

IN THE SUPREME COURT OF MISSOURI

IN RE:)
)
 DAVID SWIMMER,) No. SC88336
)
 Respondent.)

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Respondent agrees that Informant's Statement of Facts comports with the Legal File submitted to the Court, and wishes to supplement the Statement of Facts with information contained in Respondent's Supplemental Record. This contains a Proposed Stipulation of Facts (SLF 1) submitted by the Respondent which was rejected by the OCDC, and the checks for reimbursing the three clients involved in this matter (SLF 7). These reimbursement checks were issued prior even to the adoption of the Joint Stipulation by the parties in this matter.

ARGUMENT

Respondent agrees with Informant's characterization of the law and appropriate discipline in this matter; in fact, if anything, the discipline was more harsh than necessary. As Informant correctly noted, this was a matter that primarily involved a failure to appropriately communicate with three clients. As noted by this Court in *In re Frank*, 885 S.W.2d 328, 333 (Mo. banc 1994):

Absent aggravating or mitigating circumstances, reprimand is generally appropriate when a lawyer has received an admonition for the same or similar conduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

The attorney in *Frank* committed thirty-nine separate violations involving eleven clients, then refused to co-operate with the disciplinary authorities investigating the violations. Here, there were three violations involving the three clients, and Respondent has fully complied with the disciplinary authorities – he promptly turned over his entire client files, appeared at all proceedings and fully answered the questions the authorities had, has continually indicated his willingness to participate in any programs OCDC has suggested, and has refunded ALL fees paid by these clients to those clients. In fact, on his own initiative, Respondent over the last several months has met regularly with attorney Sarah Read to further hone his ability to effectively communicate with clients, in an effort to prevent any further problems.

However, as Informant noted, this case is almost identical to *In re Wiles*, 107 S.W.3d 228 (Mo. banc 2003), in which this Court found that probation was appropriate, the identical discipline recommended in this case. Respondent here has noted that case, accepts the discipline recommended in this case, and is working diligently both to satisfy the terms of the probation (in fact, as noted above, going beyond the terms of the probation) and ensure he is never the subject of a disciplinary proceeding again.

Respondent instead wishes to address an issue touched on by Informant, the advantages of ratifying the stipulated discipline entered into between Informant and Respondent. Respondent does not in any way wish to derogate the authority of this Court in setting discipline. The Advisory Committee is just that – advisory – and Respondent does not mean to suggest by the following argument that this Court is under any obligation to accept either stipulated discipline from the OCDC, or a recommendation from the Advisory Committee.

However, if this Court did choose to impose a different discipline on Respondent at this stage of the proceedings, it does raise some worrisome issues of fairness to Respondent.

This matter was decided on stipulated facts. The document entered into between the parties here included both the stipulated facts and the recommended discipline. During the negotiation involved in the discipline in this matter, Respondent had submitted an alternative stipulation of facts, which OCDC refused to adopt. Instead, in order to receive the stipulated discipline, Respondent was

instead put in a “take it or leave it” position: adopt the stipulated facts, or proceed with a hearing. These facts were merely the Information that was filed in this matter.

The difficulty Respondent has at that point is that while he may not necessarily agree with every single stipulated fact, he does agree that the discipline recommended by OCDC was appropriate based on the conduct he committed. He is then further hamstrung by this Court’s opinions that cooperation with the OCDC is a mitigating circumstance, and the failure to cooperate is an aggravating circumstance. *See, e.g., In re Tackett*, 159 S.W.3d 846 (Mo. banc 2005); *In re Harris*, 890 S.W.2d 299 (Mo. banc 1994).

Wisconsin solves this problem by Supreme Court Rule: If the recommended, stipulated discipline is not acceptable to the Supreme Court, the entire matter is remanded back for a hearing. Wisconsin Sup. Ct. Rule 22.12. Respondent respectfully suggests that if this Court believes the stipulated discipline is not appropriate given the facts in this case, that it remand this matter back to the Advisory Committee for a hearing in order to develop a factual record. This will encourage the goals of stipulated discipline enumerated by Informant’s Brief without impinging on any rights of the Respondent. It will also encourage attorneys to continue to cooperate with OCDC in resolving disciplinary issues.

CONCLUSION

Respondent therefore joins Informant in requesting this Court adopt the recommendation of the Advisory Committee, or remand this matter back to the Advisory Committee for a hearing and to develop a factual record.

CERTIFICATE OF COMPLIANCE

David Knieriem, the undersigned attorney for Respondent, hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this Respondent's Brief:

1. Complies with Missouri Supreme Court Rule 55.03,
2. Complies with the limitations contained in Missouri Supreme Court Rule 84.06(b),
3. Contains 1244 words, and 130 lines, excluding the cover page, according to the word count toll contained in Microsoft Word software with which it was prepared,
4. Contains zero lines of monospaced type in the brief (including Points Relied On, footnotes, signature blocks and cover page),
5. The disk accompanying this Respondent's Brief has been scanned for viruses and to the best knowledge, information, and belief of the undersigned, it is virus-free.

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Certificate of Service

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