IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
NOEL F. BISGES	)	**Supreme Court #SC95332**
	)	
Respondent.	)	

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

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

STATEMENT OF FACTS

Respondent Noel Francis Bisges was admitted to Missouri's Bar in 1991. He has a law office in Jefferson City, Missouri. He accepted an admonition in 1997 for violation of the diligence rule (4-1.3) and for failure to adequately supervise his paralegal (4-5.3). He accepted an admonition in 2007 for failing to submit a partial refund of a fee to a client upon termination of a representation (4-1.16).

The following facts are taken from the federal decisions and orders regarding Respondent Bisges' representation of a bankruptcy client.

On July 14, 2010, Respondent Bisges filed his client's Chapter 7 bankruptcy case in the United States Bankruptcy Court, Western District of Missouri. The client received a discharge on October 7, 2010. **App. 3.**

On February 25, 2011, the client's case was reopened on the U.S. Trustee's (Nancy Gargula) motion. The trustee examined Respondent and the client and thereafter determined that the client owned horses that had not been disclosed on her bankruptcy schedules. **App. 3.** The trustee additionally alleged Respondent knowingly and intentionally advised his client not to disclose a potential preferential transfer of $3,000.00 to the client's mother just prior to filing her bankruptcy petition. **App. 6.** The trustee also alleged that Respondent allowed amended pleadings to be filed in his client's case without requiring the client to sign them, in violation of a bankruptcy statute.

On February 13, 2013, the bankruptcy court held a trial on the trustee's motion seeking disgorgement of fees and sanctions. **App. 4.** After hearing the evidence, the

court concluded that Respondent Bisges advised his client to make misrepresentations to the court regarding a possible preferential payment the client made to her mother. **App. 6.** The factual basis for that conclusion was that Respondent's client paid her mother $3,000.00 immediately before she filed for bankruptcy. In an email from Respondent to his client, Respondent advised the client that the payment should not happen but "short of it not happening, my next best advice is to make sure it cannot be traced and stick with the story. It did not happen." **App. 6.**

The bankruptcy court concluded Respondent filed inaccurate asset schedules on his client's behalf by omitting from the schedules several horses owned by the client at the time of the filing. A bankruptcy statute states that the lawyer's signature on the client's petition is certification that the attorney "has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect." **App. 7.** While Respondent testified at the bankruptcy hearing that his client never disclosed to him that she still owned horses at the time the bankruptcy case was filed, the bankruptcy court found the more credible evidence supported the conclusion that Respondent did know about the horses and knew his client did not disclose them on her schedules. **App. 8.** The court noted that, aside from conflicting testimony about whether the horses were mentioned on a fax exchanged between Respondent and his client, Respondent knew his client had owned horses in the past, yet made no effort to ascertain whether she still owned any at the time of filing the petition. **App. 9.**

The bankruptcy court also concluded Respondent filed schedules and statements with the bankruptcy petition that had not been actually signed by his client. The client had signed schedules at Respondent's office, but Respondent subsequently amended the documents and filed them without obtaining his client's signature, in violation of bankruptcy statute. **App. 9-10.**

The bankruptcy court ordered Respondent to disgorge the fees paid him ($1,411.00) and to pay sanctions in the amount of $4,233.00 to the bankruptcy estate. **App.15-16.** Respondent's client paid the case trustee $1,000.00 to settle her part of the dispute. **App. 3.**

The matter thereafter was before the District Court for the Western District of Missouri, both because the bankruptcy judge referred the case for possible disciplinary action, and because Respondent appealed from the bankruptcy court's decision. **App. 17.**

The district court noted that Respondent admitted giving his client the "e-mail advice" recited above about the potential preference. The district court found that the record clearly supported the conclusion that Respondent recommended that his client conceal from official records a substantial transaction that looked like a preference for a favored creditor (the client's mother). **App. 18.** District Judge Sachs found that the record supported the conclusion that Respondent "condoned a reported practice of minimizing the reporting of assets such as pets, including horses" that may have significant value. **App. 18.** He also found that the record supported the conclusion that

Respondent "disregarded procedural rules such as having a written contract with a debtor and obtaining signed verification of final drafts of papers prior to filing." **App. 18.**

The district court discussed in a footnote a motion by Respondent to dismiss the trustee's case against him due to the destruction, as a matter of routine, by third parties of the recording of the creditors' meeting in his client's Chapter 7 proceeding. The district court found that the routine destruction was not prejudicial and would not warrant dismissing the trustee's case. **App. 19.**

Respondent Bisges appealed the district court's denial of his motion to dismiss the trustee's motion for disgorgement and the order imposing sanctions to the Eighth Circuit Court of Appeals, which affirmed the judgment. With regard to Bisges' argument that the trustee's motion against him should have been dismissed due to the destruction of the recording of his client's meeting with creditors, the eighth circuit noted that there was no evidence of bad faith by the trustee, which was a necessary finding to impose the sanction of dismissal of the trustee's motion based on spoliation. **App. 24-25.**

Regarding the sanction for advising his client not to acknowledge the preferential payment to her mother, Respondent argued that his advice was not actually set forth in a document filed in the bankruptcy case, so the sanction was improper. **App. 25-26.** The trustee pointed to a box on a form in the client's filings that was checked to indicate no payments had been made to creditors in the year preceding the bankruptcy filing, and the failure to identify the payment on a form requiring such disclosures. The eighth circuit

concluded that Respondent violated the relevant statute when he counseled or assisted his client in making a fraudulent or misleading statement in a document in a bankruptcy case.

> The bankruptcy judge found that Bisges advised Clink to omit from her bankruptcy petition the payment to her mother. That Clink did not then file a document with the fraudulent omission is of no matter. Bisges admitted that he gave the advice, and that action expressly is prohibited by § 526(a)(2).

App. 27.

With respect to the omission of the horses from the schedule of assets and the filing of pleadings without the client's signature, the eighth circuit concluded the bankruptcy judge's findings were not clearly erroneous. The judgment imposing sanctions was affirmed. **App. 28-29.**

The District Court for the Western District of Missouri thereafter considered the possible imposition of discipline against Respondent pursuant to that court's Local Rule 83.6. The court issued a show cause order to Respondent in February of 2015, to which Respondent filed a response in March. Respondent provided "background information by way of explanation of his actions, an apology and matters he presents in mitigation." **App. 30-31.** The district court appointed a panel of three judges to hear, in a non-evidentiary mitigation hearing, anything Respondent wished to say in response to the show cause order. Respondent did not request a hearing before the panel. The panel

thereafter considered the record, including Respondent's written mitigation arguments, and recommended public censure. In making that recommendation, the panel recognized that Respondent had acknowledged the wrongfulness of his conduct and had no prior professional discipline. **App. 31.**

The district court, in banc, issued its order of public censure against Respondent on August 5, 2015. **App. 32.**

POINT RELIED ON

I.

THE SUPREME COURT SHOULD, AT A MINIMUM, REPRIMAND RESPONDENT BECAUSE HE VIOLATED RULE 4-8.4(c) IN THAT HE COUNSELED A BANKRUPTCY CLIENT TO OMIT FROM HER BANKRUPTCY FILINGS A PAYMENT SHE MADE TO HER MOTHER, AN UNSECURED CREDITOR, JUST PRIOR TO FILING FOR BANKRUPTCY.

In re Wallingford, 799 S.W.2d 76 (Mo. banc 1990)

In re Cupples, 979 S.W.2d 932 (Mo. banc 1998)

In re Ver Dught, 825 S.W.2d 847 (Mo. banc 1992)

ARGUMENT

I.

THE SUPREME COURT SHOULD, AT A MINIMUM, REPRIMAND RESPONDENT BECAUSE HE VIOLATED RULE 4-8.4(c) IN THAT HE COUNSELED A BANKRUPTCY CLIENT TO OMIT FROM HER BANKRUPTCY FILINGS A PAYMENT SHE MADE TO HER MOTHER, AN UNSECURED CREDITOR, JUST PRIOR TO FILING FOR BANKRUPTCY.

Respondent has been publicly censured by the United States District Court for the Western District of Missouri for conduct that occurred in his representation of a client in a bankruptcy proceeding. In summary, just prior to filing the client's Chapter 7 petition, Respondent advised the client to conceal a recent loan repayment she had made to her mother, failed to list horses on his client's bankruptcy schedules when he either knew they existed or unreasonably failed to inquire whether she still owned them, and filed amended documents with the court without obtaining his client's signature on them.

The federal order of public censure does not designate a specific rule of professional conduct as the basis for the discipline, nor does the district court's report and recommendation assign Respondent's conduct to specific rules of professional conduct. Informant stated in the information filed with this court under Rule 5.20 that Respondent's conduct violated Rule 4-8.4(c) (engage in conduct involving dishonesty,

fraud, deceit, or misrepresentation). That rule is implicated by Respondent's e-mail telling his client to "make sure" her partial repayment of an unsecured loan to her mother "cannot be traced and stick with the story. It did not happen." Informant considers this the most serious instance of misconduct for purposes of sanction analysis.

Respondent's advice to his client regarding the preferential payment also violated Rule 4-3.3(a) (lawyer shall not knowingly make a false statement of fact or law to a tribunal), to the extent that the advice was reflected indirectly in the client's bankruptcy filings. Respondent has argued that no documents were ever actually filed in which it was asserted that the client had made no preferential payments. The trustee took issue with that assertion, noting that Respondent checked a box on one form signaling that no payment to creditors had been made in the year preceding the bankruptcy filing. The trustee also pointed out that Respondent did not list the unsecured loan from the client's mother on a "Schedule F," where such loans are required to be disclosed.

Respondent's knowing failure to list his client's horses on the appropriate schedule is also conduct that violated Rules 4-8.4(c) and 4-3.3(a). This incidence of misconduct is somewhat less serious than the one described above, if only because it lacks evidence that Respondent affirmatively urged his client not to list the horses.

In this reciprocal discipline case, Informant recommended the Court impose the equivalent sanction ordered by the federal district court - - a reprimand. The Missouri Supreme Court is, of course, free to order whatever, or no, discipline it deems appropriate in an attorney discipline case, whether in an original disciplinary proceeding or one

before the court seeking reciprocal discipline. See *In re Storment,* 873 S.W.2d 227, 230 (Mo. banc 1994). Ceding some deference to the federal court's imposition of censure in a case where the wrong was committed in that court, and in conformity with other cases involving primarily, or only, an 4-8.4(c) violation, Informant recommended reprimand.

In determining an appropriate sanction, the Court looks for guidance to the ABA Standards for Imposing Lawyer Sanctions and past disciplinary cases involving similar rule violations. *In re Forck*, 418 S.W.3d 437, 441 (Mo. banc 2014). The ABA Standards sanctions analysis requires identification of the entity to whom a duty was owed, the lawyer's mental state, the harm, and consideration of aggravating and mitigating factors.

Bisges violated duties he owed the general public by engaging in dishonesty. The same conduct violated his duty to the legal system inasmuch as he advised his client to omit material information from her bankruptcy filings.

The bankruptcy court found that Respondent "did in fact intend to mislead the Court." **App. 11.** Respondent's mental state was, then, knowing, if not intentional.

There was harm to Respondent's client, although, as Respondent has made abundantly clear, the client was not without fault. She initially got her bankruptcy discharged in the normal course of events, but her case was reopened a few months after the discharge when the trustee had reason to believe there were assets that had not been disclosed. The client, after undergoing investigation by the trustee and additional proceedings, eventually paid $1,000.00 to the case trustee to settle the dispute. There is

also harm to the legal system when an attorney's conduct necessitates reopening a closed matter, followed by an investigation, hearing, and appeal of the matter.

The Standards require assessment of aggravating and mitigating circumstances. In aggravation, Respondent had substantial experience practicing law and two prior, relatively remote, admonitions. Standard Rule 9.22(a)(i). The fact that two distinct instances of misconduct (failing to disclose the horses and filing amended pleadings without the client's signature) are present, in addition to the most serious instance of misconduct (advising client to lie about payment to her mother), constitutes an aggravating factor (multiple offenses). Standard Rule 9.22(d).

In mitigation, little mitigating advantage should weigh in the analysis from the possibility that Bisges' conduct does not appear to have had a selfish motive, because the conduct was inherently dishonest, the other part of that mitigator. Standard Rule 9.32(b). Other penalties and sanctions, which the Standards recognize as a mitigating factor, have been imposed on Respondent in that he was censured by the federal district court and ordered by the bankruptcy court to disgorge his fee and pay three times the fee to the bankruptcy estate as a sanction. Standard Rule 9.32(k). Respondent has apologized to the district court and this Court, although Respondent's extensive criticism of his former client can be said to diminish the remorse he purports to feel for his own misconduct. Standard Rule 9.32(l).

The ABA Standards capture conduct involving dishonesty, fraud, deceit, and misrepresentation (8.4(c)) in Standard Rule 5.1 - - failure to maintain personal integrity. Standard Rule 5.12 reads as follows:

> 5.12. Suspension is generally appropriate when a lawyer knowingly 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.

Standard Rule 5.13 reads as follows:

> 5.13. Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

The Standards presuppose that the more serious instances of Rule 4-8.4(c) violations involve criminal conduct, which is not alleged in this case. Respondent Bisges' knowing dishonest conduct, which does reflect adversely on his fitness to practice law, would fit within Standard 5.13.

If Respondent's misconduct is analyzed as a Rule 4-3.3(a)(2) violation, the relevant Standards provisions read as follows:

6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Cases involving dishonesty rule violations and violations of Rule 4-3.3(a)(1) are discussed below.

In *In re Wallingford*, 799 S.W.2d 76 (Mo. banc 1990), an attorney was reprimanded for violation of Rule 4-3.3(a)(1) (knowingly making a false statement of material fact to a tribunal). Ms. Wallingford signed a client's name to an affidavit, later filed in a California court, and then notarized the affidavit. She also signed a false certificate of service. The Court found that any departure from the precepts that an

attorney who is a notary should not take an affidavit or acknowledgement unless the maker signs personally and in the attorney's presence, and that an attorney should not execute a certificate of service unless the facts stated are known by the attorney to be true, "diminishes the stature and credibility of the entire legal profession." 799 S.W.2d at 78. The Court ordered the attorney reprimanded without engaging in sanction analysis.

The Court reprimanded the lawyer in *In re Cupples*, 952 S.W.2d 226 (Mo. banc 1997), for a Rule 4-8.4(c) violation for his conduct in secreting client files from a firm he was planning to leave. It should be noted that a three-judge dissent would have suspended the attorney's license without leave to apply for reinstatement for six months, relying on ABA Standards analysis and Court precedent. The dissent stated that "Honesty is, perhaps, the most essential quality for a lawyer." 952 S.W.2d at 238-39.

Cupples' second disciplinary proceeding, decided a little more than a year after the first one, also charged a single Rule 4-8.4(c) violation, this one for secretly maintaining a separate law practice while engaged in a full-time practice with a firm, and making use of firm assets in the practice undisclosed to the firm. *In re Cupples*, 979 S.W.2d 932 (Mo. banc 1998). The Court imposed an indefinite suspension with no leave to apply for reinstatement for six months, citing the presence of numerous aggravating factors, but giving mitigating weight to the absence of evidence of client harm.

An indefinite suspension with leave to apply for reinstatement in six months was ordered in *In re Disney*, 922 S.W.2d 12 (Mo. banc 1996) for a stand alone violation of Rule 4-8.4(c). The Respondent attorney was found to have violated the rule by shielding

assets in a trust from his ex-wife, who had a judgment against him. The Court noted that Disney's use of the trust to shield assets was misconduct involving subterfuge and that questions of honesty go to the heart of fitness to practice law. 922 S.W.2d at 15.

The facts underlying *In re Ver Dught*, 825 S.W.2d 847 (Mo. banc 1992), are somewhat similar to the case at bar. Mr. Ver Dught represented a client in her efforts to obtain benefits under the Supplemental Social Security Income program. The client had remarried shortly before the hearing in her case and taken her new husband's name. Before the hearing, the client expressed concern about the effect the remarriage could have on her case. Respondent told his client that if her last name did not come up, she should not mention it, but that she should testify truthfully if asked directly about it. But at the hearing, Respondent referenced his client's "two husbands" (there was a third husband at the time of the testimony) and referred to his client by one of her prior married names. Because the fact of his client's remarriage was not material to her eligibility for benefits, the Court concluded Respondent did not violate Rules 4-3.3(a)(1)(2) (make a false statement of material fact to a tribunal and fail to disclose a material fact to a tribunal when to do so is necessary to avoid assisting a criminal or fraudulent act by the client).[1] The Court concluded that Respondent Ver Dught did

[1] Note that the language found in 1992's Rule 4-3.3(a)(2) now appears in an altered form in Rule 4-3.3(a)(3).

violate Rule 4-3.3(a)(4) (offer evidence the lawyer knows to be false),[2] noting that portions of the testimony he elicited from his client were designed to mislead the judge. The Court also found that Ver Dught violated Rule 8.4(c) (dishonesty/misrepresentation) and (d) (prejudice to the administration of justice). The Court ordered Respondent's license suspended for six months, noting his participation in offering the false testimony regarding his client's last name was not passive in that he "specifically asked questions of witnesses at the hearing calling for answers he knew were false." 825 S.W.2d at 851.

Eliciting false testimony from a witness before a tribunal or practicing deception during a disciplinary investigation in violation of Rule 4-3.3 is sanctionable with, at a minimum, suspension. See, e.g., *In re Donaho*, 98 S.W.3d 871 (Mo. banc 2003); *In re Waldron*, 790 S.W.2d 456 (Mo. banc 1990). If the checked box and the failure to list the client's mother on the relevant schedule are equivalent to offering evidence to a tribunal that the lawyer knows to be false, then a more serious sanction than reprimand is appropriate.

Respondent advised a client not to reveal a preferential payment in the client's bankruptcy filings, knowing that such advice was wrong and contrary to bankruptcy law. He engaged in conduct involving deceit and dishonesty in violation of Rule 4-8.4(c). The client apparently thought better of her proposed action and did not make the affirmative misrepresentation in a filing, although a box was improperly marked indicating no

[2] The language found formerly in Rule 4-3.3(a)(4) is currently found at Rule 4-3.3(a)(3).

preferential payments had been made and the unsecured loan from the client's mother was not listed on the appropriate schedule, in violation of 4-3.3(a)(1).

CONCLUSION

Informant recommended that the Court reprimand Respondent for his dishonest conduct in advising a client not to disclose a preferential loan payment to her mother in the client's bankruptcy case, which was the most serious instance of Respondent's misconduct. In accordance with ABA Standards analysis and Court precedent, reprimand is an appropriate sanction in a range of appropriate sanctions that would include a suspension with leave to apply for reinstatement in six months.

Respectfully submitted,

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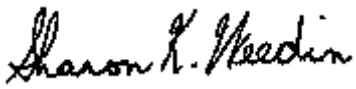

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2016, the Informant's Brief was sent to Respondent and Respondent's counsel via the Missouri Supreme Court e-filing system to:

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CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 4,028 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

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