Counsel spoke with Mother on the phone just before the first hearing. During this conversation, she clearly expressed her desire to voluntarily terminate her parental rights. Mother does not challenge this fact. Her indifference in maintaining her parental rights was evident in her failure to appear for the hearing, and her expressed desire to terminate parental rights. From these actions, it was reasonable for Counsel to conclude she was in favor of terminating her rights and he was complying with his client's wishes in advocating for an opportunity for his client to voluntarily terminate her rights.

Even though Mother did not appear for the first hearing, Counsel successfully procured an opportunity for her voluntary termination as she requested. Had Mother changed her mind about voluntary termination, she was also able to present evidence at the second hearing. Mother should not now be heard to complain about her counsel when she failed to appear for two hearings and communicated her desire to terminate her parental rights.

Rule 4–1.2(a) provides in part: "A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to Rule 4–1.2(c), (f) and (g), and shall consult with the client as to the means by which they are to be pursued...." Mother's absence from the proceedings did not negate Counsel's duty to his client.

Counsel's affirmative actions in preserving Mother's right to voluntarily terminate her parental rights, or put on evidence at a subsequent hearing, effectively represented the objectives of representation that Mother conveyed to him when she expressed her desire to terminate and failed to appear for the hearings. Mother was accorded a meaningful termination of parental rights hearing based on the record. Mother did not receive ineffective assistance of counsel in violation of her due process rights.