Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

IN THE SUPREME COURT OF MISSOURI
EN BANC

IN RE:	)	
AMBRY NICHOLE SCHUESSLER,	)	
(MBE: # 66214)	)	
	)	File No. DHP-17-013
Respondent,	)	

RESPONDENT SCHUESSLER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent Ambry Nichole Schuessler, by and through her counsel, Justin K. Gelfand and the law firm of Margulis Gelfand and Gary R. Sarachan and the law firm of Capes Sokol, respectfully submits the following proposed findings of fact and conclusions of law.

Respectfully Submitted,

/s/ Justin K. Gelfand
Justin K. Gelfand
Margulis Gelfand, LLC
8000 Maryland Avenue, Suite 420
St. Louis, MO 63105
(314) 390-0230
justin@margulisgelfand.com

/s/ Gary R. Sarachan
Gary R. Sarachan
Capes, Sokol, Goodman & Sarachan, P.C.
7701 Forsyth Blvd., 12th Floor
St. Louis, MO 63105
(314) 721-7701
sarachan@capessokol.com

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

IN THE SUPREME COURT OF MISSOURI
EN BANC

IN RE:	)	
AMBRY NICHOLE SCHUESSLER,	)	
(MBE: # 66214)	)	
	)	File No. DHP-17-013
Respondent,	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. The Charges Against Schuessler

The Office of Chief Disciplinary Counsel filed an Information against Schuessler charging her with the following violations:

1. Rule 4-8.4(c) by "[f]ailing to disclose information and lying to the OCA[1] supervisors, Internal Affairs officers, the FBI, and the Assistant United States Attorney *regarding her knowledge of Carroll's assault*" (emphasis added);
2. Rule 4-8.4(c) by "[m]aking a racist and homophobic slur in the OCA in response to a report of possible illegal police conduct";
3. Rule 4-8.4(g) by "[m]aking a racist and homophobic slur in the OCA in response to a report of possible illegal police conduct";
4. Rule 4-8.4(c) by "[f]alsely attributing the racist and homophobic slur to Carroll during her interview with the FBI and the Assistant United States Attorney"; and
5. Rule 4-8.4(d) by "engaging in conduct prejudicial to the administration of justice."

See Information, ¶ 41.

Pursuant to Missouri Supreme Court Rule 5.15(b), this disciplinary hearing panel conducted a hearing "on the information," which was not amended prior to "submission to the

[1] "OCA" refers to Office of Circuit Attorney in St. Louis, Missouri.

panel." Informant bore the burden of proof "to establish a violation of Rule 4 by a preponderance of the evidence." *See* Missouri Supreme Court Rule 5.15(d).

II. Findings of Fact

1. Schuessler became a Lawyer in 2013. (Tr.444). In July 2014, Schuessler was employed as an Assistant Circuit Attorney for the City of St Louis, her first legal job. Schuessler was 25 years old when this employment commenced. (Tr.487).
2. On Wednesday, July 23, 2014, while Schuessler was in her office preparing for her first solo jury trial, Assistant Circuit Attorney Bliss Worrell ("Bliss") entered Schuessler's office uninvited. Bliss was on her cellular telephone with Detective Thomas Carroll ("Carroll") and placed the call on speakerphone. (Tr.455-458).
3. Carroll, while on speakerphone, described his assault on a suspect. (Tr.455-458).
4. Carroll described putting his gun in the suspect' s mouth. In response, Schuessler made a tasteless joke (the "Joke"): "I bet that's not the first big black thing he has had in his mouth". (Tr.457-458, 491).
5. The Panel finds that the Joke was merely a joke, and was not intended to be a racist or homophobic slur.
6. On Wednesday, July 24, 2014, Assistant Circuit Attorney Katherine Dierdorf ("Dierdorf") entered Schuessler's office and informed Schuessler and Assistant Circuit Attorney Lauren Collins ("Collins") that Bliss had filed false charges against the suspect Carroll claimed to have assaulted. (Tr.246).
7. Schuessler immediately expressed her concern that those who knew of the false charges could lose their jobs simply by knowing of the filing of the false charges. (Tr.249).

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

8. During the 45-minute period after learning of the filing of the false charges, Schuessler and Collins, in an effort to make certain they had the correct facts, researched whether the false charges were actually filed by reviewing computer records. (Tr.250).
9. After confirming that false charges were, in fact, filed, Schuessler and Collins jointly determined they must report the false charges.
10. Schuessler and Collins jointly reported the false charges to their supervisor, Pippa Barrett. (Tr.258).
11. Schuessler (and Collins) timely reported the filing of the false charges. The Panel further finds that in so reporting the filing of the false charges to their supervisor, Schuessler and Collins acted consistently with the training they received (Tr.396). The Panel further finds that Schuessler and Collins' reporting of the filing of the false charges was in full compliance with their ethical duties as they were in possession of *Brady* material[2] and possessed knowledge that a suspect had been charged with a crime the suspect did not commit. (Tr.292,303).
12. Later, on July 24, 2014, Schuessler spoke with supervisor Beth Orwick ("Orwick") and supervisor Ed Postawko ("Postawko"). (Tr.305).
13. Orwick testified that the situation Schuessler found herself in would be overwhelming for any lawyer, herself included, and that Schuessler was truthful when she reported overhearing a conversation between Bliss and Carroll on speakerphone and that Schuessler was truthful when she reported the filing of the false charges. (Tr.306-307).

[2] A prosecutor has an ethical and legal obligation to disclose potentially exculpatory material information to a criminal defendant. *See, e.g.*, *Brady v. United States*, 397 U.S. 742 (1970).

14. Schuessler was not terminated from her employment at the Circuit Attorney's Office but left voluntarily. (Tr.308-309).

15. The Panel finds Orwick's testimony to be credible and worthy of belief.

16. The Panel finds the decision by the Circuit Attorney's Office to allow Schuessler's continued employment, with full knowledge of Schuessler's Joke, as validation that the Joke, and the false attribution by Schuessler of the Joke to Carroll, was not material to any issue in the prosecution of Carroll or Bliss.

17. On July 25, 2014, Schuessler voluntarily participated in an interview with the Internal Affairs Division of the St. Louis Metropolitan Police Department ("IAD") and Barrett. The interview lasted 21 minutes. (*See* Informant's Exhibit 11).

18. Schuessler was told the purpose of the interview was to ask her questions about her knowledge of the arrest of Michael Waller. (*Id.* At 2).

19. Schuessler volunteered an abundance of information during this interview with IAD including the filing of the false charge, that Carroll had assaulted a suspect along with the vivid details of that assault, and that she reported this information to her supervisor. (*Id.* at 3,8).

20. The Panel finds that Schuessler "did not fail to disclose information" to, and did not "l[ie] to the OCA supervisors" or the "Internal Affairs officers" about "her knowledge of Carroll's assault." *See* Information, Paragraph 41(a)(1). The panel further finds that Schuessler answered all the questions posed to her and that she volunteered important information to IAD even though she was not asked specific questions about the information she provided.

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

21. Subsequent to the interview with IAD and Barrett, Schuessler voluntarily was interviewed by the FBI and AUSA Harold Goldsmith ("AUSA") on two occasions.
22. The Panel finds that, during both interviews, Schuessler stated that Carroll had used his gun and had assaulted a suspect. (Tr.172, 176).
23. In the first interview, Schuessler incorrectly attributed the Joke to Carroll.
24. The Panel finds that the attribution of the Joke to Carroll was the only untrue statement made by Schuessler to the FBI and the AUSA, and that Schuessler made no material omissions during the two interviews and no material false statements during the two interviews.
25. The Panel finds that Informant failed to prove by a preponderance of the evidence that the false attribution of the Joke, or the Joke itself, had any substantial effect, or could have had any substantial effect, on the outcome of the Bliss or Carroll prosecutions.
26. The Panel finds that the attribution of the Joke to Carroll by Schuessler was the result of her embarrassment at making the Joke, and finds her testimony in this regard credible and worthy of belief. (Tr.510-511).
27. The Panel finds that, at the time she made the Joke, Schuessler was not representing a client.
28. Since 2014, Schuessler became a member of a well-respected family law firm in Clayton: Coulter Lambson, LLC. (Tr.874-875).
29. Schuessler's mentor, employer and direct supervisor, Joseph Lambson ("Lambson"), testified that Schuessler has an excellent reputation for truth and veracity in both the community and in the office, and that his opinion is based on feedback he has received from judges and opposing Counsel. (Tr.878-879).

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

30. Lambson further testified that judges have approached him to tell him that Schuessler has done a thorough, diligent and ethical job and that Schuessler routinely approaches him to make sure matters are being handled in an ethical manner. (Tr.879-881).
31. Lambson acknowledged that Schuessler made him aware of the underlying allegations in this matter and that he has kept Schuessler employed at his law firm notwithstanding the allegations because, in his experience, Schuessler is hard-working, dedicated, ethical, honest and an effective attorney. (Tr. 882).
32. The Panel finds Lambson's testimony credible and worthy of belief.
33. The Panel finds that Schuessler's testimony in this matter was credible and worthy of belief and that she is truly contrite as to her attribution of the Joke to Carroll.
34. The Panel finds that the attribution of the Joke to Carroll was an isolated incident.
35. The Panel finds that, while Schuessler was not forthcoming by attributing the Joke to Carroll, the false attribution was not material to the prosecutions of Bliss and Carroll and had no effect on the administration of justice to Bliss or Carroll.
36. The Panel finds that, based upon the record as a whole, Schuessler can be entrusted with the duties and responsibilities of a Missouri attorney.
37. The Panel finds that Schuessler is not a threat to the public or those charged with the administration of justice in her capacity as a practicing attorney.

III. Conclusions of Law Regarding the Charges Against Schuessler

Schuessler is not charged with exercising poor judgment in certain circumstances. When testifying, Schuessler was the first to acknowledge that she was sincerely remorseful for making the Joke in the first place and for attributing it to Carroll.

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

A. Rule 4-8.4(c) by "[f]ailing to disclose information and lying to the OCA supervisors, Internal Affairs officers, the FBI, and the Assistant United States Attorney regarding her knowledge of Carroll's assault"

Missouri Supreme Court Rule 4-8.4(c) dictates that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The Information does not charge Schuessler with "fraud," and specifically alleges that Schuessler's violation was in failing to disclose information and lying to "the OCA supervisors, Internal Affairs officers, the FBI, and the Assistant United States Attorney *regarding her knowledge of Carroll's assault*." *See* Information, ¶ 41(a)(1).

Two OCA supervisors testified: Barrett and Orwick. Neither testified that Schuessler lied to them and Orwick admitted under oath that Schuessler truthfully told her about overhearing a conversation involving Worrell and Carroll on the phone involving an assault and that Worrell charged a man with a crime he did not commit. (Tr. 306-307.) And perhaps most importantly, there is absolutely no evidence that Schuessler lied or failed to disclose information to her OCA supervisors "regarding her knowledge of Carroll's assault."

Similarly, the IAD transcript is determinative. In her twenty-one-minute interview, Schuessler was not asked a single question about "Carroll's *assault*." Rather, Schuessler was expressly asked about knowledge she had "regarding the *arrest* of Mr. Michael Waller." *See* Informant's Exhibit 11. The arrest happened at Busch stadium according to Barrett. (Tr. 402.) The assault happened in a St. Louis police holding cell. Nevertheless, Schuessler volunteered an abundance of information to IAD throughout the interview, including most importantly for this allegation that Carroll "beat the crap out of him." (Informant's Exhibit 11 at 4.)

Finally, Schuessler did not lie to the FBI or the Assistant United States Attorney about her knowledge of Carroll's assault. In stark contrast, Goldsmith admitted that his own handwritten

notes of Schuessler's statements to him and the FBI included: "Punched him, hit him with chair, gun in mouth." (Tr. 168.) When expressly asked, "In fact, at the very first meeting on August 13th, Ambry said she had heard and gave you infonnation about this beating; am I correct?", Goldsmith answered: "Right." (Tr. 163.)

Thus, Schuessler did not fail to disclose information or lie to the OCA supervisors, Internal Affairs officers, the FBI, or the Assistant United States Attorney "regarding her knowledge of Carroll's assault" as expressly alleged in the Information.

B. Rule 4-8.4(c) by "[m]aking a racist and homophobic slur in the OCA in response to a report of possible illegal police conduct"

There is no dispute between the parties that, in the moment she learned about Carroll's alleged assault on a suspect, Schuessler responded: "I bet that's not the first big black thing he has had in his mouth." (Tr. 457-458, 491.)

This statement, while tasteless, was merely a joke—and was not intended to be racist or homophobic. Furthermore, Schuessler testified credibly that she is embarrassed she made the Joke and that the Joke must be considered in the context of Schuessler's actions in the two days following the isolated Joke. The following day, upon learning that Bliss filed false charges against a man for a crime he did not commit, Schuessler reported the false charges to her supervisor within 45 minutes of learning about it and she did so even though it put her living situation in jeopardy because her *de facto* landlord, Dierdorf, pressured her not to say anything at all.

Moreover, the Joke does not fall within the scope of Rule 4-8.4(c) because the Joke did not involve "dishonesty, deceit or misrepresentation." *See* Information, ¶ 41(a)(2). Thus, Schuessler cannot be held accountable for violating this rule because the rule requires proof that the Joke involved "dishonesty, deceit, or misrepresentation." *Id.*

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

C. Rule 4-8.4(g) by "[m]aking a racist and homophobic slur in the OCA in response to a report of possible illegal police conduct"

As an initial matter, the Information does not allege that Schuessler's words or conduct occurred "in representing a client." *See* Information ¶ 41(a)(2). This is determinative because Missouri's rule charged in this allegation is limited to actions in which an attorney "manifest[s] by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation." *See* Missouri Supreme Court 4-8.4(g).

In 2016, the American Bar Association (ABA) issued a rule that reached much more broadly than what had been in use before, namely, a comment under Model Rule 8.4(d) that addressed knowingly "manifest[ing]... bias or prejudice" in the course of "representing a client" so as to "prejudic[e]... the administration of justice" in violation of Model Rule 8.4(d). With limited qualifications, the new Model Rule provides that it is professional misconduct for a lawyer to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status *in conduct related to the practice of law*" (emphasis added). Missouri has not adopted this rule and, because it was issued in 2016, could not have adopted it even if it wanted to for conduct that occurred in 2014 (two years before the ABA adopted this model rule).

The Model Rule governs conduct that is increasingly more attenuated from the actual practice of law or involving moral turpitude. Missouri has chosen to keep its disciplinary rule more narrowly focused.

When interpreting the scope of the Missouri Rules of Professional Conduct, the plain language controls. *See In re Hess*, 406 S.W.3d 37, 43 (Mo. banc 2013) ("This Court's primary rule of interpretation is to apply the plain language of the rule at issue") (internal citations omitted);

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

Buemi v. Kerckhoff, 359 S.W.3d 16, 20 (Mo. banc 2011), reh'g denied (Oct. 4, 2011) ("This Court interprets its rules by applying the same principles used for interpreting statutes") (internal citations omitted).

The plain language of Rule 4-8.4(g) is clear: "It is professional misconduct for a lawyer to...manifest by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation" (emphasis added). The applicable comment underscores that the purpose behind this rule is to protect against "discrimination in the provision of services in the state judicial system." Rule 4-8.4(g), Comm. 4. ("Rule 4-8.4(g) identifies the special importance of a lawyer's words or conduct, in representing a client, that manifest bias or prejudice against others based upon race, sex, religion, national origin, disability, age, or sexual orientation.... The manifestation of bias or prejudice by a lawyer, in representing a client, fosters discrimination in the provision of services in the state judicial system, creates a substantial likelihood of material prejudice by impairing the integrity and fairness of the judicial system, and undermines public confidence in the fair and impartial administration of justice") (emphasis added). Thus, Rule 4-8.4(g) is only implicated by words spoken or conduct undertaken "in representing a client."

Missouri could have chosen to adopt the new broader Model Rule which opens for possibility sanctioning conduct unrelated to the actual practice of law or a lawyer's fitness to practice, and not connected with the administration of justice. It did not do so. In deciding when an attorney-client relationship exists, a Missouri court defined the relationship as "when a prospective client seeks and receives legal advice and assistance from an attorney who intends to undertake to provide legal advice and assistance to the prospective client *in a particular matter*. *State ex rel. Thompson v. Dueker*, 346 S.W.3d 390, 394 (Mo. Ct. App. 2011) (emphasis supplied).

Missouri is one of sixteen states that includes the qualifier in Rule 4-8.4(g) that words and conduct that demonstrate bias or prejudice only violate the rule if the bias or prejudice is manifested "in representing a client." *See* Lavelle, Lydia, "Nondiscrimination Rules with Regard to Sexual Orientation: A Survey of the Rules of Professional Conduct in the Fifty States," 36, 36 Whittier L. Rev. 237, n. 108 (Winter 2015) (listing states, including Missouri, which include the qualifier to this ABA Model Rule).[3]

Orwick testified under oath that Schuessler's actions in connection with this Waller incident were that of a fact witness and that this was not in connection with any matter she was handling or for which she was assigned. (Tr. 305-306.) Indeed, the Waller case was not charged until a day *after* Schuessler made the tasteless joke, meaning it could not possibly have been made "in representing a client."

D. Rule 4-8.4(c) by "[f]alsely attributing the racist and homophobic slur to Carroll during her interview with the FBI and the Assistant United States Attorney"

This panel has determined that the Joke was not racist or homophobic. The panel has also found that the attribution of the Joke to Carroll in Schuessler's first interview with the FBI and the Assistant United States Attorney was not material to the prosecution of Bliss and Carroll and was the result of embarrassment—and done for no other reason.

Furthermore, however, Schuessler's conduct must be considered in context. In the first FBI interview where this statement allegedly occurred, even Goldsmith admitted that Schuessler disclosed the use of a gun, Carroll's admissions, the details about the assault, and the false charges. *See* Tr. At 172 ("She told us he used a gun, that's correct," in response to a question: "We can

[3] Schuessler requests that this panel also consider, and make a recommendation based on, her motion to dismiss this allegation because it is unconstitutional.

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

agree, can we not, that from the very first interview with you, and then the subsequent interview with you, that Ambry did not fail to tell you that Carroll said he used a gun, right?"); *Id.* at 176 (Goldsmith acknowledged that the FBI report stated, "Schuessler stated he was either sitting in a chair or kneeling on the ground when he put the gun in his mouth" and explained, "I understand it's written differently in the report. I'm just telling you my recollection of it"). In the first interview, Schuessler attributed the Joke to Carroll because she was embarrassed and acknowledged the very next time she spoke with Goldsmith and the FBI that she was the one who made the joke. (Tr. 98.) Schuessler nevertheless told Goldsmith and the FBI about the speakerphone conversation, about Carroll's admission that he put a gun in the mouth of Waller, the details she learned about the assault, and the details she learned about the false charges. (Tr. 509-510.) As Schuessler testified, she was not forthcoming about who made the joke simply because she was embarrassed. (Tr. 510-511.) The panel found this testimony to be credible.

Nevertheless, the panel does not simply take Schuessler at her word that embarrassment caused her to not fess up to the joke. Rather, it is the only possible explanation that makes sense. After all, by this point, Schuessler had already dealt Carroll two mortal wounds: that he assaulted an innocent inmate and that he used a gun in the assault. This means she was clearly not trying to protect Carroll. Likewise, Schuessler had already dealt a mortal wound to Worrell; it was Schuessler, 45 minutes after learning Worrell filed false charges, who reported Worrell for serious misconduct that resulted in her termination, disbarment, and a federal felony criminal conviction. When considered in the entire context, it is clear Schuessler was simply embarrassed.

According to Goldsmith, Schuessler was "truthful" in the second interview. (Tr. 100.) Indeed, approximately two months later, Goldsmith chose to put Schuessler before the grand jury to seek indictments against Worrell and Carroll and Goldsmith said she testified truthfully before

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

the grand jury. (Tr. 188-189.) At the end of her grand jury testimony, a federal grand juror told Schuessler that she appreciated Schuessler's "integrity." (Tr. 189.)

What matters here is whether Schuessler's comment about who made the joke was material—precisely because there was no dispute that Carroll admitted to using a gun and the only question was *who* made a tasteless joke after that admission. In this regard, Jeff Jensen's testimony was enlightening. Jensen, the sitting United States Attorney, previously served as an Assistant United States Attorney, an FBI special agent, and a partner at the Husch Blackwell law firm. (Tr. 837-838.) He testified he has participated in hundreds, if not thousands, of FBI interviews. (Tr. 838.) And even as the sitting United States Attorney for the Eastern District of Missouri, Jensen readily and quickly acknowledged that people make *immaterial* false statements in FBI interviews all the time. (Tr. 838.)

Goldsmith's actions reveal he agreed this was not material. After Schuessler admitted she was not truthful about who made this joke, Goldsmith put Schuessler on the stand before a federal grand jury to successfully obtain charges against Carroll and Worrell. Goldsmith did not disclose this "false statement" to the grand jury—not because he acted improperly but because he clearly did not think it was material. Two other federal prosecutors put Schuessler on the stand at sentencing and the judge made findings consistent with Schuessler's testimony. And the Circuit Attorney's Office kept Schuessler on as a prosecutor until she voluntarily resigned—in stark contrast to their decision to immediately terminate Dierdorf and Worrell.

E. Rule 4-8.4(d) by "engaging in conduct prejudicial to the administration of justice"

Schuessler stands apart from others in this case—in a good way. Schuessler courageously reported misconduct, disclosing important *Brady* information within an hour of learning it and disclosing *Brady* in a case she was not even handling. Indeed, even Goldsmith acknowledged that

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

if Schuessler expressed concern about a *Brady* violation, she was "doing the right thing." (Tr. 185.) And Orwick credited Schuessler and Collins with disclosing this *Brady* information to Barrett. (Tr. 303-304.)

When it comes to the administration of justice, protecting the rights of a criminal defendant is paramount. Within 45 minutes of learning about the false charges, Schuessler reported it to her supervisors. It took them five days to dismiss the false charge by representing to the court only that the "State elects not to proceed" and more than two months to dismiss the remaining charges against this victim of police and prosecutorial misconduct with equally troubling vague language.

When all is said and done, there is not a single word Schuessler said or action Schuessler took that actually caused prejudice to the prosecution or sentencing of Worrell or Carroll—but what Schuessler said and did unambiguously led to the exoneration of a man for a crime he did not commit and ultimately to the release of that man.

While Schuessler did not do everything right—and is profoundly remorseful for that fact—she accomplished this most important task consistently with her training, her office policy, and most importantly, her ethical obligations.

IV. Conclusion

Based on the foregoing, the panel concludes that Informant failed to prove by a preponderance of the evidence any of the violations alleged against Schuessler in the pending Information. As such, the panel recommends that the Information be dismissed as it applies to Schuessler.

*****

Schuessler respectfully requests that the panel dismiss the Information because Informant failed to prove by a preponderance of the evidence the violations alleged against her in the

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

Information. However, in the event the panel disagrees and concludes that consideration of a sanction is appropriate, Schuessler respectfully provides additional analysis for the panel's consideration.

Under Missouri law, the point of attorney discipline is not to punish the attorney. *In re Littleton*, 719 S.W.2d 772, 777 (Mo. banc 1986); *In re Forck*, 418 S.W.3d 437, 444 (Mo. banc 2014). "[T]he purpose of suspending or disbarring an attorney is to remove from the profession a person whose misconduct has proved [her] unfit to be [e]ntrusted with the duties and responsibilities belonging to the office of an attorney, and thus to protect the public and those charged with the administration of justice, rather than to punish the attorney." *In the matter of Anthony Canzoneri*, 334 S.W.2d 30, 33 (Mo. banc 1960) (internal quotation marks omitted).

Stated another way, the fundamental purpose of attorney discipline is to protect the public and maintain the integrity of the legal profession. *In re Zink*, 278 S.W.3d 166, 169 (Mo. banc 2009); in accord, e.g., *In re Stabb*, 785 S.W.2d 551, 554 (Mo. banc 1990); *In re Caranchini*, 956 S.W.2d 910, 918-19 (Mo. banc 1997). "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, 808 (Mo. banc 2003). The determination of appropriate discipline takes into consideration aggravating and mitigating circumstances. *Id.* "A disciplinary proceeding is held, not with a primary purpose of punishment, but as an inquiry into respondent's fitness to continue as an attorney." *In re Maier*, 664 S.W.2d 1, 2 (Mo. banc 1984).

In determining an appropriate sanction, four types of discipline are authorized: reprimand, indefinite suspension, suspension for a fixed period, and disbarment. *In re Caranchini*, 956 S.W.2d at 918-19; *In re Carey*, 89 S.W.3d 477, 502 (Mo. banc 2002); *see also In re Frank*, 885 S.W.2d

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

328, 333-34 (Mo. banc 1994). When determining an appropriate penalty in an attorney disciplinary proceeding, the panel must consider the gravity of the attorney's misconduct as well as any mitigating or aggravating factors that tend to shed light on the attorney's moral and intellectual fitness as an attorney. *See In re Stanley L. Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). Disbarment is reserved for persons clearly unfit to practice law; and reprimands are used for isolated acts not involving dishonest, fraudulent or deceitful conduct. The intermediate sanction of suspension may involve an attorney who violates his or her duty to the public to maintain personal integrity, but the conduct does not rise to a level indicating the attorney is clearly unfit to practice law. *See In re Disney*, 922 S.W.2d 12, 15 (Mo. banc 1996). Progressive discipline is applied when imposing sanctions on attorneys who commit misconduct. *See In re Forck*, 418 S.W.3d at 444.

Mitigation evidence may appropriately pertain to a lawyer's character and reputation in the legal profession. *In re Caranchini*, 956 S.W.2d at 919. Mitigating, as well as aggravating, circumstances are considered before determining appropriate discipline in a particular case; mitigating factors do not constitute a defense to a finding of misconduct, but they may justify a downward departure from presumptively proper discipline. *See In re Farris*, 472 S.W.3d 549, 563 (Mo. banc 2015).

Schuessler's record over the past three years has been unblemished. She has no prior disciplinary history and has shown remorse for her conduct. Moreover, no client was harmed by her misconduct. To the contrary, an innocent man, Michael Waller, was helped by her good ethical conduct in bringing to her supervisor's attention the fact that Bliss charged him with a crime he did not commit.

Mitigating circumstances are case-specific. However, they serve to inform Disciplinary Hearing Panels and the OCDC. Attorney Lim was accused of holding property to which his client

was entitled upon termination of the representation. *In re Lim*, 210 S.W.3d 199 (Mo. banc 2007). Lim withheld the client's labor certification, stating it "is still *our* property until you pay for it." The OCDC agreed with the Disciplinary Hearing Panel's recommendation for suspension of six months. The Court rejected the recommendation and ordered a public reprimand, noting Lim's previous record and the fact that his conduct did not rise to the level of fraud or deceit as to warrant suspension; "[w]hile Respondent's overall comportment was certainly unprofessional...his conduct does not rise to the level...so as to warrant suspension." *Id.* at 202.

In another situation, an attorney allegedly failed to comply with Rule 15 requirements for Continuing Legal Education for approximately four consecutive years, and failed to respond to four requests for information from disciplinary authorities. *In re Shelhorse*, 147 S.W.3d 79 (Mo. banc 2004). The attorney admitted the allegations. The Disciplinary Hearing Panel recommended a public reprimand; however, the OCDC recommended a six-month suspension. The Court ordered a public reprimand, noting the attorney's lack of prior disciplinary history, and that his conduct was not shown to have directly harmed a client or the public. *Cf. In re Carey*, 89 S.W.3d at 503 (while disbarment would generally be expected in such a case, mitigating factors warranted degree of leniency and provided hope respondents could return to responsible practice of law having learned a hard lesson; imposition of suspension with leave to apply for reinstatement in one year).

As punishment is *not* the purpose of a disciplinary action, the decision-makers should weigh all the circumstances including the previous and subsequent conduct of Schuessler. The conversation among co-workers and a police officer over three years ago resulted in substantial professional and personal consequences for Schuessler including public humiliation in the media. Any misconduct on her part, especially given the past three years of unblemished performance in a law office, demonstrates that Schuessler can be—and is—entrusted with the duties and

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM

responsibilities belonging to the office of an attorney, and thus to protect the public and those charged with the administration of justice. *See generally,* 7 Am. Jur. 2d *Attorneys at Law* § 30 (purpose of attorney discipline).

Anybody who observed Schuessler's testimony in this proceeding would not doubt for a moment that Schuessler has grown and matured since her conduct as a twenty-six-year-old in her first job as an attorney and that Schuessler is remorseful for many of the decisions she made several years ago. Since then, Schuessler has excelled as an attorney as demonstrated by Lambson's testimony—and by Lambson's decision to keep her on as an employee of his law firm well aware of the allegations in this case. Given the overriding principal to "protect society and maintain the integrity of the legal profession," any sanction imposed which would interrupt her continued practice of law could only be viewed as punishment.

Electronically Filed - SUPREME COURT OF MISSOURI - October 10, 2018 - 08:00 AM