

**IN THE SUPREME COURT  
STATE OF MISSOURI**

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**IN RE:** )  
 )  
**DAVID R. SWIMMER,** ) **Supreme Court #SC88336**  
 )  
**Respondent.** )

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**INFORMANT'S BRIEF**

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OFFICE OF  
CHIEF DISCIPLINARY COUNSEL

BARRY J. KLINCKHARDT  
SPECIAL REPRESENTATIVE  
12837 Flushing Meadows Drive  
St. Louis, Missouri 63131  
(314) 544-8425

ATTORNEY FOR INFORMANT

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## **STATEMENT OF JURISDICTION**

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

## STATEMENT OF FACTS

### Background and Disciplinary History

At all times relevant to this action Respondent David Swimmer (hereinafter “Respondent”) was a duly licensed attorney admitted to practice in and before all of the courts of the State of Missouri. **App. 12.** Respondent practices law in St. Louis, Missouri. **App. 12.**

Respondent has six prior admonitions. Respondent accepted an admonition issued in June of 1992 for a violation of Rule 4-1.5(b) and (c) [Fees] and 8.4(c) [Deceit/Misrepresentation]. **App.12, 24-25.** Respondent accepted an admonition issued in September of 1992 for violation of Rule 4-1.1 [Competence], 3.3(a)(1) [Candor toward the tribunal] and 8.4(d) [Conduct prejudicial to the administration of justice]. **App.12, 26-27.** An admonition was accepted by Respondent in February of 1995 for violations of Rule 4-1.15(a) and (b) [Safekeeping Property] and 8.1(b) [Cooperation with Disciplinary Authorities]. **App.12, 28-29.** In December of 1996 an admonition was accepted by Respondent for a violation of Rule 1.15(c) [Safekeeping Property], 1.4 [Communication] and 1.5 [Fees]. **App.12, 30-32.** Respondent accepted an admonition in June of 2000 for a violation of Rule 4-8.4(c) [Deceit/Misrepresentation]. **App.12, 33-36.** In February of 2003 Respondent accepted an admonition for a violation of Rule 4-1.3 [Diligence] and 1.16(d) [Terminating Representation]. **App.12, 37-38.**

## Disciplinary Case

In August of 2006 a three count Information was filed against Respondent. **App.2-8.** Count One of the Information contained allegations derived from a complaint filed by Thomas Dickerson. Mr. Dickerson asserted that Respondent failed to properly represent him in his claim for sick leave pay due him upon retirement from his former employer. Respondent failed to adequately communicate with him regarding what actions Respondent would take to represent Mr. Dickerson's interest and charged excessive fees for the services he did perform. Count Two of the Information contained allegations brought by Tracy Perkins asserting that Respondent had charged excessive legal fees for the services he performed and failed to adequately communicate the scope of the representation and the nature of the fee arrangement. Count Three was based upon assertions made by Sandra DeLarber that she retained Respondent on four separate occasions to represent her but that Respondent failed to perform any services on her behalf. **App.3-7.**

Respondent and the Office of Chief Disciplinary Counsel entered into a stipulation that resolved the factual basis for discipline. **App.12-20.** The parties stipulated that Respondent's conduct with respect to Mr. Dickerson and Ms. Perkins violated Rules 4-1.4, 4-1.5 and 4-1.16(d), and that Respondent's conduct with regard to Ms. DeLarber violated Rules 4-1.1, 4-1.4, 4-1.5 and 4-1.16(d). **App.14-17.** The parties also stipulated that there were aggravating factors present in Respondent's case that included Respondent's many years in the practice of law and his prior disciplinary history involving issues present in the case at bar, i.e. communication, excessive fees and

termination of representation. The parties stipulated that a mitigating factor to be considered was Respondent's absence of a dishonest or selfish motive. Respondent and the Office of Chief Disciplinary Counsel agreed to recommend that Respondent be suspended for a period of six (6) months, with the suspension stayed for a twelve (12) month period of probation with enumerated conditions to be satisfied during that period of probation. The recommended conditions included attendance at specified CLE courses, payment of restitution to the complaining parties (\$1,160.00 to Mr. Dickerson; \$580.00 to Ms. Perkins; \$450.00 to Ms. DeLarber) and that Respondent not violate the Rules of Professional Conduct during the term of his probation. **App.17-20.**

The factual stipulation and recommended sanction were submitted to a Disciplinary Hearing Panel ("DHP"). On or about February 5, 2007, the DHP issued the "Disciplinary Hearing Panel Decision". **App.21-23.** In that decision the DHP approved and accepted the Joint Stipulation, and entered its recommendation for discipline consistent with the stipulation of Informant and Respondent. **App.21-23.** On March 20, 2007, this Court ordered the case to be briefed and argued.

#### Stipulated Facts Underlying this Disciplinary Case

##### **Dickerson Complaint**

In June of 2005 Respondent was retained by Thomas Dickerson to represent him against Bi-State Development Agency ("Bi-State") to recover \$12,000 of sick leave pay Mr. Dickerson claimed was due to him after his retirement from Bi-State. At the time of

retaining Respondent Mr. Dickerson signed a retainer agreement and paid Respondent \$1,160.00 as payment for “minimum non-refundable fees and costs”. **App.12-13.**

On or about July 11, 2005, Mr. Dickerson received a draft of a Petition against Bi-State and certain discovery pleadings from Respondent. At that time Respondent provided Mr. Dickerson with no other instructions or explanation concerning these documents. Mr. Dickerson received no further communications from Respondent regarding his case and therefore on September 12, 2005, Mr. Dickerson contacted Respondent to determine the status of his claim. Respondent informed Mr. Dickerson that it was necessary for Mr. Dickerson to sign the pleadings he had previously received. Respondent sent Mr. Dickerson a replacement set of pleadings for his signature. Throughout this time it was Mr. Dickerson’s understanding that he had retained Respondent to appear on his behalf and represent him in his claim against Bi-State. Mr. Dickerson signed the pleadings and sent them back to Respondent. Mr. Dickerson also included a letter questioning some of the billing entries charging Mr. Dickerson for matters for which Mr. Dickerson disputed that he should have been charged. **App.13.**

Shortly after receiving the signed documents Respondent sent them back to Mr. Dickerson. At that time Respondent terminated his representation of Mr. Dickerson. Mr. Dickerson subsequently discovered that the pleadings prepared by Respondent were prepared as a *pro se* pleading for Mr. Dickerson to sign and that Respondent did not intend to enter his appearance on behalf of Mr. Dickerson. **App.13-14.**

Mr. Dickerson subsequently requested that Respondent refund all or a portion of the fees Mr. Dickerson had paid, but Respondent refused to refund any portion of the fees. **App.14.**

### **Perkins Complaint**

On June 22, 2005, Tracy Perkins paid Respondent for a thirty minute consultation regarding Respondent's potential representation of her in an employment related dispute. At that meeting Respondent informed Ms. Perkins that he would not represent her on a contingency fee arrangement but would represent her on an hourly basis with an initial retainer of \$1,400. Respondent declined to retain Respondent at that time and instead filed her lawsuit *pro se*. **App. 14.**

In September of 2005 Ms. Perkins received notification from the federal court in which she had filed her employment related lawsuit that a Rule 16 scheduling conference was to be scheduled and that a Joint Proposed Scheduling Plan needed to be prepared and filed with the court. This notification prompted Ms. Perkins to return to Respondent and request that he represent her in her lawsuit. Respondent agreed to assist her in her *pro se* lawsuit on an hourly basis with payment of a \$580.00 minimum non-refundable retainer fee, which Ms. Perkins paid on September 21, 2005. That same day, Respondent presented Ms. Perkins with a contingency fee retainer agreement and asked that she sign the agreement. The agreement provided, in part, that it was a supplemental agreement to the hourly fee agreement and further provided that if a settlement was negotiated in the

lawsuit Respondent would receive a contingency fee in addition to the hourly fee. Ms. Perkins signed the contingency fee agreement on that date. **App. 14-15.**

On September 22, 2005, the day following her execution of the contingency fee agreement, Ms. Perkins contacted Respondent and told him that she wanted to cancel the contingency fee agreement and proceed solely on an hourly fee basis. In response, Respondent terminated his representation of Ms. Perkins, sending her a letter that stated, in part, that his law office “will not represent you further for anything and prefers that you keep whatever further communication you feel necessary with me only in writing from hereon please. I’m now angry with you but have no additional time to invest on and with people who make what I believe to be terrible decisions for their own benefit.” Respondent did not enter an appearance on behalf of Ms. Perkins, and did not attend the Rule 16 conference or prepare the Joint Proposed Scheduling Order. **App. 15-16.**

### **DeLarber Complaint**

In June of 2002 Sandra DeLarber retained Respondent to represent her in a worker’s compensation claim against her employer Southwestern Bell (“SWB”) for stress related injuries. At that time Ms. DeLarber signed a contingency fee agreement with Respondent providing for a 25% contingency fee for his services in relation to her claim. Notwithstanding the retainer agreement, Respondent did not pursue a worker’s compensation claim on behalf of Ms. DeLarber and never informed her of the reason(s) for his failure to do so. **App. 16.**

In October of 2002 Ms. DeLarber’s employment with SWB was terminated. In February of 2003 Ms. DeLarber met with Respondent to discuss the possibility of

pursuing any legal claims arising out of the termination of her employment. Respondent informed Ms. DeLarber that he would “take care of it” but Respondent did nothing further in regard to any claims that Ms. DeLarber may have had as a result of the termination of her employment with SWB. **App. 17.**

In April of 2003 Ms. DeLarber again met with Respondent, this time retaining Respondent to represent her in pursuing a claim for unemployment benefits. Respondent agreed to represent her in this matter, had Ms. DeLarber sign a retainer agreement and pay him \$450.00 as payment of “minimum non-refundable fees and costs”. Respondent had “minimal experience” in unemployment matters and merely referred Ms. DeLarber to another attorney. Respondent performed no services on behalf of Ms. DeLarber in regard to her claim for unemployment benefits. **App. 17.**

**POINT RELIED ON**

**I.**

**THE SUPREME COURT SHOULD SUSPEND RESPONDENT FOR SIX MONTHS, STAY THE SUSPENSION, AND ORDER RESPONDENT TO SUBMIT TO A TWELVE MONTH PERIOD OF PROBATION SUBJECT TO THE CONDITIONS ENUMERATED IN THE JOINT STIPULATION AS TO DISCIPLINE, BECAUSE THE SANCTION AGREED TO BETWEEN RESPONDENT AND OCDC BEST SERVES THE PURPOSES OF ATTORNEY DISCIPLINE TO PROTECT THE PUBLIC AND MAINTAIN THE INTEGRITY OF THE LEGAL PROFESSION BY SANCTIONING RESPONDENT FOR THE MISCONDUCT, REQUIRING RESTITUTION TO THE INJURED CLIENTS AND REQUIRING RESPONDENT TO ATTEND LAW PRACTICE MANAGEMENT CLE PROGRAMS TO ACQUIRE THE KNOWLEDGE AND TOOLS THAT WILL ASSIST RESPONDENT IN PREVENTING A RECURRENCE OF THE MISCONDUCT THAT HAS MARKED HIS PAST PRACTICE.**

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

*In re Mirabile*, 975 S.W.2d 936 (Mo. banc 1998)

ABA Standards for Imposing Lawyer Sanctions (1991)

Rule 4-1.4

Rule 4-1.5

Rule 4.1.16

Rule 5.225

## ARGUMENT

### I.

**THE SUPREME COURT SHOULD SUSPEND RESPONDENT FOR SIX MONTHS, STAY THE SUSPENSION, AND ORDER RESPONDENT TO SUBMIT TO A TWELVE MONTH PERIOD OF PROBATION SUBJECT TO THE CONDITIONS ENUMERATED IN THE JOINT STIPULATION AS TO DISCIPLINE, BECAUSE THE SANCTION AGREED TO BETWEEN RESPONDENT AND OCDC BEST SERVES THE PURPOSES OF ATTORNEY DISCIPLINE TO PROTECT THE PUBLIC AND MAINTAIN THE INTEGRITY OF THE LEGAL PROFESSION BY SANCTIONING RESPONDENT FOR THE MISCONDUCT, REQUIRING RESTITUTION TO THE INJURED CLIENTS AND REQUIRING RESPONDENT TO ATTEND LAW PRACTICE MANAGEMENT CLE PROGRAMS TO ACQUIRE THE KNOWLEDGE AND TOOLS THAT WILL ASSIST RESPONDENT IN PREVENTING A RECURRENCE OF THE MISCONDUCT THAT HAS MARKED HIS PAST PRACTICE.**

The facts involved in this matter have been agreed to by stipulation and, after review and consideration, accepted and approved by the disciplinary panel appointed to consider this matter. The stipulated facts reflect a pattern of misconduct in Respondent's representation of three separate clients.

In his representation of Dickerson, Perkins and DeLarber, Respondent, contrary to his obligations under Rule 4-1.4, failed to adequately communicate to his clients the nature and scope of the representation he was undertaking in their behalf. Having failed to properly communicate with his clients, Respondent charged fees that, given the limited scope and length of time of the services he performed, were unreasonable. Respondent's conduct in this regard violated Rule 4-1.5. After termination of the representation, he failed to return any portion of the excessive fee to the clients. **App. 12-17.** Rule 4-1.16(d) clearly provides that any fees received but not earned shall be refunded to the client upon termination of the representation. Respondent's refusal to return unearned fees, even though characterized as "non-refundable", violated this Rule. In addition, Respondent has previously been admonished for communication issues with his clients and the resulting misunderstandings regarding his fees. Both Informant and Respondent, in light of these stipulated facts, the mitigating and aggravating factors, and the prior disciplinary history of Respondent, have agreed that a sanction of a six month suspension, stayed during a one year probationary period, is appropriate. **App. 12-17.**

Under the ABA Standards for Imposing Lawyer Sanctions (1991) (the "Standards") Respondent's misconduct warrants a suspension. Standards Rule 4.42(b) provides that, in the absence of aggravating or mitigating circumstances, a suspension is generally appropriate when "a lawyer engages in a pattern of neglect and causes injury or potential injury to a client". In this case, a "pattern of neglect" exists. In all three client matters upon which this case is based, Respondent failed to adequately communicate the scope of his intended representation and, when the attorney-client relationship

terminated, he failed to return the unearned portion of his fee. In 1992 and 1996 Respondent was admonished for similar conduct. **App. 26-27, 30-32.** Aggravating and mitigating factors are present in this case. As Respondent and Informant have stipulated, aggravating factors include Respondent's prior disciplinary history (Standards Rule 9.22(a)) and his substantial experience in the practice of law (Standards Rule 9.22(i)). Respondent's absence of a dishonest or selfish motive may be considered in mitigation. Standards Rule 9.32(b). The ABA Standards support the sanction proposed by Respondent and Informant and adopted by the DHP.

The proposed sanction is also supported by this Court's prior decision of *In re Wiles*, 107 S.W.3d 228 (Mo. Banc 2003). The *Wiles* Court analyzed the three factors set forth in Rule 5.225 for a lawyer's consideration for probation. The first factor requires that the lawyer be "unlikely to harm the public during the period of probation and can be adequately supervised". Rule 5.225(a)(1). In this case Respondent, while he has received a number of admonitions over the years, has received only two admonitions in the last ten years and none in the last four. The present complaints against Respondent primarily arise out of his failure to appropriately communicate with his clients, therein creating a misperception amongst the clients over what services they were to receive for the fees paid. Respondent, through his cooperation with the Office of Chief Disciplinary Counsel during its investigation of the present complaints, has shown a strong desire to correct his manner of communicating with his clients and address the issues identified in this proceeding. The first factor to be considered for probation is therefore satisfied.

The second factor to be considered is that Respondent “is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute”. Rule 5.225(a)(2). Given Respondent’s years of practice, it is evident that he does possess the ability to practice law and perform legal services without bringing the profession or the courts in disrepute. The second requirement for considering probation is therefore satisfied.

Finally, the third factor to be considered in determining eligibility for probation is that the attorney “has not committed acts warranting disbarment”. Rule 5.225(a)(3). In this case, while the stipulated violations of Respondent are serious, they do not rise to a level that would warrant disbarment. See *In re Mirabile*, 975 S.W.2d 936, 939 (Mo. Banc 1998) (to disbar an attorney, it must be clear that the attorney is not fit to continue in the profession; disbarment is reserved only for clear cases of severe misconduct). The third prong of the analysis is therefore also satisfied.

Neither an admonition nor a reprimand would be a sufficient sanction where a lawyer has previously accumulated a long list of admonitions. Indeed, the *Wiles* Court found that a reprimand was not appropriate in these circumstances. A suspension therefore is the most appropriate sanction. Since the Court in *Wiles* ordered a stayed suspension where there was more serious misconduct and a longer history of prior discipline present, it is difficult to justify an actual suspension in this case. Under these circumstances, a suspension, stayed during a probationary period, is the most appropriate sanction.

In considering whether the proposed sanction is appropriate the Court should also consider that the Office of Chief Disciplinary Counsel and Respondent, through a cooperative process of negotiation, agreed to recommend a six month stayed suspension with a twelve month probation. Stipulated disciplines accomplish several goals: they encourage lawyers to accept responsibility for their wrongdoing, they encourage cooperation with disciplinary authorities, and they encourage modification of unethical behavior in those cases where probation with conditions requiring affirmative action by the lawyer to acquire knowledge and tools with which to reform conduct makes up part of the stipulated sanction. In this case, not only has Respondent agreed to a stayed suspension with a probationary period, but Respondent has further agreed to make restitution to the complaining parties, and to complete nine hours of Law Practice Management CLE to further develop his practice management skills and address the issues that have been identified through this disciplinary process. Respondent, the public, the complaining parties and the profession are all benefited by the remedial conditions imposed in the sanctions agreed upon by the Office of Chief Disciplinary Counsel and Respondent.

### **CONCLUSION**

After careful investigation of the facts and due consideration of all the information that factor into lawyer sanction analysis, the Office of Chief Disciplinary Counsel has, with Respondent's concurrence, reached a stipulated resolution of the pending complaints. For the reasons set forth herein, the Court is urged to implement the sanction recommended by the Office of Chief Disciplinary Counsel, the Respondent and adopted

by the Disciplinary Hearing Panel. The Office of Chief Disciplinary Counsel recommends that the Court suspend Respondent for six months, and stay the suspension subject to a twelve month probation, subject to the provisions more specifically set forth in the Joint Stipulation As To Discipline.

Respectfully submitted,

ALAN D. PRATZEL #29141  
Chief Disciplinary Counsel

By: \_\_\_\_\_  
Barry J. Klinckhardt #38365  
Special Representative  
12837 Flushing Meadows Drive  
St. Louis, Missouri 63131  
(314) 544-8425 – Phone  
(314) 544-8472 – Fax  
bklinckhardt@srob.com

ATTORNEYS FOR INFORMANT

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17<sup>th</sup> day of May, 2007, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

David C. Knieriem  
7711 Bonhomme Ave., #850  
Clayton, MO 63105

Attorney for Respondent

\_\_\_\_\_  
Barry J. Klinckhardt

**CERTIFICATION: RULE 84.06(c)**

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

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 3,355 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

\_\_\_\_\_  
Barry J. Klinckhardt

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