

**IN THE SUPREME COURT  
STATE OF MISSOURI**

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|                        |   |                               |
|------------------------|---|-------------------------------|
| <b>IN RE:</b>          | ) |                               |
|                        | ) |                               |
| <b>GRANT W. SMITH,</b> | ) | <b>Supreme Court #SC86187</b> |
|                        | ) |                               |
| <b>Respondent.</b>     | ) |                               |

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**INFORMANT'S BRIEF**

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## **TABLE OF AUTHORITIES**

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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**

Respondent was licensed in 1988. **App. 2.** Mr. Smith practices in Jefferson City, Missouri. **App. 11.**

Mr. Smith accepted an admonition issued in September of 1992 for violation of Rule 4-1.4 because he failed to keep his client reasonably informed about her legal matter. **App. 26.** Respondent accepted an admonition issued in March of 1993 for lack of diligence serving a client in violation of Rule 4-1.3. **App. 28.** Respondent accepted an admonition issued in January of 1995 for violations of Rules 4-1.3 (diligence) and 4-1.4 (communication). **App. 30.** Respondent accepted an admonition issued in May of 1996 for violation of Rule 4-1.4 (communication). **App. 32.** Respondent accepted an admonition issued in May of 1996 for violation of Rule 4-1.4 for failure to make reasonable communications with a client. **App. 34.** Respondent accepted an admonition issued in October of 1997 for violation of Rules 4-1.3 (diligence), 4-1.4 (communication), and 4-8.1(b) (failure to respond to requests for information from disciplinary authorities). **App. 37-38.**

### **Disciplinary Case**

In April of 2004, a first amended information was filed against Respondent Grant Smith. **App. 2-10.** It contained allegations derived from complaints made by two individuals: Curtis Dittmer and David Hamilton. Mr. Dittmer complained about what

happened during Respondent's representation of him, and then his ex-wife, between November of 2000 and February of 2003. **App. 11-13.** Mr. Hamilton complained about Respondent's conduct during his representation of Mr. Hamilton between August of 2003 and February of 2004. **App. 14-15.**

Mr. Smith and the Office of Chief Disciplinary Counsel entered into a stipulation that resolved the factual basis for discipline. **App. 10-15.** The parties also stipulated that Respondent's conduct with respect to Mr. Dittmer and Mr. Hamilton violated Rules 4-1.3, 4-1.4, 4-1.7, 4-1.16(d), and 4-5.2(b). **App. 13-14, 15-16.** Mr. Smith and the Office of Chief Disciplinary Counsel agreed to recommend that Respondent be suspended for a period of 18 months, but that the suspension be stayed for an 18 month period of probation with enumerated conditions to be satisfied during that period of probation. The recommended conditions included quarterly reporting requirements, attendance at specified CLEs, taking and passing the Multistate Professional Responsibility Examination, development of a law office management plan, and payment of restitution (\$250.00 plus interest) to Mr. Hamilton. **App. 18-25.**

The factual stipulation and recommended sanction were submitted to a disciplinary hearing panel on May 19, 2004, at which time the panel directed a few questions to Respondent. **App. 45-48.** On June 24, 2004, the panel issued its "Conclusions and Recommendations." **App. 40-44.** The panel recommended a 60 day suspension, to be followed by an 18 month period of stayed suspension accompanied by probation. The panel recommended that Mr. Smith be required to submit to examination by either a psychiatrist or psychologist "qualified to render an opinion on Grant W.

Smith's psychological condition and ability to practice general law," that he attend specified CLEs, that he take and pass the Multistate Professional Responsibility Examination, and that he develop and submit for approval to his probation monitor a law office management plan and procedures for the training and supervision of support staff.

Neither Respondent nor the Office of Chief Disciplinary Counsel concurred in the panel's recommended sanction. The matter was submitted to the Court with a motion recommending that the Court accept the parties' stipulation and recommendation in lieu of the panel's recommendation. The Court activated a briefing schedule.

#### Stipulated Facts Underlying this Disciplinary Case

##### **Dittmer Complaint**

In or about November 2000, Respondent was retained by Curtis Dittmer to represent him in a dissolution of marriage matter which had been commenced by Dittmer's wife. On or about January 30, 2002, terms of a stipulated settlement were placed on the record and counsel for Dittmer's wife was to prepare final orders in the matter. After six months of haggling by the parties over the terms to be included in the final order, in or about June 2002, the dissolution was finalized. Included in the Judgment and Decree of Dissolution of Marriage was the executory provision concerning the division of the Thrift Savings Plan maintained by Dittmer through his employment.

**App. 11.**

In or about March 2002, prior to the finalization of the dissolution and prior to any order from the court pertaining to the division of property between the parties, Mr.



Dittmer's former wife sold a mobile home that belonged to the parties, agreeing to carry the loan of the buyer. Said sale was made without Dittmer's consent. Thereafter, on finalization of the dissolution in June 2002, Dittmer was awarded the mobile home. **App. 12.**

Dittmer elected to honor the mobile home sale his former wife had made but by August 2002 the new buyers had defaulted on the loan. Dittmer sought Respondent's assistance, calling him on numerous occasions and leaving messages for a return call. Although Respondent wrote a letter to the new owners on Dittmer's behalf on September 11, 2002, he did not receive a response and thereafter did nothing further to pursue the matter or advise Dittmer that he would no longer represent him in regard to the matter. On September 26, 2002, Dittmer sent Respondent a letter by fax, again, requesting further assistance. Respondent did not respond to Dittmer's requests for assistance or follow up on the matter. Respondent failed to respond or otherwise communicate further with Dittmer concerning the matter with the result that Dittmer was forced to hire new counsel to assist him in the matter and protect his assets. **App. 12.**

In the Judgment and Decree of Dissolution of Marriage, Dittmer's former wife was awarded real estate near Henley, MO which had belonged to the parties during marriage. She agreed to assume the debt thereon and hold Dittmer harmless. After finalization of the dissolution, her payments immediately became late and erratic and Dittmer's credit was in jeopardy. Dittmer sought Respondent's assistance with the matter, writing letters to Respondent on July 30, 2002, September 26, 2002, and September 30, 2002, and calling and leaving messages for Respondent to return his calls.

Respondent failed to respond to Dittmer's requests or otherwise communicate with Dittmer with the result that he was forced to hire new counsel to assist him in the matter and protect his interests. **App. 13.**

In the Judgment and Decree of Dissolution of Marriage, Dittmer's former wife received approximately \$7,000.00 from one of Dittmer's retirement accounts. Although counsel for Dittmer's former wife prepared the necessary documents to obtain her portion, in or about October 2002, Dittmer's retirement board rejected the language set forth in the dissolution decree leaving the issue unresolved. Despite Respondent's continuing obligation to Dittmer in regard to the yet unresolved issue in the dissolution matter, on or about November 8, 2002, and through February 14, 2003, Respondent accepted representation of Dittmer's former wife on a DWI charge. Respondent accepted representation of Dittmer's former wife during a time when he was still representing Dittmer on an unresolved issue in the Dittmer dissolution matter and without obtaining the consent of Dittmer. **App. 13.**

### **Hamilton Complaint**

On or about August 26, 2003, Respondent was hired by David Hamilton, a resident of Alton, Illinois, to handle a speeding ticket that he had received on or about August 1, 2003, in Cape Girardeau, MO. After being referred to Respondent's office by another attorney, Hamilton spoke to Respondent's office assistant who indicated that Respondent could handle the matter for Hamilton for a fee of \$250.00. Mr. Hamilton sent Respondent the traffic citation he had received and a check for \$250.00 on August

26, 2003. Hamilton's check was deposited by Respondent on September 2, 2003. **App. 14.**

Periodically between August 2003 and the end of the year, Hamilton received documentation from authorities both in Missouri and Illinois concerning the aforementioned ticket. Each time he contacted Respondent's office concerning the documentation he had received and was advised by Respondent's office assistant to send the documents to Respondent's office and assured that Respondent would handle the matter. **App. 15.**

In early January 2004, Hamilton received a letter from the State of Illinois Office of the Secretary of State informing him that his driver's license would be suspended effective February 13, 2004, for the reason that he had failed to appear in court on March 26, 2003, on the traffic warrant he had received in Cape Girardeau, MO. He immediately contacted Respondent's office and spoke to Respondent's office assistant who told him Respondent would handle the matter. **App. 15.**

Notwithstanding assurances by Respondent's office assistant, Respondent failed to take any action to resolve the matter on Hamilton's behalf and failed to appear for hearing on the matter with the result that on February 21, 2004, Mr. Hamilton was arrested and jailed on the traffic warrant in Alton, Illinois. **App. 15.**

**POINT RELIED ON**

**I.**

**THE SUPREME COURT SHOULD SUSPEND RESPONDENT FOR 18 MONTHS, STAY THE SUSPENSION, AND ORDER RESPONDENT TO SUBMIT TO AN 18 MONTH PERIOD OF PROBATION SUBJECT TO THE CONDITIONS ENUMERATED IN THE JOINT RECOMMENDATION FOR SANCTION (APP. 18-25), BECAUSE THE SANCTION AGREED TO BETWEEN RESPONDENT AND OCDC BEST SERVES THE DUAL PURPOSES OF LAWYER DISCIPLINE IN THAT CLOSE MONITORING OF RESPONDENT'S PRACTICE AND THE LAW PRACTICE MANAGEMENT EDUCATIONAL COMPONENT OF THE PROBATION SHOULD PROTECT THE PUBLIC AND THE PROFESSION FROM RECURRENCE OF THE MISCONDUCT THAT HAS MARKED RESPONDENT'S PAST PRACTICE.**

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

*In re Westfall*, 808 S.W.2d 829 (Mo. banc 1991)

## **ARGUMENT**

### **I.**

**THE SUPREME COURT SHOULD SUSPEND RESPONDENT FOR 18 MONTHS, STAY THE SUSPENSION, AND ORDER RESPONDENT TO SUBMIT TO AN 18 MONTH PERIOD OF PROBATION SUBJECT TO THE CONDITIONS ENUMERATED IN THE JOINT RECOMMENDATION FOR SANCTION (APP. 18-25), BECAUSE THE SANCTION AGREED TO BETWEEN RESPONDENT AND OCDC BEST SERVES THE DUAL PURPOSES OF LAWYER DISCIPLINE IN THAT CLOSE MONITORING OF RESPONDENT'S PRACTICE AND THE LAW PRACTICE MANAGEMENT EDUCATIONAL COMPONENT OF THE PROBATION SHOULD PROTECT THE PUBLIC AND THE PROFESSION FROM RECURRENCE OF THE MISCONDUCT THAT HAS MARKED RESPONDENT'S PAST PRACTICE.**

The facts have been agreed to by stipulation, and there is not a huge degree of difference between the panel's recommended sanction and the sanction recommended by the Office of Chief Disciplinary Counsel and Respondent. The two obvious differences between the two recommended sanctions are that the panel would require Respondent to serve an actual sixty day suspension, to be followed by an eighteen month stayed suspension with probation, and the panel would require Respondent to submit to an

examination by a health care professional “qualified to render an opinion on Grant W. Smith’s psychological condition and ability to practice law.” The panel reserved approval of the healthcare professional to an unspecified “Committee.”

Looking first at the panel’s recommendation that Respondent submit to examination by a mental health care professional, it should be noted at the outset that so far as this disciplinary record reveals, Respondent’s mental health has never been questioned or placed in issue. The basis, then, for this particular recommendation by the panel is unknown. Absent some record evidence substantiating the need for a mental health evaluation, i.e., a nexus between the panel’s recommendation of a mental health evaluation and the record, it is submitted that none should be required. Further, once a disciplinary hearing panel has issued a decision, its much appreciated work should be at an end. The probation rule, 5.225, does not anticipate that panels, or disciplinary committees, take an active role in monitoring the terms of probation, i.e., approving or disapproving the selection of an examining physician. There simply is no justification in this record for including an evaluation by a mental healthcare professional, who is to be approved by a “committee,” as a condition of any probation the Court may order.

The question of whether the Court should include a short period of actual license suspension is a stickier issue. The sanction jointly recommended by disciplinary counsel and Mr. Smith carefully took into consideration the type of misconduct Respondent is guilty of committing, his past record of misconduct, and the dual purposes of attorney discipline. The conditions of probation contained in the stipulated sanction are directed specifically to the deficiencies in Respondent’s practice, primarily failures in diligence

and communication, which experience tells us account for the types of misconduct Respondent is guilty of committing. Additionally, whereas the probation conditions crafted by OCDC staff counsel carefully enumerated the reporting requirements with which Respondent must comply to successfully complete the probation, the conditions enumerated in the panel's decision provide no means for enforcement or remedy for noncompliance with the probation.

Further, and very importantly, the Office of Chief Disciplinary Counsel and Respondent, through a cooperative process of negotiation, agreed to recommend an eighteen month stayed suspension with 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. And, stipulated sanctions potentially conserve the disciplinary system's resources and expedite the system's response to the public's complaints against lawyers.

The disciplinary hearing panel's decision suggests two reasons for the recommendation that Respondent be required to serve an actual term of suspension. First, there is Respondent's accumulation of six admonitions over a five year period, from which unseemly record the panel understandably concluded that Respondent had not been deterred from repeating unethical conduct. Second, the panel clearly concluded that Mr. Smith felt no remorse for his ethical lapses.

There is no disagreement between the disciplinary hearing panel and the Office of Chief Disciplinary Counsel that a reprimand is not sufficient where a lawyer has accumulated a long string of admonitions, yet continues to garner substantiated complaints. Indeed, this Court said in *In re Wiles*, 107 S.W.3d 228 (Mo. banc 2003) (per curiam), that a reprimand is insufficient in these circumstances. In express recognition of the aggravating effect of a string of prior admonitions, the Wiles Court ordered a stayed suspension and placed Mr. Wiles on a closely monitored probation. Like Mr. Wiles, Mr. Smith's ethical transgressions fall predominantly in the diligence and communication categories. It should be noted that there is no allegation of trust account issues in the case at bar, as were implicated in the Wiles case. As a stayed suspension was ordered by the Court in Wiles, where there was a safekeeping property issue, it is difficult to justify an actual suspension in the case at bar, where there is no allegation of misuse of client property. Mr. Smith's ethical transgressions fall predominantly in the diligence and communication categories. It is respectfully suggested that the panel's recommendation that Respondent serve an actual sixty day suspension in addition to the eighteen month period of stayed suspension/probation has at its root a desire to punish Respondent, which is not the proper basis for lawyer discipline. *In re Westfall*, 808 S.W.2d 829, 836 (Mo. banc 1991).

As to the panel's concern that Mr. Smith expressed no remorse for his misconduct, the short transcript of the exchange between Respondent and the panel when this matter was submitted to the panel in May would indicate otherwise. Mr. Smith made no excuses for his misconduct, he explained several steps he has taken to improve his office



management problems, and he indicated to the panel that he understood his professional obligations to his clients included the obligations to be diligent and communicate. And, the Office of Chief Disciplinary Counsel would be remiss in not emphasizing that Respondent has cooperated with staff counsel throughout this case to reach a resolution consistent with the goals of attorney discipline.

## **CONCLUSION**

After careful investigation of the facts and due consideration of all the information that factors 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 and the Respondent. The Office of Chief Disciplinary Counsel recommends that the Court suspend Respondent with no leave to apply for reinstatement for eighteen months, and stay the suspension subject to an eighteen month probation as more particularly set forth in the Joint Recommended Discipline.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_, 2004, two copies of  
Informant's Brief have been sent via First Class mail to:

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\_\_\_\_\_  
Sharon K. Weedon

**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 3,038 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.

\_\_\_\_\_  
Sharon K. Weedon

## **APPENDIX**