IN THE SUPREME COURT OF MISSOURI
EN BANC

In re:	)	
JAMES M. ROSWOLD, Mo. Bar # 41053	)	Supreme Court No. 91893
Respondent.	)	

BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

This is a lawyer reciprocal discipline case. Therefore, as the Informant's Brief states, this Court has jurisdiction over this case pursuant to Article V, Section 5 of the Missouri Constitution; Missouri common law; and Missouri Revised Statute § 484.040.

CASE SUMMARY

This is a reciprocal discipline proceeding. Respondent James Roswold had his license to practice law in Kansas suspended for up to one year after Mr. Roswold's senior partner and mentor, Mark Schmid, misled a Kansas client to believe that the client's Kansas case had been settled, when in fact the case had been dismissed. Mr. Schmid's misconduct led to Mr. Roswold's suspension because Mr. Roswold was Mr. Schmid's partner; Mr. Roswold and Mr. Schmid had both represented the Kansas client, but Mr. Schmid had done so without gaining admission in Kansas including *pro hac vice*; and, the Kansas Supreme Court determined, the facts supported the legal conclusion that Mr. Roswold had assisted the unauthorized practice of law and allowed Mr. Schmid's misconduct in violation of Kansas Rules of Professional Conduct 1.1, 1.3, 1.4, 1.5(d), 5.1, 5.5 and 8.4(a) and Kansas Rule 116, relating to *pro hac vice* admission. *See In re Roswold*, 249 P.3d 1199 (Ks. 2011).

Mr. Roswold comes before this Court conceding the facts found by the Kansas Supreme Court, as he believes *In re Caranchini*, 956 S.W.2d 910 (Mo. 1997), requires. But this Court may reach its own legal conclusions. Mr. Roswold therefore asks this Court to impose a lesser penalty, preferably an admonition or stayed suspension. Mr. Roswold believes such relief is appropriate because:

(a) Suspension in Kansas resulted from the Kansas Supreme Court's conclusion that Mr. Roswold's misconduct was "knowing"; Missouri law does not support the conclusion that Mr. Roswold's conduct constituted "knowing" violations, however, and a less culpable mental state should result in a lesser sanction;

(b) Even when using the facts found by or stipulated to in Kansas, there is no support for finding Mr. Roswold violated each of the Missouri Rules comparable to the Kansas Rules cited. In particular, Mr. Roswold did not violate Missouri Rule 4-1.5(c), and there is no basis under Missouri law for holding Mr. Roswold directly and personally liable for violating Rules 4-1.1, 4-1.3, 4-1.4, or 4-8.4; and

(c) The nature of Mr. Roswold's misconduct, as well as the extraordinary mitigation he has performed including since the Kansas disciplinary hearing, support that Mr. Roswold should receive sanctions of a reprimand or stayed suspension.

Accordingly, Mr. Roswold here asks that this Court to impose a lesser sanction, or alternatively allow for the submission of additional evidence –in a separate Missouri proceeding or in this case – such that Mr. Roswold may offer proof that a lesser penalty should be imposed. The remainder of this Brief discusses each of these points in turn.

STATEMENT OF FACTS

Introduction. Under *In re Carinchini*, 956 S.W.2d 910 (Mo. 1997), Mr. Roswold is collaterally estopped and precluded from relitigating the facts determined in the Kansas disciplinary proceeding. In certain instances, however, certain assumptions made as this matter progressed through the Kansas disciplinary system led to a distortion of the underlying facts. Moreover, this case comes to this Court with no factual record beyond the Kansas Supreme Court's Order. Accordingly, Mr. Roswold offers the following brief summary of facts, supplementing the record and highlighting corrections where appropriate.

Personal Background. Mr. Roswold is a 46-year-old lawyer who has practiced for just over twenty years. He has been married for 15 years, and has three children, ages 11, 8, and 5. Presently, Mr. Roswold is one of two partners of the law firm Kansas City Accident Injury Attorneys, P.C. ("KCAIA"), whose primary office is in Kansas City, Missouri. KCAIA has two partners, one associate, and four nonlawyer staff. Its practice focuses on representing plaintiffs in personal injury and workers compensation cases. Approximately two-thirds of its cases are pending in or will be filed in Missouri, and one-third in Kansas. As discussed more below, since the suspension of Mr. Roswold's Kansas law license, the other two KCAIA attorneys – who are each licensed in Kansas as well as Missouri – are handling all Kansas matters.

Professional Experience. As the Informant's Brief states, Mr. Roswold graduated from law school, obtained his Missouri license, and started practicing law in 1990. (Informant's Brief at 5; *In re Roswold*, 249 P.3d at 1201.) Since 1990, Mr. Roswold has engaged in the private practice of law, primarily from an office in Kansas City, Missouri. Most of his clients and matters are also located in Missouri.

In 1993, Mr. Roswold joined the Kansas City, Missouri firm Copilevitz, Bryant, Grey & Jennings, P.C. ("Copilevitz Bryant"). *Id.* There, he began to work for Copilevitz Bryant partner Mark Schmid, a senior partner admitted in Missouri in 1980. Mr. Roswold worked extensively with Mr. Schmid, and found him to be an intelligent, capable litigator who maintained a strong reputation in the legal community. (Mr. Roswold is not aware, for example, of any disciplinary issues Mr. Schmid faced prior to the 2004 Kansas investigation discussed below.)

At Copilevitz Bryant, Mr. Roswold was handling a significant number of Kansas matters. Therefore, in 1994, Mr. Roswold passed the Kansas bar examination and obtained his Kansas law license.

In 1995, Mr. Schmid left Copilevitz Bryant to form his own firm, Mark R. Schmid & Associates, P.C. Mr. Schmid asked Mr. Roswold to follow as an associate, and Mr. Roswold agreed. Mr. Roswold worked as Mr. Schmid's sole associate until 1999, when Mr. Schmid invited Mr. Roswold to join him as a partner in the renamed firm Schmid & Roswold, P.C. Mr. Roswold accepted the

invitation, was named a "partner," and believed he was a half-owner of Schmid & Roswold, P.C., but he never received an actual ownership interest in the law firm.

Schmid & Roswold primarily represented plaintiffs in Missouri personal injury and workers compensation cases. A minority of their cases were pending in Kansas or for Kansas clients. As of 2008, the firm had approximately 120 open files.

Handling of Cases at Schmid & Roswold, P.C. Like most smaller law firms, Schmid & Roswold had one partner who primarily handled administrative matters. That partner was Mr. Schmid. Also like many smaller law firms, the partners at Schmid & Roswold generally worked on their own cases. They would discuss matters quite regularly and cover for each other when appropriate, but largely kept their cases separate.

Kansas cases, however, were handled a bit differently. Mr. Roswold was admitted in Kansas, but Mr. Schmid was not. Therefore, when Mr. Schmid was retained to handle a Kansas matter, he would have Mr. Roswold review and sign the complaint. Kansas jurisdictions near Kansas City regularly set case management conferences promptly after a defendant appears in a case. Mr. Roswold would therefore appear at this first case management conference with Mr. Schmid and move for Mr. Schmid to be admitted *pro hac vice*. Mr. Roswold and Mr. Schmid would of course frequently confer on the Kansas cases, as they did

on all cases. But Mr. Roswold would also review and sign each Kansas pleading. Mr. Schmid's name and Missouri bar number were listed lower down the signature block.

2004 Kansas Disciplinary Investigation. This arrangement for handling Kansas and Missouri cases appeared fine. For approximately ten years after Mr. Schmid formed his own firm, Mr. Schmid and Mr. Roswold had a solid relationship. At least as far as Mr. Roswold knew, Mr. Schmid was competently representing his Missouri and Kansas clients and handling administrative matters at the firm, which continued to grow in clients, employees, and profitability. In addition, Mr. Schmid and Mr. Roswold did not encounter any problems regarding obtaining *pro hac vice* admission for Mr. Schmid or ensuring Mr. Roswold had adequate involvement and supervision when Mr. Schmid handled Kansas cases.

In 2004, however, a Kansas matter that Mr. Schmid was handling did result in Mr. Roswold receiving the disciplinary penalty of a diversion. But this sanction did not arise from unauthorized practice or lack of supervision.

The matter, pursuing a workers compensation claim for a Kansas resident "R.S.W.,"[1] started in the regular manner. The client retained Mr. Schmid, who then pursued the matter, often discussing it with Mr. Roswold. The defendant then

[1] The Kansas Supreme Court referred to clients using initials. Mr. Roswold has therefore continued this practice in this Brief.

unexpectedly provided videotaped evidence showing that R.S.W. was arguably working outside his claimed restrictions. Mr. Schmid and Mr. Roswold discussed the videotape and its impact, and ultimately Mr. Schmid obtained R.S.W.'s written authorization to dismiss the case. Concurrent with the dismissal, the defendant sent over a stipulation titled "Agreed Award," saying the stipulation was a "housekeeping" matter. Mr. Schmid and Mr. Roswold both found the stipulation odd, and reviewed and discussed it. Seeing nothing problematic, Mr. Schmid and Mr. Roswold ultimately agreed that Mr. Roswold should execute and Mr. Roswold did execute the stipulation, because they viewed signing the stipulation as consistent with R.S.W.'s direction to voluntarily dismiss the case.

Unfortunately, Messrs. Schmid and Roswold did not recognize that by stating R.S.W. was "not entitled to benefits," the stipulation allowed the defendant to seek recovery of workers compensation benefits previously paid. The defendant took the stipulation to the workers compensation fraud and abuse tribunal, and attempted (Mr. Roswold believes unsuccessfully) to recover $40,000 previously paid as benefits to R.S.W. R.S.W. filed – and settled – a legal malpractice claim against Schmid & Roswold, Mr. Schmid, and Mr. Roswold. R.S.W. also initiated Kansas disciplinary proceedings against Mr. Roswold.

The Kansas Disciplinary Administrator investigated and ultimately offered Mr. Roswold diversion, which Mr. Roswold accepted in 2006. At no point were

unauthorized practice or supervision issues referenced in this 2004 Kansas disciplinary investigation. Further, to Mr. Roswold's knowledge, Mr. Schmid was not disciplined in Missouri or Kansas for anything related to his mishandling of R.S.W.'s representation.

Mr. Schmid Conceals Deeper Problems. Mr. Roswold did not see the 2004 Kansas disciplinary investigation as anything more than an unfortunate consequence of an isolated mistake. Rather, Mr. Roswold perceived that Mr. Schmid was still handling his cases and law firm administration capably. Whether the R.S.W. matter triggered problems or not, however, about the same time that R.S.W.'s matter was resolved Mr. Schmid apparently began to neglect both client matters and his administrative responsibilities at Schmid & Roswold. Unfortunately, Mr. Schmid also began to take steps, sometimes extraordinary steps, to conceal these problems from Mr. Roswold and the staff of Schmid & Roswold, as well as from the affected clients. Mr. Schmid's concealment continued, in fact, until Mr. Roswold forcibly ended it in May 2010.

(Mis)Representation of J.C. In November 2008, Mr. Roswold learned that the Kansas Disciplinary Administrator was investigating Mr. Schmid's handling of another Kansas case. In 2004, a Kansas resident referred to as "J.C." had contacted Mr. Schmid about a medical malpractice case. Mr. Schmid agreed to handle J.C.'s case, and J.C. signed a Contract for Employment of Attorney with Schmid &

Roswold. (Respondent's Appendix at RA7.) Mr. Schmid prepared a complaint, which Mr. Roswold reviewed and signed. The complaint's signature block listed Mr. Roswold's name and Kansas Bar Number, as well as Mr. Schmid's name and Missouri Bar Number.

Mr. Schmid then proceeded to handle J.C.'s case, discussing it frequently with Mr. Roswold, as frequently as they discussed other cases. Also, Mr. Roswold continued to sign all pleadings, since this was a Kansas case. Mr. Roswold's name and Kansas Bar Number generally appeared on the signature blocks above Mr. Schmid's name and Missouri Bar Number, as was the custom for Schmid & Roswold, P.C. in Kansas cases where Mr. Schmid was admitted *pro hac vice.* But Mr. Schmid was not admitted *pro hac vice* to handle J.C.'s case. Rather, perhaps because the relevant jurisdiction (Shawnee County, Kansas) did not hold early case management hearings as was the practice closer to Kansas City, Mr. Roswold had not appeared at the start of the case to obtain Mr. Schmid's admission *pro hac vice.* No motion for Mr. Schmid's *pro hac vice* admission was ever filed. Nevertheless, Mr. Schmid proceeded to handle the case, including appearing for depositions, without obtaining *pro hac vice* admission. Nothing alerted Mr. Roswold to the fact they had not obtained Mr. Schmid's admission *pro hac vice* to handle J.C.'s case, including that – to Mr. Roswold's knowledge, at least – opposing counsel never

raised the issue that Mr. Schmid was not admitted to handle J.C.'s matter in Kansas.

Moreover, in addition to handling the case without a proper *pro hac vice* admission, Mr. Schmid was actually mishandling and concealing his mishandling of J.C.'s case. The defendants had moved for summary judgment. Instead of reviewing the motion, sharing it with Mr. Roswold, discussing it with him, and then preparing a response for Mr. Roswold to review and sign as was their custom, Mr. Schmid hid the motion for summary judgment. Mr. Schmid also hid that he did not respond to the motion, and that summary judgment was entered against J.C. Mr. Schmid sought to conceal the adverse judgment. Mr. Schmid apparently told J.C. that he could settle the matter, and obtained J.C.'s authority to settle the matter for $30,000 or more. Mr. Schmid then fabricated a $32,500.00 settlement. He told J.C. of the settlement and paid her $3,990.53, saying the rest was attorney fees and costs. J.C. complained to Mr. Schmid that she felt the expenses were too high. So Mr. Schmid paid her another $10,833. But J.C. had also complained to another attorney, who called the defense counsel to discuss J.C.'s settlement. The defense counsel reported there had been no settlement, that the defendants had prevailed through their unopposed motion for summary judgment. The other lawyer then reported Mr. Schmid to the Kansas Disciplinary Administrator.

Kansas Investigation. The Kansas Disciplinary Administrator opened an investigation of Mr. Schmid and the J.C. case in January 2008. Mr. Roswold had no notice of this investigation. Mr. Roswold also had no notice that Mr. Schmid had mishandled J.C.'s case. Instead, Mr. Schmid lied to Mr. Roswold about the status of the case, and hid any relevant documents. Mr. Schmid also tried to mislead the Kansas disciplinary investigator. Mr. Schmid maintained a story – set out in a five-page letter – that he had met with J.C. and obtained her verbal authority to dismiss her case. Mr. Schmid reported that later, after summary judgment was entered, J.C. contacted Mr. Schmid, upset with the adverse judgment, and he offered her a settlement to make her whole. Supposedly, J.C. had accepted but later rejected Mr. Schmid's initial roughly $4000 offer, and Mr. Schmid responded with a subsequent offer of $10,833. Mr. Schmid claimed this resolved the matter. (*See* Mr. Schmid's Letter dated March 20, 2008, Respondent's Appendix at RA1 to RA6.) Mr. Schmid was also dragging his feet in responding to the Kansas investigator, apparently seeking to cover up his misconduct and to preserve his fabricated explanation.

In November 2008, Mr. Roswold finally learned of the problems with J.C.'s case, and the resulting disciplinary investigation when the Kansas Disciplinary Administrator notified Mr. Roswold that he faced a disciplinary charge arising from Mr. Schmid's mishandling of J.C.'s case. Mr. Roswold immediately

confronted Mr. Schmid, and Mr. Schmid confessed what had occurred in J.C.'s case. Mr. Roswold forced Mr. Schmid to make full disclosure about J.C.'s case to the Kansas disciplinary investigator and Missouri disciplinary counsel. They also contacted Schmid & Roswold's malpractice insurer and reported the incident. Concurrently, Mr. Roswold reported Mr. Schmid's actions to the Missouri Office of Chief Disciplinary Counsel ("OCDC") and worked with J.C.'s new counsel to remedy the injury J.C. had incurred. This included that Schmid & Roswold settled the legal malpractice claims that J.C. potentially had against Schmid & Roswold.

Roswold Seizes Control Over Client Matters. After Mr. Roswold was made aware of Mr. Schmid's failure to handle the J.C. case properly, Mr. Roswold also immediately began taking measures to protect and preserve the interests of Mr. Schmid's clients. Previously, as his own practice and stature grew, Mr. Roswold had sought a greater role in administration of the law firm. Mr. Schmid had rebuffed such requests. In March 2007, Mr. Roswold even left a written demand, seeking greater participation in firm management. Mr. Schmid and Mr. Roswold met to discuss Mr. Roswold's demand in April 2007, but Mr. Schmid appeared prepared to ignore Mr. Roswold's request. Mr. Roswold therefore gradually increased his involvement in firm activities such as hiring that did not require Mr. Schmid to share additional firm information that he was still withholding.

Upon learning of the investigation into J.C.'s matter in late 2008, however, Mr. Roswold forced his way to gain greater control over the firm. Mr. Roswold began to place all Kansas cases – and ultimately all cases – at Schmid & Roswold more directly under Mr. Roswold's supervision. In other words, Mr. Roswold began pulling cases and clients from his trusted senior partner, and to treat that mentor as Mr. Roswold would previously have treated an associate. As previously noted, Mr. Roswold also became fully involved in resolving cases arising from the J.C. matter, spedifically settling the potential malpractice claim from J.C. and resolving a related declaratory judgment action by Schmid & Roswold's insurer.

Schmid's Full Misconduct Uncovered. Despite Mr. Roswold's attention and efforts, Mr. Schmid continued to conceal matters from Mr. Roswold and mislead Mr. Roswold about the status of matters. Mr. Roswold, meanwhile, pressed for full disclosure and to remedy what he thought was an isolated problem. For example, in 2009, Mr. Roswold contacted Missouri attorney Robert Russell about assisting Mr. Schmid with the Missouri disciplinary investigation. For several months, Mr. Roswold pressed Mr. Schmid aggressively to meet with Mr. Russell, hoping this would facilitate a dialogue between Mr. Schmid and the Missouri OCDC and a resolution of the complaint concerning J.C. Mr. Roswold also gathered and organized a package of documents to assist Mr. Russell in helping Mr. Schmid. In

March 2010, Mr. Roswold was finally able to get Mr. Schmid to go meet with Mr. Russell.

As a direct result of the meeting between Mr. Schmid and Mr. Russell, Mr. Roswold learned that Mr. Schmid had received a complaint from the Missouri OCDC concerning J.C.'s matter some months earlier. Mr. Schmid had failed to respond to that complaint. This failure to respond led to Mr. Schmid being disbarred by default in February 2010, but Mr. Russell had that disbarment vacated.

It was not until May 2010, that Mr. Roswold finally discovered the full extent of former his senior partner and mentor Mr. Schmid's problems. Mr. Roswold picked up a facsimile sent to Schmid & Roswold, P.C. before Mr. Schmid could intercept it. The facsimile revealed that a vendor had obtained a $197,000 judgment against the law firm for unpaid marketing expenses. Mr. Roswold had already terminated his partnership with Mr. Schmid in 2009 and since March 2010 had actively tried to exclude Mr. Schmid from the office. Now realizing his one-time mentor and senior partner could no longer be trusted at all, Mr. Roswold terminated his professional relationship with Mr. Schmid, changing the locks on the law firm door and mailbox. Mr. Roswold then conducted an exhaustive investigation of Mr. Schmid's office. This investigation revealed 245 pieces of unopened correspondence hidden under Mr. Schmid's desk and in his credenza. It

also uncovered a host of other problems that Mr. Schmid had caused and concealed, including:

a. In 2005, Mr. Schmid missed a statute of limitations for a Missouri client. Schmid & Roswold's insurer ultimately paid $460,000 to settle the resulting claim. Mr. Schmid hid the mistake, claim, and settlement from Mr. Roswold;

b. In 2006, Schmid & Roswold was rejected for insurance renewal. Mr. Schmid concealed this rejection and procured new insurance – at premiums three times higher than before – from a different insurer without alerting Mr. Roswold;

c. Starting in 2006, Mr. Schmid had failed to pay and hid notices of nonpayment of substantial taxes owed by Schmid & Roswold, resulting in tax levies against the law firm;

d. Throughout 2008 and 2009, Mr. Schmid continued to conceal case developments, mislead Mr. Roswold as to case status, and bury pleadings and correspondence in cases other than J.C.'s case in his office, including numerous documents that evidenced other derelictions and failures; and

e. Throughout 2008, Mr. Schmid failed to pay substantial law firm marketing charges, and intercepted notices to Mr. Roswold and hid

notices of these charges. This caused the firm to incur more than $100,000 in unpaid charges, which Mr. Schmid again hid and allowed to result in a judgment against the firm. The judgment also forced the firm to terminate what was then a primary marketing endeavor. Prior to May 2010, Mr. Schmid had lied to Mr. Roswold regarding the reason for this termination.

f. In December 2009, Mr. Schmid had apparently received but failed to open an envelope from the Missouri OCDC. This envelope contained a complaint relating to J.C.'s case and another Missouri case. The envelope was hidden among the 245 pieces of unopened mail in Mr. Schmid's desk and in his credenzas.

Kansas Proceedings. Upon learning of Mr. Schmid's mishandling of the J.C. case, and the Kansas investigation, Mr. Roswold promptly arranged a meeting and met with the Kansas investigator, attorney Timothy J. Sear of Polsinelli Shughart P.C. Mr. Roswold also caused Mr. Schmid to confess his misconduct with regard to J.C. and with Mr. Schmid's help prepared and submitted a seventeen-page chronology about the representation of J.C. Ultimately, this led the Kansas investigator to conclude there was not probable cause to believe Mr. Roswold had committed an ethics violation.

Despite the Kansas investigator's determination that there was inadequate evidence to proceed, the Kansas disciplinary process did move forward against Mr. Roswold. In August 2010, there was a Kansas disciplinary hearing, where Mr. Roswold stipulated the facts that ultimately led to his discipline, and his attorney conceded that Mr. Roswold had violated certain Kansas Rules discussed below. The hearing panel reviewed these stipulations and concessions and the rest of the record, and determined that Mr. Roswold's misconduct was due to negligence. The hearing panel therefore concluded that Mr. Roswold should receive a censure.

The Kansas Supreme Court then took the case on review. In April 2011, the Kansas Supreme Court issued its Order suspending Mr. Roswold's license. As discussed in greater detail below, the Kansas Supreme Court concluded as a matter of law that Mr. Roswold's conduct had violated numerous Kansas Rules. *See Roswold*, 249 P.3d at 1207. In imposing a suspension, the Kansas Supreme Court rejected the conclusion of the Kansas hearing panel that Mr. Roswold's conduct was negligent and that Mr. Roswold should receive published censure. Rather, particularly with regard to his violation of Kansas Rule 5.5 and assistance of Mr. Schmid's unauthorized practice, the Kansas Supreme Court concluded that Mr. Roswold's violations were knowing. In doing so, the Kansas Supreme Court probably lacked knowledge that the Kansas investigator Mr. Sear had concluded

that there was insufficient evidence to believe that Mr. Roswold had committed any ethics violations.

Missouri Investigation. Ultimately, Mr. Roswold filed four reports with the Missouri OCDC regarding Mr. Schmid. Those four complaints were filed in November 2008, September 2010, December 2010, and February 2011. Mr. Roswold also prepared and forced Mr. Schmid to file two reports with OCDC, both in July 2010. These complaints, as well as one or more other complaints, led the OCDC to conduct an extensive investigation of Mr. Schmid and his handling of client files.

Mr. Roswold has assisted this Missouri investigation. In 2008, he obtained a confession from Mr. Schmid concerning J.C.'s case. Mr. Roswold forced Mr. Schmid to self-report his misconduct. In early 2009, Mr. Roswold worked with Mr. Schmid to provide a second, more detailed report regarding the handling of J.C.'s case. Later, in 2010, after Mr. Roswold began to uncover other problems caused by Mr. Schmid, Mr. Roswold provided this additional information he was discovering regarding mishandled cases to Mr. Russell, who was then serving as Mr. Schmid's counsel and dealing with the OCDC. Mr. Roswold then spoke directly to Alan Pratzel, Missouri's Chief Disciplinary Counsel, and directly reported what he was uncovering. Mr. Pratzel requested and Mr. Roswold did provide written reports concerning what he was uncovering during the second part

of 2010 and into 2011, in a series of three complaints filed in September and December 2010 and January 2011 reporting Mr. Schmid concerning multiple cases.

The Missouri OCDC has followed up on these reports. There are at least two disciplinary cases against Mr. Schmid apparently pending before this Court: *In re Schmid*, Case No. SC 90705 (Mo.), and *In re Schmid*, Case No. SC 91484 (Mo.). These cases do not appear to encompass all the matters against Mr. Schmid, but Case Net contains little information about the content or progress of these matters. On information and belief, however, Mr. Schmid's Missouri license has been suspended on an interim basis, and he faced a recent disciplinary hearing, which was postponed due to certain testing of Mr. Schmid.

To Mr. Roswold's knowledge, although the OCDC investigation into Mr. Schmid's misconduct has been quite thorough, no one in the Missouri discipline system has suggested that Mr. Roswold should face direct Missouri disciplinary action. This reciprocal proceeding is the only Missouri discipline case facing Mr. Roswold.

Establishment of New Firm. While dealing with the client legal and ethical problems that Mr. Schmid created, Mr. Roswold has also had to deal with significant injury Mr. Schmid caused to Mr. Roswold's law practice. Mr. Roswold has responded in part by forming an entirely new law firm. Originally

Mr. Roswold opened the law firm as Roswold Law Group, P.C., although more recently he has renamed it Kansas City Accident Injury Attorneys, P.C. ("KCAIA") – to avoid any issues with his name being associated with a law firm operating in Kansas while Mr. Roswold is suspended there – and invited Victor Finkelstein, a lawyer admitted in both Missouri and Kansas, to become a partner in KCAIA.

When suspended in Kansas, Mr. Roswold promptly notified affected Kansas clients of the suspension, and with the clients' permission transferred the matters to other Kansas admitted lawyers, primarily KCAIA partner Mr. Finkelstein and KCAIA associate Heather Lottmann. In addition, to minimize disruption of client matters should Mr. Roswold be suspended in Missouri, Mr. Roswold has already notified KCAIA clients that Mr. Finkelstein and Ms. Lottmann are assuming primary responsibility for their matters, while Mr. Roswold has largely removed himself from the provision of legal services to clients to take on more of a firm management role.

Mr. Roswold and KCAIA have also adopted or brought into fuller implementation a broad range of protections intended to ensure that KCAIA lawyers and staff comply with all applicable legal and ethical obligations, and that the interests of all clients are well-protected. This includes careful calendaring and monitoring of all client matters, as well as careful supervision of the receipt and

handling of client funds. KCAIA and Mr. Roswold also regularly draw upon the legal ethics and law firm practice expertise from counsel experienced in such matters, including the undersigned counsel Michael Downey, who teaches legal ethics as an adjunct professor at Washington University and St. Louis University's law schools and focuses his practice on advising lawyers and their firms on legal, ethical, and risk management matters.

Mitigation. Last, but certainly not least, Mr. Roswold has engaged in substantial, voluntary mitigation and remediation for Schmid & Roswold clients apparently harmed by Mr. Schmid. When Mr. Roswold first learned of problems arising from Mr. Schmid's mishandling of the J.C. matter, Mr. Roswold promptly notified Schmid & Roswold's insurer about the matter; retained counsel at his own expense; and through that counsel initiated contact with J.C.'s new counsel and assisted J.C.'s counsel in obtaining a mediated settlement with the insurer.

Assisted by other KCAIA lawyers and staff, Mr. Roswold also completed an in-depth investigation of the cases Mr. Schmid had handled. KCAIA and Mr. Roswold confirmed that the claims remained viable in approximately 50 cases that Mr. Schmid had been handling. KCAIA arranged for these clients to engage the new firm or transfered these cases to new counsel to ensure the clients' interests were fully protected. In approximately twenty matters, including J.C.'s, Mr. Roswold and his colleagues determined that Mr. Schmid had compromised the

client's claims. Mr. Roswold has reported all these matters to the OCDC in the four reports he has filed concerning Mr. Schmid.

Mr. Roswold has notified the insurer for Schmid & Roswold, P.C. about the cases likely to result in malpractice claims. Mr. Roswold has also reached out to the affected clients, notified them of the problems, and helped seek resolutions that make the potentially injured clients whole. At least ten such cases now appear fully and finally resolved. Mr. Roswold expects the remaining cases will be suitably resolved in the near future. Mr. Roswold has spent hundreds of hours and more than $100,000 over the past few years trying to unravel and fix all of the problems caused by Mr. Schmid's misdeeds. Further discussion of such mitigation is discussed below in Section II.d.

SUMMARY OF ARGUMENT

I. This Court should make an initial determination whether this matter is even appropriate for reciprocal discipline in light of the fact that Respondent is primarily a Missouri lawyer, this is primarily a Missouri matter, and the Missouri OCDC is already investigating and has taken action against Mr. Schmid.

II. If this Court does proceed to consider reciprocal discipline, this Court should impose a lesser sanction on Mr. Roswold on the basis that his mental state, the Kansas factual findings, and Missouri precedent support that Mr. Roswold acted negligently and in violation of fewer Missouri Rules, and thus should receive a lighter sanction under Missouri precedent. (Response to Informant's Point #1.)

a. Missouri's standard for assessing appropriate reciprocal discipline.

b. Missouri law does not support the conclusion that any violation was "knowing."

c. This Court should impose a lighter penalty than Kansas did because, even if Kansas's findings of fact are accepted, there is no factual support that Mr. Roswold violated each of the comparable Missouri Rules.

d. Missouri precedent supports that Mr. Roswold should serve a sanction of substantially less than a one-year suspension.

ARGUMENT

I. This Court should make an initial determination whether this matter is even appropriate for reciprocal discipline in light of the fact that Respondent is primarily a Missouri lawyer, this is primarily a Missouri matter, and the Missouri OCDC is already investigating and has taken action against Mr. Schmid.

An initial issue for consideration by this Court is whether Mr. Roswold should face reciprocal discipline based upon the Kansas proceedings, or whether instead this Court should allow the independent Missouri disciplinary investigation to determine what ethics charges, if any, should be brought against Mr. Roswold. Precedent supports that, where a jurisdiction has adequate nexus to a matter and has already initiated its own investigation, that jurisdiction may allow its own independent investigation to decide what consequences, if any, a lawyer should face from that jurisdiction. *See, e.g., In re Weiner*, 547 S.W.2d 459 (Mo. 1977); *In re Rokahr*, 681 N.W.2d 100 (S.D. 2004); *In re Ceroni*, 683 A.2d 150 (D.C. 1996). In *Weiner*, for example, this Court elected not to impose additional discipline upon a respondent lawyer "in view of the suspension imposed by Ohio, the time that has elapsed since imposition of the suspension, and respondent's forbearance from practicing law in Missouri during the same time." *Weiner, 547 S.W.2d 460.*

Here, the nexus requirement is satisfied. Both Mr. Roswold and Mr. Schmid were officed and primarily practicing in Missouri. In addition, although J.C. was a Kansas matter and client, most of Mr. Schmid's misconduct occurred in Missouri and related to Missouri clients (at least 15 of the approximately 20 mishandled client matters were Missouri matters). Further, Missouri has already initiated a substantial investigation related to Mr. Schmid's violations. As noted, Mr. Roswold has previously communicated with OCDC, including filing four reports with OCDC concerning Mr. Schmid, and there are at least two Missouri discipline matters pending related to Mr. Schmid. *See In re Schmid*, Case No. SC 90705 (Mo.); *In re Schmid*, Case No. SC 91484 (Mo.). Apparently, Missouri is the only jurisdiction presently conducting disciplinary investigations or disciplinary proceedings against Mr. Schmid. Further, only Missouri – and in particular the Missouri OCDC – has access to its complete investigative file and results from the recent testing that Mr. Schmid is undergoing, testing which may illuminate Mr. Schmid's mental state both before and after his misconduct. Such test results may also help explain why Mr. Schmid went to such lengths to conceal that misconduct from everyone, including Mr. Roswold.

In light of the nexus and status of the Missouri proceedings, and the resources Missouri has expended for the overall investigation, it is appropriate under *Rokahr* and related precedent for this Court to allow its own independent

disciplinary investigation to proceed, including determining whether Mr. Roswold should see face any disciplinary charges. Moreover, sound policy supports that Missouri conduct its own independent investigation and determine on its own what discipline should be sought in this matter. Specifically, it seems sensible to resolve the disciplinary matters concerning Mr. Schmid before addressing any related matters that may involve Mr. Roswold. In addition, if this Court accepts on a reciprocal matter the Kansas Supreme Court's conclusion that Mr. Roswold had "knowingly" violated Kansas Rules, this might unduly prejudice Mr. Roswold's interests in subsequent matters related to the investigation and resolution of Mr. Schmid's mishandling of Missouri cases.

II. If this Court does proceed to consider reciprocal discipline, this Court should impose a lesser sanction on Mr. Roswold on the basis that his mental state, the Kansas factual findings, and Missouri precedent support that Mr. Roswold acted negligently and in violation of fewer Missouri Rules, and thus should receive a lighter sanction under Missouri precedent. (Response to Informant's Point #1.)

a. Missouri's standard for assessing appropriate reciprocal discipline.

If, despite the arguments in Section I, this Court elects instead to proceed with evaluating reciprocal discipline against Mr. Roswold, the next question this Court would face is what effect the Kansas Supreme Court's Order should have on this Missouri proceeding. Under Missouri precedent – including *Caranchini* and *In re Storment*, 873 S.W.3d 227 (Mo. 1994) – a lawyer facing reciprocal discipline is deemed collaterally estopped from challenging the facts found by the foreign court. But, as the Informant concedes (Informant's Brief at 16), this Court makes an "independent determination of whether the Missouri Rules have been violated" such that discipline should be imposed. *Caranchini*, 956 S.W.2d 912. The Missouri Supreme Court Rule addressing reciprocal discipline, "Rule 5.19[,] contemplates that this Court may choose not to discipline a lawyer disciplined by another state."

Id. "For example, the attorney's conduct may not be a ground for discipline in Missouri." *Id.* (citations omitted). The bottom line: "This Court makes its own independent judgment as to the fitness of the members of its bar." *Id.* After all, "according [another state's discipline] order full faith and credit does not *require* discipline in Missouri." *Id.*

When evaluating a lawyer's conduct for 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." *In re Ehler*, 319 S.W.3d 442, 451 (Mo. 2010). The American Bar Association Standards for Imposing Lawyer Sanctions ("ABA Standards") also provide guidance, but the ABA Standards are advisory, not mandatory. The aims of Missouri lawyer discipline are "to protect the public and maintain the integrity of the legal profession," not to punish the lawyer. *In re Coleman*, 295 S.W.3d 857, 869 (Mo. 2009).

When this Court evaluates the Rules that have been violated, Mr. Roswold's mental state, and mitigating factors, and consults the appropriate ABA Standards, this Court should conclude Mr. Roswold should receive a lighter penalty in Missouri than Kansas imposed. Three reasons support the imposition of lighter discipline:

(a) Suspension in Kansas resulted from the Kansas Supreme Court's conclusion that Mr. Roswold's misconduct was "knowing"; Missouri law does not support the conclusion that Mr. Roswold's conduct constituted "knowing" violations, however, and a less culpable mental state should result in a lesser sanction;

(b) Even when using the facts found by or stipulated to in Kansas, there is no support for finding Mr. Roswold violated each of the Missouri Rules that Kansas indicates were violated. In particular, there is no basis for finding Mr. Roswold violated Rule 4-1.5(c), and no basis under Missouri law for holding Mr. Roswold himself directly and personally liable for violating Rules 4-1.1, 4-1.3, 4-1.4, or 4-8.4; and

(c) The nature of Mr. Roswold's misconduct, as well as the extraordinary mitigation he has performed including since the Kansas disciplinary hearing, support that Mr. Roswold should receive sanctions of a reprimand or stayed suspension.

Mr. Roswold therefore requests that this Court reprimand him, or impose a shorter – and preferably a stayed – suspension. The basis for imposing this lesser disciplinary sanction follows.

b. Missouri law does not support the conclusion that any violation was "knowing."

A review of the Kansas Supreme Court's Order proves that the key reason the Kansas Supreme Court rejected the Kansas hearing panel's suggestion of a censure and instead suspended Mr. Roswold was that the Kansas Supreme Court determined circumstantial evidence supported the conclusion that Mr. Roswold's conduct in J.C.'s matter constituted a "knowing" violation of the Kansas Rules of Professional Conduct. Had the violations merely been negligent, a suspension would not be appropriate. Rather, under ABA Standards at 4.43, 4.53, 4.63, and as the Kansas hearing panel determined, Mr. Roswold should receive a reprimand (in Kansas, a censure). (*See* ABA Standards 4.43, 4.53, and 4.63, Respondent's Appendix at RA8-10.) Thus, we turn initially to this crucial determination, the question of Mr. Roswold's mental state.

To act "knowingly," this Court would need to conclude he acted with "conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result." *In re Coleman*, 295 S.W.3d at 870 (citing the ABA Standards). To find Mr. Roswold acted "negligently," meanwhile, this Court would need to conclude only that Mr. Roswold failed to "be aware of a substantial risk that circumstances

exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Id.*

The Kansas hearing panel had concluded Mr. Roswold "negligently" violated his professional obligations. Truncating its analysis and thus not considering mental state for each alleged Rule violation, the Kansas Supreme Court concludes that Mr. Roswold acted knowingly, "especially as it concerns Schmid's unauthorized practice of law in Kansas." *Roswold*, 249 P.3d at 1207. The Kansas Supreme Court bases this conclusion on three findings of fact, that Mr. Roswold:

> (1) knew Schmid was meeting with, advising, and representing J.C. in her Kansas lawsuit when Schmid was not authorized to practice law in Kansas and not admitted *pro hac vice* by the district court;
>
> (2) knowingly assisted Schmid in the unauthorized practice of law by signing notices to take depositions that only Schmid planned to attend; and
>
> (3) knew about a prior problem relating to Schmid's representation of clients in a Kansas-based case.

Id. at 1207.

The determination that Mr. Roswold acted "knowingly" is a legal conclusion – and thus one this Court does not need to adopt under this Court's decisions in *Caranchini* and *Storment*. The Kansas Supreme Court references its conclusion regarding mental state as just that, a legal conclusion, thus a determination that does not bind this Court. Further, the Kansas Supreme Court's conclusion that Mr. Roswold's violations were "knowing" focuses only on the Rule 4-5.5 violation. There is no clear path from these three findings to a legal conclusion that Mr. Roswold violated any other ethics rule "knowingly." For example, that Mr. Roswold knew Mr. Schmid was meeting with J.C. and planning to notice up and attend depositions suggests that Mr. Schmid was satisfying, not violating, his obligations to communicate with the client and to represent the client competently and diligently. (As discussed in greater detail below, Kansas sanctioned Mr. Roswold for violating Kansas Rules 1.1, 1.3, and 1.4, among others, in addition to Rule 5.5.)

These elements upon which the Kansas Supreme Court relied to conclude Mr. Roswold had acted "knowingly" are an unsteady foundation. Mr. Roswold knew – and concedes he knew – about Mr. Schmid's practice in Kansas, and did sign pleadings in the case. But Mr. Roswold did not and cannot honestly concede that he realized that Mr. Schmid had not obtained *pro hac vice* admission in J.C.'s case. Mr. Roswold had previously sought and obtained *pro hac vice* admission for

Mr. Schmid in numerous Kansas proceedings. Nothing suggests Mr. Schmid would have been denied *pro hac vice* if a motion had been filed, or that Mr. Roswold would not have caused such a motion to be filed if he learned that such a motion had not previously been filed. Also, the 2004 Kansas discipline investigation and resulting diversion did not criticize Schmid & Roswold, P.C.'s practice for not obtaining *pro hac vice* admission for Mr. Schmid in that case, or its handling of Kansas cases generally. The absence of Mr. Schmid's admission *pro hac vice* to represent J.C. was an oversight. This Court should not conclude that it was "knowing" misconduct.

In addition, the Kansas Supreme Court relies on the premise that there were ten cases similar to J.C.'s. But the notion there were ten "similar" cases is a distortion, a result of the relay of information through the Kansas disciplinary process (a bit like what occurs in the game "Telephone"). To the best of Mr. Roswold's present knowledge, resulting from his exhaustive audit of hundreds of files that Mr. Schmid had handled in the past decade, Mr. Schmid had made mistakes in other cases, but there were not 10 cases like J.C.'s case. The word "similar" is subject to distortion, and here it is distorted. It begs the question "similar in what way?" The answers show absence of a relevant pattern:

a. How many Schmid & Roswold cases where Mr. Schmid hid a motion for summary judgment, failed to respond, and allowed

the case to be dismissed on summary judgment? One, J.C.'s case.

b. How many Schmid & Roswold cases where Mr. Schmid fabricated and paid a settlement? One, J.C.'s case. (After May 2010, Mr. Roswold uncovered a second Missouri case which may have had the potential to result in a fabricated settlement. But Mr. Roswold stopped this incident in its earliest stages and forced Mr. Schmid to self-report the issue to the OCDC.).

c. How many filed Kansas cases where Mr. Schmid took or defended depositions, apparently without obtaining *pro hac vice* admission? Two, J.C.'s case, plus the 2010 investigation uncovered one other that occurred in 2008, shortly before Mr. Roswold first learned of Mr. Schmid's mishandling of J.C.'s case.

d. How many Schmid & Roswold cases where Mr. Schmid failed to provide competent, diligent representation and misled Mr. Roswold about the status of the cases, jeopardizing the client's claims? Approximately twenty, of which only 3 were Kansas cases.

The "ten similar cases" referred to in the Kansas hearing panel's Order reflected that, at the time of the Kansas hearing, Mr. Roswold had identified approximately ten cases – primarily Missouri cases – where Mr. Schmid had potentially compromised a client's interests, primarily due to Mr. Schmid missing a statute of limitations or failing to prosecute. But as the above analysis makes clear, these ten cases, and the additional ten or so cases that Mr. Roswold has located since, were not really "similar" to J.C.'s case – at least for the key purpose here of determining whether Mr. Roswold should be sanctioned for "knowingly" violating Missouri Rules including Rules 4-1.1, 4-1.3, 4-1.4, 4-1.5(c), 4-5.1, 4-5.5, and 4-8.4(a). Moreover, Mr. Schmid concealed virtually all these problems from Mr. Roswold – in addition to, for example, the OCDC and the Kansas investigator Mr. Sear – until May 2010, when Mr. Roswold finally uncovered evidence suggesting that Mr. Schmid had mishandled more than J.C.'s case and that a full review should occur. These cases, therefore, should not be seen as a "pattern" that would support that Mr. Roswold "knowingly" participated in, assisted or ratified Mr. Schmid's unauthorized practice. Further, as discussed previously and in Section II.d, Mr. Roswold was able to and did mitigate or remedy the client harm in the majority of these cases.

This Court does not need to wrestle with such issues, however, for Missouri discipline cases appear to require a greater weight of circumstantial evidence to

conclude a rule violation was "knowing" than the circumstances that led the Kansas Supreme Court to conclude Mr. Roswold's conduct was "knowing." In *In re Mirabile*, 975 S.W.2d 936 (Mo. 1998), in fact, this Court refused to impute knowledge that a divorce petition was a sham to the lawyers who had filed that divorce petition, *Id.* at 941, despite circumstantial evidence including that (a) one of the lawyers had told a judge only two days before the filing that the couple would be better off divorced, because it would help the husband avoid payments to his (other) ex-wife; (b) the divorce was arranged between the two lawyers without the wife ever meeting her purported lawyer; (c) the wife filed the petition with the husband's lawyer within days of the divorce first being discussed; (d) there was no suggestion of marital discord or other reasons for a divorce; and (e) the two clients both moved to California together after the purported divorce. Although plainly the setting was different (*Mirabile* involves in part the duty to investigate clients), *Mirabile* also can be read – and should be read – for the proposition that this Court will not impute knowledge of wrongdoing to a lawyer without greater circumstantial evidence that such "knowledge" existed at the relevant time.

In refusing to follow another state's determination of mental state, this Court would be following the lead of *In re Rokahr*, 681 N.W.2d 100 (S.D. 2004). In *Rokahr*, the Nebraska Supreme Court had found that lawyer Alice Rokahr had intentionally backdated an easement she notarized to support the easement had

been executed before the client had terminated Ms. Rokahr's legal representation, and suspended her license to practice in Nebraska for one year. *Id.* at 103. In a concurrent proceeding, the South Dakota Supreme Court reviewed the same conduct and found "no evidence that Ms. Rokahr intentionally violated any rules of Professional Conduct." *Id.* at 104. The South Dakota Supreme Court did, however, admonished Rokahr, primarily for acceding too readily to her client's directions and for failing to recognize a conflict of interest. *Id.*

When Rokahr later reported the Nebraska suspension, the South Dakota disciplinary counsel sought reciprocal discipline. The South Dakota Supreme Court refused to enter such discipline, finding that any misconduct regarding the dating and filing of the easement was "inadvertent and isolated." *Id.* at 109. The South Dakota Supreme Court therefore refused to follow Nebraska's finding that the conduct was "knowing," thereby also rejecting the imposition of a suspension as reciprocal discipline. As noted earlier in Section I, the *Rokahr* court instead concluded that it could rely upon its own independent disciplinary investigation, which had found the much less culpable mental state.

Mr. Roswold asks this Court to likewise conclude that the weight of evidence supports a conclusion only that he acted negligently, such that a reprimand would be appropriate including under ABA Standards 4.43, 4.53, and 4.63.

c. This Court should impose a lighter penalty than Kansas did because, even if Kansas's findings of fact are accepted, there is no factual support that Mr. Roswold violated each of the comparable Missouri Rules.

In addition to the key determination of mental state, this Court must under *In re Ehler*, 319 S.W.3d 442, also determine precisely what Missouri ethical duties were violated. Estopped from relitigating facts the Kansas Supreme Court found, Mr. Roswold concedes the facts found support a legal conclusion that Mr. Roswold violated Missouri Rule 4-5.5 and likely Rule 4-5.1. However, the Kansas Supreme Court also found – including based upon a stipulation from his Kansas counsel – that Mr. Roswold violated Kansas Rules 1.1, 1.3, 1.4, 1.5(d) , and 8.4(a) . The facts found in Kansas, however, should not support a conclusion that Mr. Roswold violated every comparable Missouri Rule.

Mr. Roswold concedes that the facts he has submitted support the conclusion he violated Missouri Rule 4-5.5. Specifically, Mr. Roswold's senior law partner Mr. Schmid engaged in the unauthorized practice of law in Kansas by appearing as the only representative of J.C., and taking or defending those depositions. Mr. Roswold's conduct in assisting with filing J.C.'s matters (*i.e.,* reviewing, signing, and filing the pleadings) could constitute assisting Mr. Schmid in his unauthorized practice. This means that Mr. Roswold could be held to have violated

Missouri Rule 4-5.5(a), although – as argued above – Mr. Roswold's violation, at most, was negligent under Missouri law.

As a partner in Schmid & Roswold, P.C., Mr. Roswold also had an obligation to ensure the firm had in place reasonable measures to ensure the lawyers and staff at the firm complied with their ethical obligations. *See* Mo. S. Ct. R. 4-5.1(a). While at Schmid & Roswold, P.C., Mr. Schmid mishandled approximately twenty client matters. Although the Kansas Supreme Court admits Mr. Schmid "intentionally concealed" his misdeeds, the magnitude of misconduct that occurred could support a finding that Mr. Roswold had failed to satisfy his obligations under Rule 4-5.1(a). Mr. Roswold may be found to have violated Rule 4-5.1(c) on the basis that he may have ratified Mr. Schmid's unauthorized practice by discussing the Kansas depositions in J.C.'s case with Mr. Schmid. Therefore, facts conceded here demonstrate a violation of Missouri Rule 4-5.1.

The Kansas Supreme Court, however, also concluded that Mr. Roswold had violated Kansas's versions of Rules 4-1.1, 4-1.3, 4-1.4, 4-1.5(c),[2] and 4-8.4. Although Mr. Roswold's Kansas counsel conceded violation of such rules at the hearing, Missouri law does not support a conclusion that Mr. Roswold violated these Rules, even under the facts that Mr. Roswold has admitted. Missouri Rule 4-

[2] The Missouri Rule comparable to Kansas Rule 1.5(d), which relates to the need for written contingency fee agreements, is Missouri Rule 4-1.5(c).

1.5(c) relates to the requirement that lawyers have a written fee agreement when they are handling client matter on a contingency basis. J.C. had signed an agreement with Schmid & Roswold, P.C. (*See* Respondent's Appendix at RA7.) This engagement agreement contains all elements required by Rule 4-1.5(c). Thus, this Court cannot and should not conclude that Mr. Roswold violated Rule 4-1.5(c).

In addition, although Mr. Roswold plainly had responsibility for the representation of J.C. as a partner in the firm (see the discussion of Missouri Rule 4-5.1(a) and (c) *supra*), Mr. Roswold reasonably and subjectively expected Mr. Schmid to handle most of J.C.'s case and keep J.C. informed of material developments in her case. Mr. Schmid even appears to have satisfied all obligations owed to J.C. before he inexplicably hid the summary judgment pleadings, allowed judgment to be entered, and then fabricated the settlement. There is no evidence that Mr. Roswold knew that Mr. Schmid was failing to satisfy these obligations, or that Mr. Roswold expected or intended for Mr. Schmid to engage in such unethical conduct. Moreover, Mr. Schmid's misconduct – violating those Missouri Rules and likely several others – was independent, intervening misconduct. Thus, Missouri law does not support a conclusion that Mr. Roswold directly violated Missouri Rules 4-1.1, 4-1.3, and 4-1.4.

Finally, Missouri Rule 4-8.4(a) provides that a lawyer may commit professional misconduct by knowingly assisting another in violation of the Rules, or violating the Rules through the actions of another. The facts all support – buttressed by Mr. Roswold's efforts of mitigation and remediation – that Mr. Roswold did not knowingly assist Mr. Schmid to engage in any violations, or use Mr. Schmid as his agent. Accordingly, this Court should not reach the legal conclusion that Mr. Roswold violated Rule 4-8.4(a). For purposes of Missouri law, Mr. Roswold's violations should at most be limited to violations of Missouri Rules 4-5.1 and 4-5.5, and negligent ones at that.

The Kansas Supreme Court reached a contrary conclusion, that Mr. Roswold should be held liable for violating Kansas Rules 1.1, 1.3, 1.4, 1.5(d) and 8.4(a), but it must have done so under a unique feature of Kansas law. The violation of Kansas Rule 1.5(d) may arise from a unique Kansas requirement regarding allocation of costs in a contingency fee matter. The exact reason that Kansas law would support a violation of the other Kansas Rules, however, is not readily apparent. Perhaps the distinct feature of Kansas law that support a conclusion Mr. Roswold violated the remaining Rules is Kansas Rule 116. Under Kansas Rule 116, Mr. Roswold would have been required, as the lawyer who should have filed and supported Mr. Schmid's request for admission *pro hac vice*, to be "actively engaged in the conduct of the case"; "sign all pleadings, documents, and briefs,"

and to be "present throughout all court or administrative appearances." The Kansas Supreme Court might have felt that this Kansas Rule 116 prevented delegation of the representation to Mr. Schmid, such that Mr. Roswold should be liable for violating Kansas Rules 1.1, 1.3, 1.4, and 8.4(a). But the Missouri Rule relating to *pro hac vice* admission does not impose burdens on the moving lawyer akin to Kansas Rule 116. Rather, the applicable Missouri Rule 9.03 requires only that a lawyer seeking *pro hac vice* – that is, Mr. Schmid – "[d]esignat[e] some member of The Missouri Bar having an office within the State of Missouri as associate counsel," and then require the designated attorney to "enter an appearance as an attorney of record." Without the rigorous obligations imposed by Kansas Rule 116, there is no clear legal basis for finding Mr. Roswold violated Missouri Rules 4-1.1, 4-1.3, 4-1.4, and 4-8.4(a) on the facts or record presented.

The absence of facts that support Mr. Roswold violated Missouri Rules 4-1.1, 4-1.3, 4-1.4, 4-1.5(c), and 4-8.4(a), when Kansas concluded such violations (including due to a stipulation), provides one substantial reason why this Court should not impose a one-year suspension on Mr. Roswold. Rather, as addressed in the next section, this Court should impose a lesser sanction under Missouri law.

d. Missouri precedent supports that Mr. Roswold should serve a sanction of substantially less than a one-year suspension.

Mr. Roswold has argued above that this Court should not find he violated every Missouri Rule comparable to those cited by the Kansas Supreme Court, and whatever violations he did commit were negligent, not knowing. Hopefully these arguments will persuade this Court that Mr. Roswold should receive a much lighter penalty than that Kansas has chosen to impose.

Even if this Court rejects all these points, and instead finds that Mr. Roswold knowingly violated the Missouri provision comparable to each Kansas Rule violated, this Court should still impose a lesser penalty on Mr. Roswold. After all, Missouri reserves suspensions of one year or more for lawyers who themselves have engaged in serious, deliberate misconduct, conduct that requires a greater penalty to discourage similar misconduct in the future.

Some cases where a minimum one-year suspension has been imposed involve circumstances where the lawyer misappropriates client funds. In *In re Charron*, 918 S.W.2d 257 (Mo. 1996), for example, this Court imposed a minimum one-year suspension upon a lawyer. But Charron had misappropriated $20,000 from a probated estate to himself. Similarly, in *In re Coleman*, 295 S.W.3d 857 (Mo. 2009), the respondent was suspended for one year, where his offenses included commingling client and personal funds in his IOLTA account,

writing personal checks from his IOLTA account; settling a case in direct contravention to his client's instructions; representing a client despite a conflict of interest arising from his personal financial interests; and failing to notify a client that he was withdrawing from multiple cases and failing to protect the client's interests upon withdrawal. Mr. Roswold's case, meanwhile, does not involve any such deliberate misconduct or misappropriation of client funds. Further, Coleman's suspension was stayed, and he was placed on one year's suspension.

Meanwhile, the respondent in *In re Crews*, 159 S.W.3d 355 (Mo. 2005), cited by Informant, received a one-year suspension for himself engaging in conduct similar to what Mr. Schmid – not Mr. Roswold – did in J.C.'s case, including failing to respond to a motion for summary judgment and fabricating an excuse. Imposing the suspension with right to apply in one year, this Court explained that Crews "potentially injured the Plaintiffs by effectively eliminating their opportunity to proceed with a potentially valid claim." These "neglectful actions coupled with his non-credible attempt to explain those actions to his clients, the court and the [disciplinary hearing panel] also potentially injure the credibility of the profession as a whole." *Id.* at 361. In contrast, Mr. Roswold has been forthcoming throughout this proceeding, and has done whatever he could to preserve clients' claims or to remedy their injuries. Mr. Roswold should therefore receive a lesser sanction than Crews.

Even cases where Missouri imposes a minimum six-month suspension involve more serious and deliberate misconduct than occurred here. In *In re Zink*, 278 S.W.3d 166 (Mo. 2009), the respondent sought to obtain a lesser criminal sentence for his client by having her obtain autographed sports paraphernalia for the prosecutor. The lawyer then lied to the Federal Bureau of Investigations when the FBI began investigating the purported deal. The six month sentence was imposed even though the lawyer admitted his lies only when confronted with audiotapes that proved he was lying. *Id.* at 169.

In *In re Littleton*, 719 S.W.2d 772 (Mo. 1968), this Court suspended a lawyer for at least six months after the lawyer refused to refund monies the lawyer received to post bond for his client, made unwanted sexual advances toward her, and then sexually assaulted her promptly after she was released from jail.

Even felony convictions only result in six-month suspensions in Missouri, for example in *In re Shunk*, 847 S.W.2d 789, 791 (Mo. 1993). Shunk, meanwhile, was convicted of felony cocaine possession.

However this Court or the Kansas Supreme Court might characterize Mr. Roswold's violations, his own misconduct pales when compared to these violations – which include misappropriating client funds and felony convictions. Thus, Mr. Roswold asks that this Court reprimand him, without imposing a

suspension, or alternatively stay any suspension for a period of probation. Mr. Roswold believes such a penalty will adequately protect the public.

The final reason that Mr. Roswold should receive such a lighter sanction is the considerable mitigation and remediation he has undertaken. This Court has previously substantially lightened a disciplinary penalty due to mitigating evidence. The respondent in *In re Miller*, 568 S.W.2d 246 (Mo. 1978) for example, had misappropriated $30,000 in funds entrusted into his care. Although conceding the standard penalty for such misappropriation was disbarment, this Court only reprimanded Mr. Miller because he had cooperated in the accounting and in restoring misappropriated funds, and had not acted with moral turpitude. *Id.* At 254-55; *see also*, ABA Standard 9.32 Mitigation, Respondent's Appendix at RA11.

Mr. Roswold, meanwhile, cooperated with the Office of Chief Disciplinary Counsel, including filing four disciplinary complaints against his former mentor and senior partner, Mr. Schmid, and forcing Mr. Schmid to self-report on two other occasions. Mr. Roswold also substantially assisted the investigations into Mr. Schmid's wrongdoing, even though this assistance could ultimately aid actions against Mr. Roswold as well. In addition, Mr. Roswold has spent hundreds of hours and in excess of $100,000 trying to protect or remedy possible injuries to clients who would otherwise be harmed by Mr. Schmid.

Mr. Roswold did not have to engage in such mitigation and remediation, even putting himself at risk. Rather, he could simply have proclaimed himself a victim of Mr. Schmid, as he certainly was. He could have allowed Schmid & Roswold, P.C. to file bankruptcy, and left the clients Mr. Schmid had harmed to get whatever they could from the insurer or bankruptcy estate, without his assistance. Instead, Mr. Roswold helped maintain clients' cases, and saved most. When he could not save a case, he notified the applicable client, and helped them obtain relief from Mr. Schmid or from Mr. Schmid and Schmid & Roswold's insurer. In many instances, he has also facilitated settlements or other assistance to the injured clients.

In considering this mitigation, it may be useful for this Court to note that in a reciprocal discipline case a court may consider mitigation that occurs between the original proceeding and subsequent proceeding. *In re Van Bever,* 101 P.2d 790, 792 (Ariz. 1940). Thus, it is appropriate for this Court to consider, and this Court should consider, the evidence of substantial mitigation and remediation Mr. Roswold can offer, even if this Court must appoint a special master or hearing panel to obtain such evidence. *Cf. In re Weiner*, 530 S.W.2d 222 (Mo. 1975) *and In re Weiner*, 547 S.W.2d 459 (Mo. 1977) (involving the use of a special master). (*See also* Informant's Brief at 16.)

REQUEST FOR ORAL ARGUMENT

This Court has previously set this case for oral argument on February 15, 2012. Mr. Roswold believes oral argument is appropriate for this case; had it not been set, he would have requested oral argument. The present setting, allowing fifteen minutes of argument per side, should be sufficient.

WHEREFORE, respondent James M. Roswold requests that this Court refrain from imposing the penalty of a suspension under Missouri Supreme Court Rule 5.20; instead impose a lesser sanction, for example a reprimand or stayed suspension; or grant Mr. Roswold any other relief that this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via the Court's electronic case filing system, on this 6th day of January, 2011 to:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03. It was drafted using Microsoft Word. The font is Times New Roman, proportional 14-point font, which includes serifs. The brief complies with Rule 84.06(b) in that it contains 10,934 words and 1014 lines.

Dated: January 6, 2012

By: */s/ Michael P. Downey*