No. SC92497

# IN THE SUPREME COURT OF THE STATE OF MISSOURI

In re:

JOHN ALLAN,

Respondent.

## RESPONDENT JOHN ALLAN'S BRIEF

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Black's Law Dictionary (9th Ed. 2009)

## POINTS RELIED ON

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(Informant's Point II – The Court should suspend Respondent's license because: (A) consistent with the system of progressive discipline adopted by this Court and the ABA Sanction Standards a suspension without probation is appropriate where Respondent has previously received six admonitions, a reprimand and a stayed suspension with a probationary period; and (B) the egregious nature of Respondent's conduct in knowingly filing a false and misleading affidavit with the Court and failing to take any action to correct the false affidavit before the Court.)

*In re McBride*, 938 S.W.2d 905 (Mo. banc 1997)

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## ARGUMENT

### Point I

**Respondent Accepts and Regrets That His Actions Violated The Rules of Professional Conduct.**

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The November 7, 2007 scheduled deposition of Dr. Schmitz in Terre Haute, Indiana served as the digest of Respondent's actions that have culminated in the case before this Court.

John Allan admits the fact-actions chronicled in Informant's Brief, but disavows any inference of a scienter[1] component to his acts.

[1] Respondent denies that when he filed the Affidavit, he had "a mental state embracing intent to deceive, manipulate, or defraud." Black's Law Dictionary (9th Ed. 2009).

## Point II

**Factors in Respondent's Situation and Actions He Took in Remediation Justify Reduction in Degree of Discipline Advocated by Informant.**

(Informant's Point II – The Court should suspend Respondent's license because: (A) consistent with the system of progressive discipline adopted by this Court and the ABA Sanction Standards a suspension without probation is appropriate where Respondent has previously received six admonitions, a reprimand and a stayed suspension with a probationary period; and (B) the egregious nature of Respondent's conduct in knowingly filing a false and misleading affidavit with the Court and failing to take any action to correct the false affidavit before the Court.)

**Introduction**

The Court has the ultimate responsibility to determine the degree of discipline to be imposed in a disciplinary proceeding. The punishment imposed in disciplinary proceedings should be fair to both the public and the attorney, with an object of correcting the wayward tendency in the accused attorney while offering to him or her a fair and reasonable opportunity for rehabilitation. While a punishment should be commensurate with the offense(s) committed, no greater penalty should be imposed in a disciplinary action against an attorney than that which is required to accomplish the

purpose of protecting the courts and the public. *See generally* 7A C.J.S. Attorney & Client § 116.

Because the circumstances that give rise to disciplinary proceedings are fact intensive and sanctions are individualized, it is critical to ask the question, "who is John Allan?" [2] The answer to that question shows the context in which a "good guy" and a good lawyer did something misleading without the intent to mislead.

John Allan graduated from St. Louis University School of Law in 1974. Prior to attending law school, he was a marine officer who served in Vietnam for twelve months. He left active duty in 1971 and became a reservist. John Allan has been licensed to practice law in the State of Missouri since 1974 and has been working almost thirty-eight years exclusively in a private civil practice. He has tried well over one hundred jury trials to conclusion and many more bench trials. He has participated in appeals in both the Missouri Appellate and Supreme Courts in more than twenty-five matters. He has been an amicus counsel on a brief before the U.S. Supreme Court. On any given day, Allan has approximately thirty to forty civil matters pending in circuits across the State, as well as a few pieces of litigation pending in the federal courts. Allan is a strong proponent of Alternative Dispute Resolution and endeavors to resolve matters by mediation. He has participated in approximately ten arbitrations under the American Arbitration Association Commercial Rules.

[2] Respondent John Allan will be referred to variously by name and by party designation.

Most of Allan's cases are damage suits alleging professional negligence by doctors, lawyers and security advisors. While this makes John Allan a hero to a component of the population disillusioned and damaged by so-called experts with nowhere else to turn but to John Allan and those who similarly labor, it also makes him fairly unpopular among a significant demographic. Allan's office is staffed by a very experienced full time secretary who has worked for Allan for five years. Allan employs one lawyer who has nine years of legal experience. The lawyer works on some of Allan's cases and generates his own civil practice as well, an arrangement in place since January 2008.

Respondent practiced law for eighteen years before he was ever the subject of a disciplinary complaint. Allan does not make light of his disciplinary history. On the other hand, he practices in a field of law in which disgruntled plaintiffs are very much a part of the landscape.

**Standard of Review**

"Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed. This Court reviews the evidence *de novo*, independently determines all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. This Court treats the panel's findings of fact, conclusions of law, and the recommendations as advisory. Moreover, this Court may reject any or all of the panel's recommendations." *In re Coleman*, 295 S.W.3d 857, 863 (Mo. banc 2009) (internal citations omitted). Nevertheless, through

advisory, the Court gives considerable weight to the disciplinary hearing panel's suggestion. *In re Donaho*, 98 S.W.3d 871, 873 (Mo. banc 2003).

**Each disciplinary case involves unique facts and circumstances**

Each attorney discipline case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances. *See In re Moon*, 310 S.W.2d 935, 938-39 (Mo. banc 1958) ("In arriving at the punishment to be imposed, precedents are of little aid, and each case must be largely governed by its particular facts, and the matter rests in the sound discretion of the court." (internal citation omitted)).

The ultimate objective of attorney discipline "is not to punish the attorney, but to protect the public and maintain the integrity of the profession and the courts." *In re McBride*, 938 S.W.2d 905, 907 (Mo. banc 1997) (attorney received suspended sentence after he was convicted of second-degree assault; circumstances behind attorney's reckless conduct did not warrant suspension; he posed no threat to his clients or the public at large, and it would not serve the public or the profession to suspend his ability to provide competent legal service; public reprimand deemed to be appropriate sanction).

Informant argues that based on a model of progressive discipline, a suspension should be imposed on Respondent John Allan. In the context of attorney sanctions, however, progressive discipline is not completely linear or formulaic.

The crux of Informant's position is that the Disciplinary Hearing Panel's ("DHP") recommendation of a six-month suspension of Respondent's license to be stayed and that he be put on probation for a year with conditions, is not severe enough because of

Respondent's "extensive history of prior discipline." Informant's Brief, p. 19. It is true that over a period of nineteen years, Respondent's record reflects six disciplinary incidents. However, Informant's Summary of the "extensive history" "[s]ince 2008" is inflated, as Informant includes a reprimand from the Missouri Supreme Court issued in May 2007.[3] Informant's Brief, p. 5; I-App.[4] 281. What is most striking about Informant's advocacy for stripping John Allan bare of his ability to make a living, *i.e.*, "indefinitely suspend Respondent from the practice of law with no leave to apply for reinstatement for one year," is its citation to case law describing circumstances readily distinguishable from Allan's circumstances and his actions to remediate and make amends.

Acknowledging that Informant is citing three cases for the proposition that this Court has relied on the American Bar Association's Standards for Imposing Lawyer Sanctions ("ABA Standards") to determine the appropriate discipline to be imposed in attorney discipline cases, each case cited describes more egregious behaviors on the part of the attorneys involved than what is reflected in the case at bar. For example, an indefinite suspension was ordered in *In re Crews*, 159 S.W.3d 355 (Mo. banc 2005). Crews' actions effectively eliminated his client's opportunity to proceed with a

[3] Respondent would give the benefit of the doubt and ascribe this inaccuracy to "negligence" and not to "intent."

[4] Respondent will use the designation "I-App." for citations contained in Informant's Appendix.

potentially valid claim. (Crews neither filed a response to defendant's motion for summary judgment nor appeared at the hearing, resulting in a ruling in favor of the defendant.) He then attempted to shroud his sub-standard actions by offering varying explanations. His position was further complicated by Crews' "steadfast refusal to recognize his breach of ethical principles, even when given the opportunity to do so during this Court's oral argument." *Id*. at 361. In the Allan scenario, the repercussions were not as dire for his clients. Moreover, Allan "fessed up" to his clients and argued successfully to a Court of Appeals that they should not suffer any consequence from their attorney's wrongdoing. He did not try to hide or mask his actions; rather, his explanation for the Affidavit-action has been consistent. Finally, he has recognized his breach of ethical principles to Courts and to the DHP.

Disbarment was the resulting sanction in *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994). The Information filed against Griffey listed several alleged violations of rules of professional conduct, the most serious of which was forgery of his clients' names on their life insurance checks and the deposit of those checks into his office operating account. (As the Court commented, proof beyond a reasonable doubt of that conduct could result in a criminal conviction.) *Id*. at 603. The Court found Griffey's attempts to cover up his improper conduct as compounding the seriousness of the actions and belying Griffey's argument of mistake. The Court found Griffey's conversion of funds willful and deliberate. "Griffey deceived and defrauded his clients by failing to safeguard their funds and by acting to deceive and thereby deprive his clients of money belonging to them." It was the conversion that warranted disbarment.

Likewise, a disbarment was ordered in *In re Oberhellmann*, 873 S.W.2d 851 (Mo. banc 1994). Oberhellmann was employed by a client to represent her in a medical malpractice suit involving the stillbirth of her child. On the date Oberhellmann initiated suit in U.S. District Court, the client resided with her mother in Missouri; the Complaint alleged, however, that the client was a resident of Texas. During the course of discovery, defendants filed interrogatories inquiring into the client's place of residence. The client again informed Oberhellmann that she resided in Missouri; nevertheless, Oberhellmann filed interrogatory answers stating that the client had resided in Illinois since almost a year before the Complaint was filed. The client was unaware of how her attorney had listed her address until the time of her deposition. Oberhellmann instructed her that she should state that she resided with "Dorothy Goode at Fairview Heights, Illinois, and to further state that Goode was her cousin." The client testified as instructed although she had never heard of Dorothy Goode, nor had she ever been to Fairview Heights. In addition, before the deposition, Oberhellmann told the client that if he tapped her foot or nudged her knee during the deposition, she should respond to the question then being asked by stating that she did not know or did not recall. Following counsel's instruction, the client gave additional false answers at the deposition. *Id*. at 853. In an unrelated matter, Oberhellmann forged a name on a "withdrawal of appearance" document and filed it in a federal district court. The court found Oberhellmann's action improper and recommended that Missouri disciplinary authorities investigate the conduct.

Allan did not engage in behavior approaching criminal contempt, he did not urge clients or witnesses to lie, nor did he treat the funds of others as his own. Quite the

contrary: as soon as he realized his error, he explained it to all parties and took measures to make amends on behalf of his clients.[5] The referenced three cases involve cover-ups of wrongful actions, no self-recognition of ethical lapses, corruptibility (if not outright larceny), and coaching a client to commit perjury. Allan has engaged in none of these behaviors.

Informant urges the appropriateness of suspension in the instant matter. In support, Informant cites another case in which a lawyer counseled and assisted his client witness to testify falsely, *In re Storment*, 873 S.W.2d 227 (Mo. banc 1994). Storment had been disciplined for his actions in Illinois. Missouri accorded the out-of-state Attorney Discipline Order full faith and credit, and proceeded to decide if discipline in Missouri was warranted. Storment had represented a client in an Illinois divorce case; custody of the client's daughter was at issue. In testifying for the client's spouse, a witness stated that he and Storment's client had sexual intercourse in a motel while her daughter was present. Storment requested a recess and proceeded to "counsel" his client.

[5] While Respondent did not file an Amended Affidavit or immediately notify the Court of the falsity of the Affidavit, he did immediately call opposing counsel. Opposing counsel filed a "Motion to Dismiss for Fraudulent Filing of Affidavit and Failure to Comply with Section 538.225." Prior to the circuit court ruling on the Motion to Dismiss, Respondent voluntarily dismissed the lawsuit. Respondent re-filed the same cause of action with a proper Affidavit. I-App. 289 (¶ 17), 290 (¶¶ 18, 19, 20) (DHP Decision Findings of Fact).

Not only did Storment then offer the perjured testimony of his client denying that she committed adultery while her 18 month old child was in the same bed, it was Storment who told her, "You better deny this. 18 months old, Jesus." Upon finding that the evidence showed that Storment, with the intent to deceive, participated in presenting false evidence, decided that disbarment was appropriate. *Id*. at 231. Again, Allan's error did not approach the contemptuous behavior described in *In re Storment*.

*In re Ver Dught*, 825 S.W.2d 847 (Mo. banc 1992), cited by Informant, is a case in which an attorney was charged in federal court with suborning perjury and making a material misrepresentation of matters within the jurisdiction of the Department of Health and Human Services. Upon a not guilty finding by the jury, a complaint was filed with the Advisory Committee. Ver Dught had counseled a client not to mention her re-marriage during a Social Security proceeding and during the proceeding he referred to the client (who had removed her engagement/wedding ring) under her name prior to her re-marriage. The Court found that the attorney violated the rule providing that a lawyer shall not knowingly offer evidence that the lawyer knows to be false, even if the client's re-marriage was not a factor applicable to eligibility for benefits. The Court ordered Ver Dught suspended from the practice of law for six months. Again, Allan did not orchestrate a sham status for a client and then participate in playing it out to a judicial tribunal.

**Actions to Correct the Affidavit**

Informant asserts that Allan took no actions to correct the Affidavit, even after it had been discovered by opposing counsel. Informant's Brief, p. 19. Citing *In re*

*Caranchini*, 956 S.W.2d 910 (Mo. banc 1997), Informant reminds this Court of its recognition that it is a lawyer's obligation to proceed with absolute candor towards a tribunal for the sake of the legal system. Caranchini had engaged in conduct which resulted in federal court sanctions. Caranchini was then charged with misconduct in four different federal cases, *e.g.*, she filed a wrongful discharge Complaint when both of her clients had previously executed documents releasing their employer from employment-related claims; she attempted to use a forged document to support a plaintiff's sexual harassment claim; she made an affirmative misrepresentation regarding a key date, intentionally withheld the name of an employer's manager who could potentially serve as a significant witness in her client's case, deliberately misrepresented her ability to connect the testimony of several witnesses to her client, filed a recusal motion that had no reasonable basis in fact or law; filed a frivolous sanctions motion against opposing counsel in the trial court and pursued a frivolous appeal from the denial of that motion – actions detrimental to Caranchini's own client and apparently based upon Caranchini's personal animosity toward the district court judge and opposing counsel. While Caranchini offered what she considered mitigating evidence, she continued to refuse to acknowledge her wrongdoing, nor did her record serve as a strong indicator of interim rehabilitation or remorse. *Id*. at 919. Caranchini committed multiple offenses in the federal courts and showed "a consistent willingness to forego [the] duty of candor to the tribunal." *Id*. at 920. Allan has not displayed a consistent lack of candor. Moreover, his record indicates remorse and rehabilitation. He has been remorseful to the point of arguing in the Court of Appeals that his clients should not be punished for the "sin" of

their attorney, but, rather, he would bear a personal sanction. Allan has not been "recidivist" as to the cited actions.

Before submitting the affidavit in question, Allan had spoken with Dr. Schmitz and sent him records. Allan was unaware that there were "simulator x-ray records" and it was those that Dr. Schmitz really needed to form an opinion. I-App. 034 (DHP Hearing Transcript, p. 32). Once the records were secured for the physician, he formed his opinion such that Allan could re-file the case with the appropriate Affidavit.[6] Respondent's hearing before the DHP was in January 2012, but it was in October 2008 that John Allan was explaining to the Circuit Court of Phelps County what had happened, but more significantly, that he was embarrassed and that he "did not mean to lie or falsify." Exhibit 4, Record on Appeal, Vol. 2, pp. 182-184.[7] Allan stated, "I have anguished over this error for months." *Id*. He bemoaned signing a "false Affidavit" as the information to make it true was there, but he had not taken the time to get it. He stated that he owed Dr. Matthews an apology. And he declared, "I owe the court an apology because it has to rely on the integrity of counsel…I owe my profession in

[6] Even counsel (Mr. Malkmus) for defendant Dr. Matthews did not believe that Respondent had a malevolent motive, "I do not think that [Allan] did anything intentionally dishonorable, that [he was] trying to be a liar or anything like that." I-App. 215.

[7] Curiously, Informant chose not to include Exhibit 4 introduced and admitted at the Hearing before the DHP. I-App. 088 (DHP Hearing Transcript, 86:19-25).

general and my colleagues on this case in particular an apology for the same reasons." *Id*. He asked forgiveness of all, including his clients. *Id*. John Allan lived with this case for over three years before his hearing. He made amends, he repented and he has not engaged in any similar conduct since.

The DHP found that Respondent Allan was cooperative with OCDC in the investigation of the Complaint and Information; was contrite in his testimony to the Panel; contacted the attorney in the medical malpractice case after the deposition to apologize for the surprise and the misrepresentation in the Affidavit; admitted fault to the circuit court in the underlying wrongful death case, and apologized for his mis-representation. I-App. 297 (Disciplinary Hearing Panel Decision, ¶ 34[8]).

Informant argues that the DHP's recommendation "fails to properly assess the serious nature of the professional misconduct in this case and is inconsistent with a system of progressive discipline" (Informant's Brief, p. 20) and points out that one of the violations founded by the DHP, Rule 4-1.3 (diligence) was the same rule violation for which Allan has previously been disciplined. It is interesting to note that Informant calls out Allan's violation of the rule, "A lawyer shall act with reasonable diligence and promptness in representing a client" when its emphasis otherwise has been on the false Affidavit. While Informant may be using *In re Ehler*, 319 S.W.3d 442 (Mo. banc 2010)

[8] Informant seemingly does not take issue with the DHP findings, rather with its recommendation.

to try and illustrate the serious nature of Allan's misconduct, it serves instead to contrast Allan's behavior with the gravity of Ehler's offenses and her repetition of same.

In the *Ehler* case, the Court mentioned a number of offenses committed by Ehler including her failure to give a client the interrogatories he was to complete resulting in a default judgment being entered against the client, but it found "Ms. Ehler's most egregious act of misconduct" to be "her misappropriation of client funds and mishandling of her client trust account." *Id*. at 451. The Court noted that it had previously suspended Ehler's license for six months for prior violations of the Rules of Professional Conduct that were of the same nature as her current violations. It had stayed her suspension and imposed a two-year term of probation. She committed some of the current acts of professional misconduct while she was on probation, *id*. at 445; these offenses involved violation of three of the ethic rules for which she previously was disciplined. The Court found that Ehler's behavior showed a dishonest and selfish motive in that she repeatedly converted client funds for her own personal use. Ehler repeatedly behaved with a lack of diligence and failed to provide competent representation to her clients. She failed to respond to the inquiries of her client and counsel for the opposing party, showing a pattern of failure to communicate. And additionally, she mishandled and misused her trust fund during 2007 and 2008 showing a pattern of failure to properly maintain her trust account and deliver funds to clients promptly. Ehler showed an indifference to making restitution, still owing her clients money. Ehler had withdrawn money from her client trust account to pay personal expenses while she still was on probation for violating the same ethical rules for which she was being disciplined in the cited case.

To the extent Allan had a motive in submitting a false Affidavit, it was neither dishonest nor selfish. He never improperly used client funds. Rather than one in a pattern, Allan has never before been charged with a rule violation that implicated falsity or fraud. His representation of clients has been competent and he has been responsive to their inquiries. Allan's administration of his trust account has never been an issue, nor has he done anything but to deliver funds when awarded to clients promptly. Furthermore, he met all the terms of his probation. *See, In re Mirabile*, 975 S.W.2d 936, 940 (Mo. banc 1998) (charge of professional misconduct does not constitute evidence of professional misconduct).

**A monitored period of probation would best accomplish disciplinary goals**

"The purpose of attorney discipline is to protect the public and maintain the integrity of the legal profession." *In re Stanley L. Wiles*, 107 S.W.3d 228 (Mo. banc 2003). In the *Wiles* case, the Court had before it an attorney who during a three-year time span was admonished in Missouri for four diligence rule violations, five communication violations, one safeguarding client property rule violation, and one violation of the rule against engaging in conduct prejudicial to the administration of justice. In addition, Wiles had been given two prior admonitions in Kansas. The Court ruled out the sufficiency of a reprimand. Recognizing that Respondent had committed several violations worthy of admonition in recent years, he had practiced law as a solo practitioner for many years and could be strictly monitored during a period of probation. The Court decided that Respondent possessed the required abilities to perform his duties as an attorney, and his continued practice of law would not cause the courts or the

profession to become the subject of disrepute. Finally, the attorney had not committed acts warranting disbarment. Though recognizing the seriousness of Respondent's violations, they did not rise to a level that would warrant disbarment. Accordingly, a suspension was stayed and Responded was placed on probation for a period of one year.

In October 2008, John Allan knew he had made a mistake and he tried to fix it. It was not his intent to deceive nor to gain any advantage in the law. I-App. 079-080 (DHP Hearing Transcript, 77:20-25, 78:1-3). When asked whether the imposition of a suspension on Respondent would create a hardship on his clients, Allan answered as follows:

> Yes, I think it would….I do legal malpractice cases, that's all, most of the clients that hired me hired me because they say either A, they didn't know people did that or B, they've gone to several lawyers and can't get anybody or it's referred by another lawyer. And I know of two other lawyers that do the volume that I do in the St. Louis area and I get referred, brought in by other states because there's actually lawyers in other states, nobody in other states. So these are delicate things and there's not too many people that are willing to stick their heads in the fan I guess as often as I do but they're not going to readily find other lawyers to do these things.

I-App. 082-083 (DHP Hearing Transcript, 80:11-25, 81:1-4).

Respondent has never been admonished or reprimanded – or otherwise disciplined – for any alleged breach of any professional misconduct involving dishonesty, deceit, or any similar conduct in the past. I-App. 084 (DHP Hearing Transcript, 82:13-21).

A member of the DHP inquired of Respondent as to what he could say to provide the panel "some assurance that in the future if your license remains intact and everything, your practice continues the way it is that this type of a similar problem like this will not happen." I-App. 108 (DHP Hearing Transcript, 106:12-16). Allan responded:

> It won't happen because it just won't. I have faults but not truth telling faults. This was, I don't know Mr. Nack, it just won't happen again. I don't need to do push-ups to say okay, now I've reached a level of cure on making stupid mistakes but I have learned a lesson is to not, to follow the rules and don't embellish them or add to them or think geez, I'm doing other people favors or whatever. There is a procedure that you follow and things come out if procedures are allowed to go the way they were. I think Dr. Matthews even though it's a technical rule that for months the case before that would have been filed no problems, he's entitled because I say that in there, entitled to be treated by the rules that are in effect at the time. This was unbeknownst to me at that time, it totally was not an intended consequence **but sitting in his chair** I'd

> say this guy's presented false statements to the Court. (emphasis supplied).

I-App. 108-109 (DHP Hearing Transcript, 106:17-25, 107:1-8).

A prohibition on Respondent practicing law would be unduly harsh in the circumstances. The public does not need to be protected from John Allan to that extent and "[d]iscipline, if imposed, is imposed not as punishment against the offender, but in protection of the public." *In re Westfall*, 808 S.W.2d 829, 836 (Mo. banc 1991). Suspension without a stay would serve only as punishment to Allan in this situation. *See In re Lim*, 210 S.W.3d 199, 201 (Mo. banc 2007) (Lim's letter to client was "bold effort to coerce payment by withholding the labor certification – a document to which client was entitled" and he sent a letter to the U.S. Immigration and Naturalization Service reporting that client lacked good moral character needed to obtain immigration benefits; the Court ordered public reprimand instead of DHP recommendation of six month suspension – despite Lim's vindictive and unprofessional conduct, it did not warrant suspension).

The case of *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009) might also inform the outcome of Allan's situation. Many of the facts essential for resolution of Coleman's alleged disciplinary rule violations were not contested. He had been cited for multiple violations of the rules in his representation of a client in three cases and one violation for the improper handling of his IOLTA account. The Court found that Coleman committed violations by accepting a settlement offer in a wrongful death case without the consent of his client and filing a motion in that case requesting that the court enforce the agreement

despite his client's refusal to settle; by entering into written agreements with his client purporting to give him the exclusive right to settle her three cases and taking direct, adverse action against the client's directives when Coleman filed and proceeded on a motion to enforce the agreement; by failing to keep his personal funds separate from his IOLTA account; by failing to take reasonable steps to protect the client's interest on termination of representation; and by violating other rules of professional conduct and engaging in conduct prejudicial to the administration of justice. *Id*. at 859. The OCDC requested that the Court suspend Coleman's license with no leave to reapply for a period of one year.

Following a detailed account of the facts, the Court considered the appropriate discipline to impose. The Court acknowledged that applying the ABA Standards, the nature of Coleman's conduct justified suspension of his license to practice law without leave to reapply for one year. The Court continued "the ABA Standards provide, however, for lesser discipline where the behavior was not intentional. The ABA Standards suggest that probation is the appropriate punishment when the conduct can be corrected and the attorney's right to practice law needs to be monitored or limited rather than revoked." *Id*. at 870. The Court enumerated the factors indicating eligibility for probation. As was the case with Coleman, so it is with Allan, his violations with their

aggravating and mitigating circumstances, make him a proper candidate for probation. Supreme Court Rule 5.225.[9]

Probation is an appropriate sanction because John Allan can competently perform legal services but may have organizational problems that require supervision. There is little to no likelihood he will harm the public during his period of rehabilitation. Following his "malfeasance," Allan undertook in good faith curative and remedial measures to rectify the harm caused by his derelictions and ensure their non-recurrence. His actions do not constitute a defense, but Respondent believes they are appropriate to mitigate any punishment to be imposed.

[9] The "Conditions" section of the Rule to take effect January 1, 2013 instructs: "(1) The nature and circumstances of the lawyer's misconduct and the history, character, and health status of the lawyer shall be taken into consideration when reprimanding a lawyer with requirements or when placing a lawyer on probation."

## CONCLUSION

For the above-stated reasons, Respondent asks this Court to take into account all relevant factors in determining the appropriate sanction. John Allan's personal and professional profile militate against suspension of his ability to practice law.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with Rule 84.06(b) and contains 5745 words, excluding the cover, this certification and the signature block, as counted by Microsoft Word; that the electronic copy of this brief was scanned for viruses and found to be virus free; and that notice of the filing of this brief, along with a copy of this brief, was sent through the Missouri eFiling System on this 23rd day of July, 2012, to:

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