IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
ELLE SULLIVANT	)	**Supreme Court #SC92386**
	)	
Respondent	)	

RESPONDENT'S BRIEF

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ATTORNEY FOR RESPONDENT

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I.

ATTORNEY SULLIVANT ACKKNOWLEDGES SHE IS SUBJECT TO DISCIPLINE FOR CERTAIN CONDUCT CHARGED BUT MAINTAINS NO DISCIPLINE SHOULD BE IMPOSED WHERE OCDC HAS FAILED TO PROVE A CHARGE BY THE PREPONDERANCE OF THE EVIDENCE AND WHERE CLAIMS WERE NOT CHARGED AND WHERE CLAIMS ARE BEING RAISED FOR THE FIRST TIME ON APPEAL

A. SOME BUT NOT ALL STATE COURT CONDUCT CHARGED WAS UNAUTHORIZED PRACTICE.

Attorney Sullivant now understands and admits that her acts set out below amounted to the unauthorized practice of law while her law license was tax suspended. During the period of her suspension from March 3 to June 4, 2008, Attorney Sullivant limited her practice activities and did not take on new clients but at times she admits that she made filings with a state court when she believed her clients could lose rights if she failed to take action. Attorney Sullivant understands now that while tax suspended she should have helped her clients find other counsel to make these filings:

- Motion filed March 6, 2009 in *JS Construction v. Kool Nites Limousine*, in the Circuit Court of Jackson County.
- Motion filed on March 18, 2009 in *Sharp v. Farm-to-Market Brand Company*, in the Circuit Court of Jackson County

• Reply filed on March 23, 2009 in the *JS Construction* case.

. • Motion filed on April 1, 2009 in *Doran v. ADT Security Services, Inc.*, in the Missouri Court of Appeals, Western District.

• Participation in a phone conference May 28, 2009 in *Kemper v. Rodgers*, in the Circuit Court of Jackson County.

Informant also cites the following activities Attorney Sullivant testified about as more evidence of unauthorized practice: paying attention to her cases, reading through ongoing issues in those cases, preparing for a trial set for June 15, 2009 and contemplating ideas and strategies in that case and another case. A180 Attorney Sullivant denies that these activities constitute the unauthorized practice of law, and Informant has cited no cases for the proposition that if you think about your clients or their cases or write notes or read about them for your own use only, such action constitutes the practice of law.

1. Attorney Sullivant Sought Advice About How to Conduct Herself During Her Tax Suspension, Conducted Research on the Issue and Limited Her Activities During the Suspension.

When she first learned she was suspended because of state taxes, Attorney Sullivant didn't really know what it meant. A534. She sought out Legal Ethics Counsel Sara Rittman and remembers actually talking with Ms. Rittman who provided Attorney Sullivant with what considerations should be regarding the unauthorized practice of law. Attorney Sullivant took those to heart. A176. Ms. Rittman's advice to Attorney Sullivant was to research what constitutes the unauthorized practice of law and then do not engage

in those activities. A177.

Attorney Sullivant did not receive a letter from this court dated October 7, 2008 about a possible suspension for a tax non-compliance issue (A318-319), which OCDC claims was sent to her. A512. Attorney Sullivant does admit receiving a letter in November 2008 with a November date on it A513-514. Based on her recollection its contents were similar to the October letter. A513. No evidence was entered into the record to establish that the October letter was sent to Attorney Sullivant.

While the exact contents of the November 2008 letter are unknown because neither Attorney Sullivant nor the OCDC produced that letter, the events as Attorney Sullivant knew them were these:

- During their 16 years of marriage, Attorney Sullivant' s husband Scott, a CPA and controller for a large company, always was the one to file the tax returns. A170, 245, 246.
- When Attorney Sullivant asked her husband in November 2008 if their tax returns had been filed, he assured her they had been. A249 (p.5-11), A515.
- Assuming the November letter had language similar to the October 7 letter, Attorney Sullivant knew that her license was "subject to automatic suspension unless the matter is satisfactorily resolved within 30 days of the date of the last notice sent by the clerk." A318 (Emphasis original). The October letter also stated that "under the Missouri statutes and Rules of this Court we will have no discretion whatsoever to delay or otherwise avoid the penalty provided for non-compliance." A319

- Based on her husband's assurance, Attorney Sullivant did not expect to hear anything more from the Supreme Court relating to a tax suspension, and she didn't -- not 30 days later in December 2008, not 60 days later in January 2009, not 90 days later in February.
- Based on the Court's statement that it had no discretion to delay or otherwise avoid the penalty provided, even though Attorney Sullivant believed she was tax compliant, she had no reason to believe the Court could delay action by as much as 90 days or that the Court would take action without notification.

Attorney Sullivant believes she obtained actual notice of her tax suspension during the first week of March, although she never received any official notice of her suspension. A516. Attorney Sullivant thereafter limited her activities in her state court cases by not submitting discovery requests, not responding to discovery, not participating in depositions and not appearing in court and not making filings in court. A180, 191. Attorney Sullivant admits that she did file the motions and reply referenced above because she believed her failure to do could cause her clients to lose their rights. A318, 319, 326. Notwithstanding what she should have known, Attorney Sullivant believed tax suspensions were not intended to be and were not treated as a disciplinary suspension for a violation of Missouri's Rules of Professional Conduct, found in Mo.S.Ct. Rule 4.

Neither Ms. Rittman's affidavit and notes (A324-327) nor Attorney Sullivant' s testimony about her communications with Ms. Rittman indicate that Ms. Rittman said Attorney Sullivant she needed to withdraw immediately from all cases pending within the geographic borders of Missouri, or that, although Attorney Sullivant' s office was closed

during the period of March 6 through June 3, 2009 (A179), she needed to have her name removed from the office door and from the directory in the building where her office was housed and that she should cease using any stationery that identified a Missouri office address or that she was licensed in Missouri.

Attorney Sullivant also researched the unauthorized practice of law based on Ms. Rittman's advice and found little direction of what not to do and what to do. A534. She did a case law review of activities that would equate to the practice of law, looked at the activities and felt she had a grasp after looking at the activities. A535. She adopted a working definition of what the practice of law. A535.

From March 6 until she was reinstated June 4, 2009, Attorney Sullivant did speak with her existing clients but she did not accept new clients and did not give any legal advice or meet in person with clients during that period. A180 Attorney Sullivant did not charge or accept fees from her clients. A530. During this time Attorney Sullivant lived in Washington, D.C. and shut down her office in Independence by locking the door to it. A179.

2. **Attorney Sullivant' s Actions Do Not Show Indifference to or Defiance of Her Tax Suspension**

The record here refutes Informant's argument that Attorney Sullivant showed "a deliberate indifference . . . to defy the restriction imposed by the suspension. This is not a situation where a lawyer received some misguided ethics advice nor a situation where a lawyer was confused about the requirements of the law." Informant's Brief, 77.

The evidence in this case shows no deliberate indifference or defiance from

Attorney Sullivant. It is uncontroverted that Attorney Sullivant sought guidance and input from Sara Rittman and that Ms. Rittman told Attorney Sullivant not to engage in the unauthorized practice of law. No evidence suggests that Ms. Rittman offered even one specific example of unauthorized practice or that Ms. Rittman told Attorney Sullivant she needed to notify all her clients immediately and withdraw from all her cases immediately. When asked if she relied on any advice from Ms. Rittman, Attorney Sullivant testified, "Well, let me begin by saying I'm not scapegoating anyone. My conduct, my actions were my own decision. I did try to seek out people to provide input into what that could be." A177

Seeking out and following the advice of Ms. Rittman to research what constitutes the unauthorized practice of law are not acts of indifference or defiance. In addition, making determinations that she could not engage in and then refraining from discovery, giving legal advice, taking on new clients, charging or receiving fees from clients or making court appearances does not show deliberate indifference or defiance. Attorney Sullivant' s efforts to limit her activities are demonstrated by the *Kemper v. Rodgers* case before Judge Roldan. That case was set for trial on June1, 2009. Attorney Sullivant believed that her license would be reinstated before that date. She wanted to take a deposition in that case before trial but had not done so before learning of her suspension. A191. She did not notice up a deposition in that case before the trial date because she "was not going to conduct a deposition with no license." A191. Instead she waited. When her reinstatement did not come through as the trial date approached, she told opposing counsel she wanted to take the deposition early on the morning of trial. As

discussed in another section herein, the trial did not go forward on June 1 and Attorney Sullivant did not take the deposition she wanted in that case before or on June 1. Had Attorney Sullivant been indifferent or defiant, as Informant claims, she would have noticed up the deposition between March 4 and June 1, taken it, and declared "ready" on the morning of June 1 before Judge Roldan. She did none of these things.

B. FEDERAL LAW PERMITTED ATTORNEY SULLIVANT'S PRACTICE IN THE U.S. DISTRICT COURT DURING HER MISSOURI TAX SUSPENSION.

1. Respondent Did Not Engage in Conduct Prejudicial to the Administration of Justice by Failing to Advise the United State District Court of Missouri and the United States Circuit Court of Appeals of Her Tax Suspension.

Informant argues the tax suspension was public discipline, and therefore disclosure of her suspension was required under the local rules of the United States District Court for the Western District of Missouri.

Relying on an order dated April 26, 2011 in *In re George Spencer Miller*, SC91026, for the proposition that this Court's order suspending an attorney for failure to prove payment of state taxes is not an administrative order and terminates any probation previously entered. The *Miller* order does not address whether a tax suspension is discipline. In addition, this order post-dates Attorney Sullivant's suspension by two years and therefore, provided her no guidance for purposes of this proceeding. The rules she reviewed made distinctions between a tax suspension and a suspension for violating the Rules of Professional Conduct that comes after a lengthy process with specific findings of violations.

Attorney Sullivant respectfully suggests her tax suspension was not "discipline", triggering the local federal rule.

Informant argues that the state tax suspension also precluded Attorney Sullivant's practice in federal court. The theory apparently is premised on the fact the U.S. Western District of Missouri and the 8th Circuit Court of Appeals are both located within the geographic boundaries of the State of Missouri. Informant asserts that because Respondent's open practice of law in federal court matters while tax suspended evidences defiance of the suspension order, warranting heightened discipline. .

Respondent respectfully disagrees and instead argues federal law permitted her to continue representation in her federal cases during her tax suspension. [1]

This Court will find that state and federal courts do not often agree on whether an attorney suspended or disbarred by a state supreme court can continue to practice exclusively in a federal court that is physically located within the state's borders. However, one principle remains constant and true. "As nearly a century of Supreme Court precedent makes clear, practice before federal courts is not governed by state court rules." *In re Poole*, 222 F.3d 618, 620 (9th Cir.2000).

Further, recent case law supports Attorney Sullivant's conclusion that she could continue her practice in federal court during her tax suspension. *See Surrick v. Killion,* 449 F.3d 520 (3d Cir. 2006), a case which sprung from a case relied on by Informant, *In*

[1]The authority of this Court to review and impose discipline based on misconduct occurring in a federal court is a separate matter and not at issue in this case.

re Marcone, 855 A.2d 654 (Pa. 2004). In *Surrick* the Pennsylvania Supreme Court suspended Attorney Surrick for five years for acting with "reckless disregard of the truth" in accusing a judge of "case fixing" in a pleading. *Office of Disciplinary Counsel v. Surrick*, 749 A.2d 441, 442 (Pa. 2000). In recognition of the state suspension, the U.S. District Court for the Eastern District of Pennsylvania ordered reciprocal discipline for 30 months, *In re Surrick*, 2001 WL 1823945 (E.D. Pa., June 21, 2001), *aff'd* 338 F.3d 224 (3d Cir. 2003), and readmitted him on May 17, 2004.

Within 90 days of the *Surrick* decision, a second case, *Marcone,* visited this issue and found that an attorney suspended in Pennsylvania state courts but readmitted to the federal district court would continue to violate the state's unauthorized practice prohibition if he maintained a law office in Pennsylvania. 855 A.2d at 665-666. Faced with this ruling, Attorney Surrick sought commenced a declaratory judgment against the state's disciplinary counsel, arguing *Marcone* was contrary to federal law, that he be permitted to open a law office in Pennsylvania for the exclusive practice before the U.S. District Court and that Pennsylvania State officials be enjoined from disciplining him for maintaining such an office.

The Third Circuit upheld the district court's ruling declaring Attorney Surrick could open a legal office for the practice of law before the United States District Court but under several conditions. The Third Circuit's discussion of the federal court's authority to weigh in on these decisions began with *Theard v. United States*, 354 U.S. 278, 281, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957) ("The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of

their officers, among whom . . . lawyers are included.")

In *Theard* the court declared "[d]isbarment by the federal courts does not automatically flow from disbarment from state courts." 354 U.S. at 382. In doing so, the Third Circuit cited to the 1987 decision from the United States Supreme Court in *Frazier v. Heebe*, in which the Court pointed to its history it "has repeatedly emphasized . . . that disqualification from membership from a state bar does not necessarily lead to disqualification from a federal bar." *Frazier v.Heebe*, 482, U.S. 641, 647, n. 7, 107 S.Ct. 2067, 96 L.Ed.2d 557.

In considering the significance *of Surrick to* the issue at hand, it is helpful to look at how the disciplinary counsel framed the issue, "whether a state may prohibit an attorney admitted to the bar of the federal district court, but suspended from the state bar, from maintaining a legal office for the sole purpose of supporting a practice before the federal court." 449 F.3d at 530. To start its analysis, the Third Circuit looked to *Sperry v. State of Florida,* 373 U.S. 379, 83 S.Ct 1322, 10 L.Ed.2d 428 (1963), which held that under the Supremacy Clause of the Constitution, "'the law of the state, though enacted in the exercise of powers uncontroverted, must yield'" when incompatible with federal legislation. *Id*. at 383. (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 6 L.Ed. 23 (1824)).

The *Sperry* case involved an attempt to prevent a patent practitioner from preparing patent applications and other legal instruments filed solely with the U.S. Patent and Trademark Office within the Florida borders, but was not licensed by the Florida bar. The *Sperry* court reasoned that "if the state were permitted to enforce licensing

requirements contrary to federal law, the state would then have the power of review over federal licensing requirements." *Surrick,* 449 F.3d at 530.

In the *Surrick* declaratory judgment case, the disciplinary counsel tried to distinguish *Sperry* in two ways. First, *Sperry* dealt with a congressional statute that expressly allowed for patent prosecutions by non-lawyers, in contrast to *Surrick*, where no federal statute was at issue. Second, while *Sperry* was primarily concerned with patent law, Attorney Surrick intended to litigate federal diversity actions in which for all practical purposes he would be practicing Pennsylvania law. In rejecting these arguments, the Third Circuit noted that when state law conflicts or is incompatible with federal law, the Supremacy Clause holds federal law will preempt the state law, generally in one of three ways. *Id.* One is "conflict preemption" which arises when "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," (quoting *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1984)). The Third Circuit noted the well-established law that "a federal court has the power to control admission to its bar and to discipline attorneys who appear before it." (citing *Chambers v. NASCO, Inc*., 501 U.S. 32,43, 111 S.Ct 2123, 115 L.Ed.2d 27 (1991)). This power, it noted, flowed from both statute and the inherent authority of the federal courts. *See* 28 U.S.C. § 2071(a) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."); 28 U.S.C § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and

conduct causes therein."); *See also Chambers,* 501 U.S. at 43, 111 S.Ct. 2123 (using federal courts' control over the admission to their bars as an example of an inherent power "governed not by rule of statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Surrick,* 449 F.3d at 532.)

Noteworthy in *Surrick* is the Court's rejection of disciplinary counsel's argument that *Sperry* served as a limited ruling, saying counsel misread *Sperry* and misapprehended the invocation of the preemption doctrine. 449 F.3d at 532. It also rejected the suggestion Surrick's specific intent to practice diversity cases should influence the Court's analysis. "Although we acknowledge that federal cases, and especially diversity cases, often involve questions of Pennsylvania law, and that the Commonwealth has a legitimate interest in preventing suspended attorneys from practicing state law, preemption analysis does not involve a balancing of state and federal interests. Once it is determined that there is a conflict between a valid federal law and a state law, the state law must give way. See *Sperry,* 373 U.S. at 385, 83 S.Ct. 1322. 449 F.3d at 534."

The Third Circuit specifically disagreed with the *Marcone* state court's determination that its rule preventing an attorney from establishing an office for the purpose of engaging in representation before a federal court does not "significantly frustrate" the exclusive authority of a federal court to determine who may practice before it. 449 F.3d at 536, n.2. The appeals court agreed with the District Court that maintaining a law office is "reasonably within the scope of practice authorized" by 28 U.S.S. §§ 1654

and 2071 and "that the state's regulation of such conduct hinders Surrick's federal license to practice law." 449 F.3d at 533. The court also observed that it had "extreme difficulty in accepting the notion that maintaining an office constitutes engaging in the practice of law but prohibiting one from maintaining an office does not burden the right to practice law." *Id.*

In support of the proposition this Court may regulate the status of Respondent's federal admission to practice, Informant cites the Court's responsibility to oversee the its interest in controlling when an attorney practices state law within the federal court. The reality is attorneys from many states practice "Missouri law" in state and federal courts all over the country due to a conflict of law determination and diversity cases. State supreme courts are not seeking out those lawyers wherever they may be to subject them to discipline for creating a risk of poorly presenting "state law" claims.

Further, the actual risk to the public when a tax suspended Missouri attorney applies Missouri law in federal court is arguably much smaller than the risk of attorneys admitted in other jurisdictions applying Missouri law in tribunals throughout the country.

As to the new contention in Informant's brief is that Attorney Sullivant engaged in the unauthorized practice of law because she held herself out to the public as authorized and admitted to practice law in Missouri during her tax suspension when she failed to vacate her Missouri office and failed to take down her or the firm's name from the building directory or the door to her office suite, Respondent respectfully disagrees.

As the *Surrick* Court noted, "[a]s both a practical and historical matter, the maintenance of a law office is incident to the practice of law." *Id.*

Even setting aside the *Surrick* decision, the evidence in this case raises serious doubt as to whether Attorney Sullivant actually did maintain an office in such a way as to hold herself out to the general public as authorized and admitted to practice law in Missouri during her suspension. The undisputed testimony in this matter is that, upon her suspension in 2009, Attorney Sullivant locked the door to her office, returned home and waited for reinstatement. A79.

Granted, she continued to pay her rent, but Missouri's Rules and cases do not suggest that an attorney who is suspended or disbarred must break her lease or remove her name from a building directory. In addition, while the evidence establishes her name was on the directory and on her office door; it does not establish that either sign identified her as an attorney or as a Missouri attorney. A178. In addition, her business phone either was not answered or it was forwarded to her cell phone. A500 But most important, the record is devoid of any evidence showing during her suspension period, a single person was actually harmed by attempting to hire Attorney Sullivant under the belief she was licensed as a lawyer by Missouri and could appear in state court cases. In fact, the undisputed evidence is that Attorney Sullivant did not undertake any new representation during her period of suspension, state or federal. A180, 504, 506.

Perhaps most importantly, the Western District's rules allowed Attorney Sullivant's continued practice because she was not subject to public discipline. Rule 83 .6(b)(1). In addition, Rule 83.6(b)(4) provides a process by which the federal court will review public discipline by a state court before determining whether it shall impose identical discipline. This means that even if an attorney is subject to public discipline by

a state court, discipline in the federal court is not automatic and must follow a specified course.

To reiterate, the United States District Court, Western District of Missouri has its own rules, process and procedures governing both the admission to the court and the right to continue to appear and practice before the court. Respondent, at all times relevant hereto, has remained in good standing with the federal court.

Respondent's right to practice in the federal court has never limited by any action of the federal court. The local rules make it very clear that, once admitted to the federal court, the right to continue to practice in the federal court continues until one is suspended or disbarred from practicing in the federal court. This suspension or disbarment can only issue from the federal court.

The unauthorized practice of law in the federal court only occurs where the attorney is suspended or prohibited from practicing law by the federal court. Under Local Rule 83.5(c)(1) of the Western District an attorney admitted to practice before it may be disbarred or suspended "[f]or misconduct defined in these Rules, and for good cause shown, **and after notice and an opportunity to be heard**." Unauthorized practice is addressed in Local Rule 83.6(m), which states unauthorized practice only occurs where the attorney is disbarred or suspended. Respondent's permission to practice in the Western District has never been the subject to discipline imposed by the Western District.

Western District Rule 83.6 allowed Ms. Sullivant's continued practice. Its reporting requirement is limited to "*public discipline* by any other Court...of any state."

Rule 83.6(b)(1). (*Emphasis added*). The Rule is limited to "orders" and "judgments" of "discipline". Rule 83.6(b)(2) and (3).

While Missouri offers no case on point as to what is discipline, point, we are not without guidance in this area. In *Sitcov v. District of Columbia Bar,* 885 A.2d 289 (D.C. Ct. of Appeals 2005), the issue was whether an automatic suspension for failing to pay bar dues constituted discipline, such that the suspended lawyer must be accorded full due process rights, including notice and an opportunity to be heard, before being suspended. 885 A.2d at 297. The attorney argued that since he was suspended from practicing law he was "disciplined" and, therefore, had to be accorded full due process before such a suspension could occur. *Id.* Although the D.C. Bar rules did not define the term "administrative suspension," the court noted an important difference between the automatic suspension for not paying dues and a disciplinary suspension, concluding that "a suspension for nonpayment of dues is not discipline." *Id.* at 298. The court noted that an attorney disciplined for misconduct faces more harsh consequences than one suspended only for not paying dues, such as the requirement of serving out the suspension, the need to report the suspension to all adverse parties and all courts, and a record that can come back to haunt to attorney in the event of another violation. Since Sitcov's suspension was not discipline, the D. C. Court of Appeals found he was not entitled to full due process procedures. *Id.* at 299. Further, since the suspension was not discipline, the attorney is not required to report notice of the suspension to clients or the courts. *Id.* at 298.

The *Sitcov* court concluded that the distinction between administrative and

disciplinary suspensions is reasonable and that other jurisdiction recognize the distinction as well, citing *In re Oliver*, 89 P.2d 229, 233 (Utah 1939), recently re-affirmed in *In re Sonnenreich*, 86 P.3d at 712, 717-19. The *Sonnenreich* court noted that a suspension for failure to pay dues "casts no reflection upon the member's moral qualifications." *Id.* A suspension for failure to pay attorney dues "has no bearing on [his or her] qualifications, competence or moral character." *People v. Kieser*, 79 N.Y.2d 936, 582 N.Y.S.2d 988, 591 N.E.2d 1174 (1992). Admittedly, failure to file a state tax return, depending on the surrounding circumstances, can be more serious that failure to pay dues. However, before the legislature passed §484.053, RSMo that was the impetus for Rule 5.245, this Court had not drawn a straight line between an attorney's failure to file a state tax return in Missouri and the conclusion that such failure automatically and indisputably meant that an attorney lacks the qualifications, competence or moral character to practice law. A reasonable inference from these facts is that, until the Legislature passed this statute, the Missouri Supreme Court had concluded that an attorney's failure to file a state tax return, without more information than that, did not pose a threat to the public requiring the suspension, particularly an automatic suspension, of an attorney's license.

Additional evidence that a tax suspension was not considered discipline in Missouri at the time of Attorney Sullivant's tax suspension appears in the Reports of the Office of the Chief Disciplinary Counsel to this Court. Beginning in its report dated May 2008 for the year 2007 and continuing through the year 2009, when Attorney Sullivant was reinstated after her tax suspension, the OCDC identified tax suspension reinstatements as "Non-Disciplinary Reinstatements" A67-R – A164-R. For 2007, the

first full year that Rule 5.245 was in place, section I. of the report listed in alphabetical order the names of each attorney who was "disciplined" that year. In Section II, the attorneys' names who had pending "disciplinary" actions at the close of 2007 were listed. Section III was entitled "REINSTATEMENT PROCEEDINGS" with two subsections: "A. DISCIPLINARY MATTERS" and "B. NON-DISCIPLINARY REINSTATEMENTS" (A77-R – A78-R.). Under the "non-disciplinary" reinstatements, the Report discussed lawyers automatically suspended under Rule 6.01(f) for non-payment of annual enrollment fees ***and lawyers automatically suspended for state tax issues under Rule.5.245.*** (Emphasis added). Notably, the names of lawyers suspended only for tax reasons and reinstated from a tax suspension were not listed. OCDC only reported the total number without names. A78-R (p11).

OCDC followed this method of reporting and categorization for the years 2008, the year Attorney Sullivant was tax suspended and for 2009, when she was reinstated. A98-R -A164-R. Interestingly, within 2008 report at A98-R, the OCDC commented on its activity regarding the unauthorized practice of law, stating that that due to its workload and staff resources, "the office limited its efforts to conducting in-depth investigations only where there appeared to be widespread consumer fraud occurring" A116-R p. 18. Attorney Sullivant's name appears nowhere in the 2008 report.

Her name also is not found in the report for 2009. She is not listed in section I for reporting disciplinary actions taken against attorneys. Under Section III titled "REINSTATEMENT PROCEEDINGS" and under "A. DISCIPLINARY MATTERS" a

category appears entitled "Six Disciplined Petitioners Were Reinstated by The Supreme Court." Attorney Sullivant's name does not appear on that list either. A141-R p. 9. On page 10 of this Report A141-R in the next section "B. NON-DISCIPLINARY REINSTATEMENTS". again this category included lawyers automatically suspended for state tax reasons. The report states, "Lawyers may be automatically suspended for state tax issues under Rule 5.245. During 2009, the OCDC investigated and processed 30 tax suspension applications for reinstatement. Twenty-one were reinstated." A142-R. None of the attorneys were named.

These reports demonstrate that the Office of Chief Disciplinary Counsel differentiated between suspensions for unprofessional conduct and suspensions for tax reasons. The reports also show this Court knew of those distinctions made by the OCDC. Attorney Sullivant also notes no evidence in this case that her tax suspension was public, and the OCDC Reports support a conclusion that they were not. These distinctions were in place in 2008 and 2009 when Attorney Sullivant was tax suspended and then reinstated.

If it is opposing counsel's position that a tax suspension is discipline, then Respondent should have been accorded her full due process rights including what is set out in Rule 5.01 through 5.19. Respondent suggests her automatic suspension was not "discipline," because it was issued without following the disciplinary process accorded to those Missouri licensed attorneys who have allegedly engaged in professional misconduct. There can be no argument that an attorney facing disciplinary action in Missouri must be accorded due process which includes advance notice of possible

adverse action and an opportunity to be heard before any adverse action can occur. *In re Phillips,* 767 S.W.2d 16, 18 n. 1 (Mo. banc 1989).

> The minimal requirements of due process include:
>
> Notice and a hearing, or an opportunity to be heard . . .essential. . ., to a decision on the merits . . .and to the deprivation of rights and property...In our system of jurisprudence reasonable notice to a litigant (when there exists even the possibility of action adverse to his interests) is deemed to be of the essence of fairness and justice. Reasonable notice to parties whose interests are at stake in a contemplated order is a prerequisite to the lawful exercise of the court's power. Opportunity for a litigant to present his views as to matters instantly before the court which may affect his rights is the very foundation stone of our procedure.

Gladden v. Kansas City, 411 S.W.2d 228, 230 (Mo. 1967).

The Rules governing Missouri attorneys certainly contemplate and provide for due process protections when an attorney faces discipline. Thus, even in the instance case, there was the need to find probable cause in order to proceed. An information was filed, Respondent was afforded the right to counsel and to challenge hearing officers and a full hearing with rights to call witnesses and to cross-examine adverse witnesses. These steps must occur before any discipline may occur. Conversely, with regard to Rule 5.245, Respondent (and numerous other attorneys) were automatically suspended. No probable cause was found. No information was filed. No right to counsel, No hearing.

Missouri lawyers who are tax suspended also are reinstated retroactively upon compliance with Rule 5.245(c). Rule 5.27(d) and (h). This ease of reinstatement and retroactivity compel the conclusion that Respondent's suspension under Rule 5.245 was not discipline and, thus, she had no duty to report it to Western District federal court. If, on the other hand, the Panel concludes that the tax suspension was discipline, then Respondent's suspension and all others under Rule 5.245 must be deemed invalid because the attorneys were not afforded due process.

For all of the reasons stated herein, Informant has failed to prove by the preponderance of the evidence Respondent engaged in the unauthorized practice of law when she continued representation in federal court during her tax suspension.

C. ATTORNEY SULLIVANT DID NOT VIOLATE RULE 4-3.3. IN HER MAY 28, 2009 CONFERENCE CALL WITH JUDGE ROLDAN.

Informant argues that Attorney Sullivant violated Rule 4-3.3, "Candor Toward The Tribunal" in one of two ways, making a false statement of fact (that she was "ready for trial") or by failing to disclose her tax suspension. The relevant portion of Rule 4-3.3 states as follows:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer

The proceedings below do not demonstrate that Attorney Sullivant made any affirmative false assertions of fact on the May 28, 2009 conference call. Regardless, Sullivant, in retrospect, acknowledges that she should have immediately disclosed the tax

suspension on the phone with the Judge. She acknowledges that her conduct was prejudicial to the administration of justice under Rule 4-8.4(d) because having agreed to the date for trial upon belief that she would be ready for trial and then was not, the Court's schedule was impacted. However, given the surprise nature of the call, and the fact that she did not see her tax suspension as affecting the trial because it was about to be lifted and especially given her efforts to avoid the unauthorized practice of law by delaying a depositions, her conduct in not disclosing the state of her tax suspension does not rise to the level of a 4-3.3 violation. Indeed, Attorney Sullivant's good faith in the situation was demonstrated by her action after the call's conclusion of the call to verify the status of her reinstatement, which turned out to be unexpectedly delayed by vacation in the OCDC office, and then quickly disclosing it to opposing counsel and the Judge.

1. Attorney's Sullivant Conduct Shows No Willful Violation

The rules of professional conduct presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violation. *See, State ex rel. Wallace v. Manton*, 989 S.W.2d 641, 643-44 (Mo. App. S.D., 1999) (referencing paragraph [6] of "Scope" section in Rule of Professional Conduct.)

The basic facts of this case show no intent to deceive or bad faith. Indeed, the facts of this case show Attorney Sullivant immediately taking action to investigate and correct with the Court her assumption and belief that she would be ready to try her case on Monday, June 1, 2009. Given that her participation in the call came unexpectedly, Attorney Sullivant conducted herself by simply getting through the short call with the Judge. These background facts show no willfulness sufficient to find violation of the Rules. Further, what Attorney Sullivant believed in terms of her suspension and what she should do in response to and as a consequence of the suspension are significant here. Missouri Rule 4-10(a) says that "belief or 'believes' denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances." Attorney Sullivant is hopeful the Court throughout its analysis will agree that she acted out of ignorance and at no time acted from dishonest motives and determine discipline accordingly. *See In re Coleman*, 295 S.W.3d 857, 871 (Mo. banc 2009).

When Attorney Sullivant returned a call from the judge's clerk on May 28, 2009, four days before Kemper v. Rodgers was set for a bench trial with Judge Roldan, Attorney Sullivant was surprised to be speaking with the judge himself. Attorney Sullivant testified without contradiction that she received a message on Thursday, May 28, to call Judge Roldan's chambers but was not told the judge wanted to speak to her or that he was calling a conference . A195, A575. Judge Roldan testified he had no knowledge of what message his law clerk left for Attorney Sullivant. A255 . No pretrial conference or any conference was scheduled for May 28 in that case. A161 The judge

testified that the conference was less formal, A157, that his practice was to conduct such conferences without noticing them up and that he did not schedule any pretrial conference in Kemper v. Rodgers. A157.

The charge against Attorney Sullivant rests on the assertion that she "knowingly made a false statement of fact to Judge Roldan concerning her client's readiness for trial." Attorney Sullivant disputes this assertion. Even Judge Roldan testified that he had no recollection of whether the question was asked specifically, "Are you ready for trial? . . . " A158. To prevail on this charge, OCDC must prove by a preponderance of the evidence that Attorney Sullivant by her silence on that phone call she made the implicit representation that she would be ready and able to go to trial on Monday, June 1 **and** that silent representation was false and knowing in that in that Attorney Sullivant knew or should have known she would not be reinstated by that Monday, June 1.

Attorney Sullivant did not know she would not be ready for trial, and she, in fact, believed that she would be ready. The evidence is uncontroverted that Attorney Sullivant's late tax returns were submitted to the Department of Revenue on March 4 A522-523, that personnel at the Supreme Court and the OCDC gave multiple general assurances that they were working to reinstate the tax suspensions as quickly as possible and specific assurances that she had submitted everything needed and that they did not anticipate any delays, that through follow-up Attorney Sullivant was able, after more than six weeks, to finally get the Department of Revenue to issue the certification she needed to be reinstated on May 19, 2009, and on May 20, 2009 she filed her petition for reinstatement. These are the facts Attorney Sullivant knew when she returned the call to

Judge Roldan's office on Thursday, May 28.

After that unexpected phone conference, Attorney Sullivant called again to the OCDC and learned that her application had been assigned to someone who had been on vacation all week and would not return before Monday, June 1. A190 She then called her opposing counsel and told him of her dilemma and attempted to reach Judge Roldan's chambers but was not successful. A579-581. Judge Roldan confirmed in his testimony that Attorney Sullivant undertook efforts through the IT division of the Circuit Court of Jackson County to go back and try to secure emails she sent to his division and that the IT system did not store that type of information. A166-167. Attorney Sullivant had her phone records available at the hearing as proof of her efforts to reach the Judge's chambers by phone. While it is clear that her reinstatement by June 1 was not a certainty, neither was her belief unreasonable that her application would be granted by June 1. Because she had a reasonable belief, she made no knowingly false statement by her silence to Judge Roldan, and a finding under Rule 3.3 is improper.

2. Attorney Sullivant's Failure to Tell Judge Roldan on May 28, 2009 About Her Suspension Did Not Violate Rule 4-3.3(a)(2).

Attorney Sullivant's failure to tell Judge Roldan of her tax suspension is not one contemplated by 4-3.3(a)(2). Missouri's Comment to this rule focuses on the lawyer's role in offering false evidence, the tension between an attorney's obligation to "present the client's case with persuasive force" and the advocate's duty of candor to the tribunal. "Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or vouch for the evidence submitted in a case, the

lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence the lawyer knows to be false." The entire discussion in the Comment makes clear that the law, facts and evidence contemplated by the rule are those that are in issue in specific litigation before the court. Attorney Sullivant's failure to disclose her suspension simply does not fit within the parameters of this rule. Under 4-3.3(a)(2), Attorney Sullivant's failure to speak was not about the law or facts involved in *Kemper v. Rodgers*. What Attorney Sullivant should have told Judge Roldan was a personal fact and, at most, a legal ruling that was personal to her, not to the issues in *Kemper v. Rodgers*.

Informant cites no Missouri case that supports his expansive construction of Rule 4-3.3(a)(2). A review of Missouri cases failed to disclose any reported opinion decided under Rule 4-3.3(a)(2). Comments to the Model Rules of Professional Conduct further explain, "The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case." Annotated Model Rules of Professional Conduct, Ellen J. Bennett, Elizabeth J. Cohen, Martin Whittaker, 7th Edition, 2011, p. 322. A212-R. Cases under Model Rule 4-3.3(a)(2) and its predecessor before 2002, 3.3(a)(3), reveal the proper application of the rule:

• Defense counsel did not tell court of appellate decision against same defendants represented by same office, on same issue involving excessive force and use of police dog. *Massey v. Prince George's County*, 907 F.Supp. 138 (D.Md. 1995)

• Defense counsel failed to inform court of adverse decision of state's highest court in which he was counsel in a nearly identical case. *In re Thonet*, 733 N.E.2d 932

(Ind. 2000).

Counsel found no case under the equivalent of Missouri Rule 4-3.3(a)(2) to support Informant's theory here.

In furtherance of the section above about Attorney Sullivant's alleged indifference and defiance, the reality is that had Attorney Sullivant not made this disclosure to her opposing counsel and Judge Roldan, she most likely would have escaped scrutiny for the unauthorized practice of law from March 3 to June 4, 2009, which forms the basis for many of the OCDC claims against her.. This statement is not offered to suggest that failing to tell Judge Roldan that she could not proceed on June 1 would have been a proper choice. It is offered, instead, to demonstrate that Attorney Sullivant did understand that she could not engage in the authorized practice of law; what she failed to understand was all the ways one can be engaged in unauthorized practice. She understood she could not take depositions in Missouri state court cases. She understood she could not appear in court at a hearing or a trial in a Missouri state court case. That is why she disclosed her suspension to Judge Roldan; she knew she could not appear in court on behalf of her client that morning and conduct the trial.

D. ATTORNEY SULLIVANT'S STATEMENT TO JUDGE FENNER ABOUT ABILITY TO PAY DID NOT VIOLATE HER DUTY UNDER RULE 4-8.4(c) AND (d) BECAUSE IT WAS TRUE AND BECAUSE OCDC HAS NOT PROVEN BY A PREPONDERANCE OF EVIDENCE THAT IT WAS FALSE.

1. Attorney Sullivant's Financial Incapacity Is Clearly Demonstrated by the Record and Acknowledged by Informant.

The representation at issue appears in a Motion filed by Attorney Sullivant in *Arnold v. Chand* on May 1, 2009 in the United States District Court for the Western District of Missouri as follows, " Plaintiffs' counsel is prepared to submit her confidential financial records once the court rules upon counsel's accompanying request to submit the documents in camera to demonstrate counsel's absolute inability to pay the sanctions or fines imposed." A444. Attorney Sullivant made this filing in response to Judge Fenner's Order of March 31, 2009 in which he sanctioned her and her clients for failure to make discovery and determined that defendants were entitled to reasonable expenses in preparing the Motion to Compel, which Judge Fenner found to be $10,988.00. The judge made Attorney Sullivant and her clients jointly and severally liable for the amount and further directed that if the ordered discovery responses were not provided on or before April 15, 2009, an additional fine of $100.00 per day thereafter would be assessed until the ordered discovery was provided. Also in her May 1 filing Attorney Sullivant sought to withdraw because the sanctions against her and her clients created an inherent conflict of interest between them and because the judge also had denied her motion seeking more time to make expert disclosures, Attorney Sullivant noting that "this information has now been reported as a potential claim" to her professional liability carrier. "In addition, neither the undersigned or the Plaintiffs can afford sanctions or fines, a factor the Court could have considered in deciding what, if any, sanctions would be appropriate." A433. Attorney Sullivant also told the court that "due to the financial difficulties now faced by counsel as a result of her exposure to these substantial sanctions, she cannot continue to represent Plaintiffs competently and diligently . . ." A442-444 On May 7, Judge Fenner

granted the Motion to Withdraw and ordered the accrual of the $100 per day sanction terminated on May 1, when Attorney Sullivant filed her motions. "Accordingly, the total amount under this sanction is $1,500. Ms. Sullivant and Plaintiffs are jointly and severally liable for this amount and $10,988 in attorneys' fees previously assessed against them . . ." The total amount owed was $12,488. A423-424.

Here are the uncontroverted facts about Attorney Sullivant's ability to pay on May 1, 2009.

5/1/09 – Attorney Sullivant states in a court filing an inability to pay sanctions of $12,488 and asks for leave to submit her financial records in camera.

5/29/09 – Attorney Sullivant's trust account statement shows that on 4/30/09 the balance was $23.74 and on 5/29/09 the balance was $23.74. A458

6/1/09 – Attorney Sullivant deposits $284,962.07 to her trust account. A459

6/29/09 --Attorney Sullivant deposits to her trust account a check dated 6/25/09 to her from attorney Lynne Bratcher for $99,458.51, representing disputed attorneys in *Wallace v. DTG*. A457**.**

6/30/09 – Attorney Sullivant's trust account statement shows a balance of $23.74 as of 5/29/09; a deposit of $284,962.07 on 6/1/09, a deposit of $99, 458.51 on 6/29/09 and total credits for June of $391,707.09 and total debits for June of $295,231.38, leaving a balance on 6/30/09 of $96,579.45. A456-460.

7/31/09 – Attorney Sullivant's trust account statement shows a balance of $96,579.45 on 6/30; a single credit to the account of $69.86 in interest, and total debits for the month of $46, 779.61 and a 7/31 balance of $49,869.70. A464.

8/31/09 – Attorney Sullivant's trust account statement shows a starting balance of $49, 869.70; total credits of $43.16, and total debits of $21,032.22 for an ending balance of $28,880. A467

9/30/09 – Attorney Sullivant's trust account statement shows total credits of $22.12 and total debits of $10,998.16 with an ending balance on 9/30 of $17,903.65. A470

10/30/09 – Attorney Sullivant's trust account statement shows total credits of $13.33; total debits of $5,021.17 and 10/30 balance of $12,895.81. A472

11/30/09 – Attorney Sullivant's trust account statement shows total credits of $8.67, total debits of $5,630.33 and a 10/30 balance of $7,266.15. A473

12/31/09 – Attorney Sullivant's trust account statement shows total credits of $3.59, total debits of $6,170.60 and a 12/30/09 balance of $1,099.14. A474

1/29/2010 – Attorney Sullivant's trust account statement shows total credits of $0.47, total debits of $1,251.94 and a 1/30 balance of negative $152.33. A475

The $284,000 deposit stemmed from a jury verdict in Jean Dunn's favor in November 2007. A206, 208. A journal entry on the verdict was not entered until 15 months later, February 12, 2009. A206. Attorney Sullivant received no proceeds from *Dunn* until almost four months after that. When the proceeds were received, she paid several attorneys who had worked on the case and had an interest in the proceeds "thousands and thousands of dollars" as well as payments to medical providers and a paralegal owed money for his work on the case.. A208, 211, 212; A459-463.

On April 17, 2009, the judgment in the District Court in the Wallace case was

affirmed in part and remanded in accordance with the opinion of the Court. A207. That decision meant that a portion of attorneys' fees had been awarded to plaintiff Wallace, not to Attorney Sullivant specifically, and the attorneys' fees in that case were the subject of the dispute between counsel for plaintiffs. A207.

Attorney Sullivant believed every consultant and expert who had worked on the case had a direct interest or claim to the payment that was deposited into her trust account. A210.

Terri Wallace became Attorney Sullivant's client in 2003 and her case was not affirmed on appeal until 2008. A227

Attorney Sullivant had no idea at the time she made her statement to Judge Fenner as to when the Wallace appeal would be resolved. A228. Attorney Sullivant did know a dispute was ongoing about attorneys' fees and she didn't know how or when that would be resolved. A228.

With reference to the trust account bank statements from May 2009 through January 2010 and their pertinence to this charge, see section E. regarding the charge of commingled funds.

Attorney Sullivant did not set aside a portion of her attorney's fees to satisfy the *Arnold* sanction because she took a list of bills and went in "chronographical" order of who she owed and paid every bill that was in her possession. A213. In addition, the sanction imposed was appealed and not decided until December 14, 2010. A425.

Attorney Sullivant did not put money in her trust account to try to hide it from a creditor or Judge Fenner and Pat Hulla. A214.

Finances in General At the time Attorney Sullivant's husband started a new job in Washington, D.C. in early 2007, the intent was that his assignment would last 18 to 24 months, and then he would return to Kansas City, where his employer is headquartered. A246.

Mr. Sullivant testified that at the end of 2007, "several bad things were occurring," such as purchasing a house in Virginia but learning long distance that their Missouri home had two to three feet of water standing in it and having to take that house off the market for more than a year; and repairing about $40,000 worth of damage to it. A246-247. During this time the Sullivants had two mortgage payments and one income they could count on twice a month. A247.

Also during this time, with regard to Attorney Sullivant's contingency fee practice, "a lot of money was going out but not much money (was) coming in." A247. In 2008, the Sullivants incurred additional expense because of travel between Washington, D.C. and for lodging in Kansas City. Attorney Sullivant also underwent surgery to remove a cyst on her uterus. A248

During the suspension from March to June 2009, the Sullivants' finances were "being dwindled down very quickly," the downturn in the economy had reduced the income Mr. Sullivant anticipated when he moved to Washington, D.C. and in Attorney Sullivant's practice "it was a pretty intensive payout of covering expert fees and deposition fees and all that." A250.

The recession stopped Mr. Sullivant's employer's growth and impacted the time frame the Sullivants were supposed to be in Washington. A250.

In addition, the Sullivants also were victims of fraudulent purchases made out of their personal debit account and unauthorized checks on the firm operating account were written. A250, 251, 257.

In the last 10 years, the Sullivants have not had to pay additional taxes with their returns because Mr. Sullivant always drew out more of his check during the year and at the end of the year, they never had to pay more. A251

When Mr. Sullivant postponed filing their 2007 returns, the state of Virginia thought they owed Virginia taxes and levied about $20,000 from the Sullivants' bank account.A251. During this time the IRS also levied on the Sullivants' accounts and took nearly $19,000. A251

Once Mr. Sullivant filed the tax return, the Sullivants received a check back for the $19,000, but that amount was not available to the Sullivants because it had to be applied to the 2008 taxes. A251

In June 2009, not long after Judge Fenner entered the $12, 488 a sanction against Attorney Sullivant and her clients, the Sullivants "weren't even making house payments so there was no money at all for anything." They weren't making any kind of payments during that time. A252

With regard to a $6,000 trust account check to Mr. Sullivant, he believes he probably was owed many times that amount. A235

During this time frame, the Sullivants also had difficulty paying every house payment and as a result, they received a foreclosure notice. A251

To address the foreclosure, the Sullivants borrowed as much as they could against

a 401(k), which they previously had borrowed against. A251-252

Mr. Sullivant testified in July 2011 that the difference between how they handled their finances in the first 13 years of marriage as compared to the last three years is "It's become a you-can't-get-blood-out-of-a-turnip kind of situation and we made decisions that at the time seemed correct, and in looking back and not knowing what was coming down the line, we weren't so smart and we're still doing all we can to get out of it." A252

The foreclosure on their house was June 9 or 10, 2011. A252

These many facts are uncontroverted and demonstrate that Attorney Sullivant, personally and professionally, was swimming in debt from 2007 through the date of her last hearing in this matter on July 12, 2011. (Since that time, Mr. Sullivant lost his job and was unemployed for some months.) The extent of the Sullivants' debt was confirmed by a third witness, Molly Crews, a friend of Attorney Sullivant's since grade school and a licensed professional counselor. On July 12, 2011 Ms. Crews testified that during the last four years, Attorney Sullivant had disclosed a number of life stressors, such as financial problems including problems with taxes, money management, mortgages, professional fees, rent in two places and travel expense. A272. During the time of her suspension, Attorney Sullivant disclosed to Ms. Crews that her bank accounts had been levied and money taken from the family's savings and checking accounts, and that the family had gone four or five months without a single penny coming into the household. A273 .

Informant's only attempt to attack this evidence was his question to Attorney

Sullivant about the cost of the house in Virgina that she does not own and had nothing to do with purchasing. A630. Later at the July hearing , Informant returned to this irrelevant topic by questioning Mr. Sullivant about the price of the house he purchased in Virgina. These questions did nothing to establish the verity of the statement to Judge Fenner but appeared to be aimed at trying to provoke Attorney Sullivant and cast her in a negative light.

Informant's evidence that Attorney Sullivant could afford to pay Judge Fenner's sanction is a metaphorical balance sheet that only includes "assets" during a small period of time. Unanswered are questions about what debts Attorney Sullivant owed professionally and personally; how much of the June deposits Attorney Sullivant actually was entitled to; did her law firm actually show a profit for 2007, 2008, 2009, 2010, 2011; what income did she report for the pertinent years; did her firm have profit and loss statements and, if so, what did they show; and on and on. Informant offered evidence to suggest he had tried to obtain information to enable him to learn Attorney Sullivant's ability to pay. Informant's charge under in his Count VIII of the Amended Information (A17-19) of violations of Rule 4-8.4(c) and (d) must fail because of insufficient evidence.

2. Informant Offers No Definition by Which to Determine What a Person Can Afford.

Informant does not suggest a framework for a determination of one's ability to pay. Does it mean a person must be legally bankrupt? Does it mean that a person must pay sanctions before paying the lease on the office? Does it mean that sanctions must be paid before a person provides food and shelter for her family? Does it mean that a person

must forego medical care? Informant offers no guide. "Ability to pay" may be an opinion or subjective statement, but if it is capable of absolute proof in this instance, the party with the burden of proof must establish what ability to pay means and how it can be determined. Informant has done neither. Instead, his position appears to be that no matter Attorney Sullivant's professional and personal obligations and debts. any money she received after the date of the sanction, for any reason, shows she had the ability to pay. Informant claims that because Attorney Sullivant received money one to two months after her statement to Judge Fenner, related to two cases she had been working on for years, and because she should have known that she would be paid on those cases someday, she lied to Judge Fenner on May 1 and failed to correct her lie thereafter every time she had a dime to her name. No accounting rules or common logic would permit that conclusion under the uncontroverted facts here.

Also lacking is the argument that Attorney Sullivant's statement on May 1 was a lie because she should have known she would be getting the *Dunn* and *Wallace* awards at any minute. Given the longevity of both cases, according to uncontroverted facts, Attorney Sullivant would have been foolhardy to count those chickens before they hatched. Common experience in the practice of law also suggests that predicting when all motions, all appeals, all negotiations and all disputes will be resolved, resulting in actual money in hand, is a risky business. Similarly, few would find sound the practice of making financial decisions based on predicting when courts will rule on all motions and all appeals.

Finally, while Informant would have the court find that Attorney Sullivant had the

ability to pay the totality of the $12,488 sanction, he simultaneously embraces the truth of her "severe financial difficulties" which he claims are part of a pattern that violates Rule 4-1.1 Competence. *See* I.(G) Points Relied On, Informant's Brief.

The record before this court cannot support a finding that the statement to Judge Fenner violated Rule 4-8.4(c) and (d) and certainly cannot meet the preponderance of the evidence standard.

3. This Court Should Not Consider Informant's Claim that Attorney Sullivant's Non-Payment of the Sanctions Is Willful Disobedience Under Rule 4-3.4(c) Because Informant Neither Charged Nor Proved That Claim

I(F) Point Relied On of Informant's brief seeks to have this Court uphold a new charge against Attorney Sullivant that was never asserted below. Specifically, Informant proceeded below on six of nine counts against Attorney Sullivant. None of them asserted that Attorney's non-payment of the sanction in federal court violated Rule 4-3.4 (c) Fairness to Opposing Party and Counsel. Count VIII is the only count that dealt with the sanction award and it claimed that Attorney Sullivant's claim of inability to pay the $12,500 sanction and her use of the trust account to hold personal funds without satisfying the sanction constituted a violation of Rule 4- 8.4 (c) conduct involving dishonesty, fraud, deceit or misrepresentation and of Rule 4-8.4(d) conduct prejudicial to the administration of justice. No mention of Rule 4-3.4 appears anywhere in the Amended Information. A3-22.

This Court held in *In re Smith*, 749 S.W.2d 408, 414 (banc 1988) that the attorney there "is neither required nor expected to defend against charges not contained in the

information."

Even if OCDC could produce a preponderance of evidence to prove a violation of Rule 4-3.4 (c), this Court should not consider the claim because, while OCDC had many months, even years, to investigate and prosecute claims against Attorney Sullivant and even amended its information once on March 12, 2010, OCDC never charged a violation of Rule 4-3.4(c). Instead, for the first time, Informant slips this new charge into its brief on appeal here.

This is one of many efforts perceived by Attorney Sullivant as attempts to gain unfair advantage over her and to place irrelevant, inflammatory and prejudicial information before the hearing panel and this court to improperly bias the fact finders. *See* section G below for a fuller discussion of these efforts and how they led to a process that lacked fundamental fairness.

For the reasons set forth in the section above, the evidence is substantially insufficient to prove an ability to pay. Without demonstrating by a preponderance of the evidence what "an ability to pay" means and that Attorney Sullivant met that definition, it is impossible to prove that Attorney Sullivant's statement was false and that her non-payment of the sanction was "a willful failure." If none of that can be proven, then Informant cannot prove that she violated Rule 4-3.4 (c) by knowingly disobeying "an obligation under the rules of the tribunal", that she engaged in dishonesty, fraud, deceit or misrepresentation under Rule 4-8.4 (c) or that such conduct was prejudicial to the administration of justice under Rule 4-8.4 (d).

E. COMMINGLING OF FUNDS BY ATTORNEY SULLIVANT WAS INADVERTENT AND UNINTENTIONAL.

Rule 4-1.15 provides, in pertinent part:

> (f) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as provided in this Rule 4-1.15 or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or *third person* any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property. (Emphasis added.)

Although with no intent to violate Rule 4-1.15, but with an inadequate understanding of what constitutes commingling, Attorney Sullivant deposited and kept attorneys' fees in her trust account along with funds due to clients and third parties beginning in June 2009. Attorney Sullivant should have transferred her attorneys' fees to her operating account and kept them separate from funds owed to clients. This conduct was not in strict compliance with Rule 4-1.15. Attorney Sullivant understands she made this mistake, and that the safekeeping of client funds and property is of utmost importance. In her December 2010 deposition Attorney Sullivant testified she did recognize need for improvement in her trust account handling methods and that is one of the reasons why in the six to nine months, she attended continuing legal education seminars that addressed a number of these issues. A640

Attorney Sullivant would respectfully ask this Court to note that, throughout all of the actions which are the subject of this matter, no client was injured; no client funds were diverted; and none of the acts claimed were intentional on Attorney Sullivant's part.

Attorney Sullivant's Trust Account Experience

Attorney Sullivant was a prosecutor for a number of years before she entered private practice. As a prosecutor she had no experience with trust accounts and in private practice; she did not have clients by whom she was paid a retainer for hourly work. A641, l. 1- 8.

When she started her private practice, she opened a trust account in keeping with the rules. She had had no occasion to use her trust account for approximately one year. A641, l. 1- 8. [2]

Once the events took place which are the subject of these proceedings, Attorney Sullivant attended several hours of CLE's directly related to trust account management.

Dunn and Wallace Trust Deposits

[2] Informant has argued a more severe discipline is warranted because Attorney Sullivant had registered for and did attend Ethics School, of which a portion of the instruction is directed to trust account management. However, as Attorney Sullivant testified A201, she did register and attend a portion of the program but was not able to attend all of it. This fact is verified by her CLE reporting in which she included only the hours which she was present and excluded the hours she was not in attendance, including the segment related to trust account management..

The trust account deposit from the Jean Dunn case occurred on June 1, 2009 in the amount of $284,000. A459. Several contract attorneys and co-counsel had worked on the Dunn case had an interest in the Dunn proceeds as well as bills owed to medical providers. A208, 211, 458. Wes Sechtem, was a paralegal who provided services on the Dunn case. A211

On April 17, 2009, the judgment in the District Court in the Wallace case was affirmed in part and remanded in accordance with the opinion of the Court. A209 That decision meant that a portion of attorneys' fees had been awarded to plaintiff Wallace, but not to Attorney Sullivant specifically, and the attorneys' fees in that case were the subject of the dispute between co-counsel for plaintiffs, as referenced earlier in the hearing. A207

Attorney Sullivant received a check dated June 25, 2009 in the *Wallace* case and deposited that check for $99,458.52 into her trust account on June 29, 2009. A208, 460. Because of an ongoing dispute between attorneys, the Court ordered the proceeds be deposited into the Court if the parties could not reach an agreement on where the money should remain until the dispute was resolved. A209.

Attorney Sullivant's Understanding of Payments to Third-Party Creditors in Dunn and Wallace

From the Wallace and Dunn proceeds, Attorney Sullivant paid all creditors related to costs incurred in the prosecution of these two cases. These payments were made directly from her trust account to third party creditors who could have an interest in the proceeds. These payments included consultant fees, expert witness fees, contract

attorneys and other related expenses. Attorney Sullivant paid paralegal Wes Sechtem . A211 Attorney Sullivant made payment to co-counsel as a third party payment. A208, 211, 458. As Attorney Sullivant testified, "Nothing was paid for by the clients. Depositions had to be financed; consultants had to be paid, attorneys to be paid." A621

Attorney Sullivant believed every consultant and expert who had worked on the *Wallace* matter had a direct interest or claim to the *Wallace* payment that was deposited into her trust account. A210 Attorney Sullivant understood them to be third parties that could potentially have a stake in the money, and she wanted to make every effort to make sure they were paid." A210 She also believes that the rules regulating trust accounts required her to make payments directly from her trust account to these interested third parties. A212.

Attorney Sullivant's Understanding Related to Payments to Other Third Party Creditors

In addition to the direct third party creditors on Wallace and Dunn, Attorney Sullivant believed every creditor was a third party creditor who could potentially have an interest in the funds from the Wallace and Dunn funds. Based on her reading of the rules, she concluded that she was required to make payments directly from her trust account to these third parties as well. A212

Attorney Sullivant testified, "I certainly felt like I needed to make sure everyone got paid. I understood them to be third parties that could potentially have a stake in the money, and I certainly wanted to make every effort to make sure they were paid." A210. A210. Attorney Sullivant testified that her understanding of the rule on safekeeping of trust account funds, was that if there were third parties who potentially were owed money

on a case, "then you should ensure payment for them. From reading the rule and what I was supposed to do, I believed I should pay them before I paid myself. I believed that – I believed that was what I was supposed to do." A212, 608

Attorney Sullivant's trust account bank statements from May 2009 through January 2010, and her testimony that "every account that was with my office I paid off." establish that her actions ensured payment to third parties owed on a case before she withdrew any earned fees. A212 (p248 - 249, l 1-3).

Her actions were based upon her interpretations and beliefs related to trust account rules. Attorney Sullivant did not use her business operating account at this time to pay business expenses because creditors had been calling her for their money and she wanted to get them paid "the fastest way [she] could." A213 Asked why she didn't just transfer all the money into her operating account and pay off all these items from there, Attorney Sullivant testified she believed they were proper third parties and paid them immediately." A619. Asked if it would have been just as quick to transfer the money to her trust account after the funds had cleared, Attorney Sullivant said, "[She] don't know, maybe. [She] really didn't think about that at the time. . . . At the time [she] believed that these people had a vested interest in the case that they had financed, and [she] believed that they needed to be paid immediately before [she] was paid." A620

When the Dunn and Wallace payments were deposited, Attorney Sullivant did not know if she would even have any funds left to receive any fees because she believed all creditors to be third party creditors. After all third parties' interest had been paid, she transferred her fees out of the trust into her operating account." A619 .

Personal Expenses

Informant suggests that Attorney Sullivant's used the trust account for "personal" expenses, implying that she had improperly used the trust account. Any and all uses of the trust account funds by Attorney Sullivant were strictly for expenses related to Wallace and Dunn and for payment to third party creditors. The payments from the trust account were legitimate expenses and not for her personal finances, such as her rent, her law firm's rent, her telephone bill or for monthly expenses. A238 .

Payment to Spouse as Third Party Creditor

For approximately five years, Attorney Sullivant borrowed funds from her spouse, Scott Sullivant in order to finance the litigation expenses related to the Dunn and Wallace cases. When these cases concluded, Attorney Sullivant wrote a check out of the trust account to repay the loan from her husband. A212 Informant characterized this was an improper and "personal" use of trust account proceeds. It was not.

The loans made by Attorney Sullivant to Mr. Sullivant were documented, directly related to the Wallace and Dunn cases and other related cases. Mr. Sullivant was, as were all others paid, a legitimate third party creditor who was owed sums from the proceeds of the two matters. Prior to any loans from her spouse, he and Attorney Sullivant conferred with an attorney/ financial consultant on the faculty of the Bloch Business School. He advised that if her husband was going to loan her funds for litigation expenses, the loans should be properly documented and then Mr. Sullivant would stand in the same stead as any other creditor; to wit, "just like the Bank of America." A212. See also Scott Sullivant's testimony at A247, 248. With regard to the $6,000 payment from the trust

account to Mr. Sullivant, he testified at the hearing below that he probably was owed many times that amount. A255

No impropriety exists in Attorney Sullivant's repayment to her spouse/creditor.

Chase Payment

Another payment inquired about the June 8th check to Chase Epay. Attorney Sullivant testified that this payment was directly related to Wallace and Dunn. Rather than acquiring a bank loan, she elected to utilize several credit card loans to finance her practice for the five or six years while Wallace and Dunn were pending. A608, A609, A610

She stated that she did not know if Chase had a direct interest in proceeds in her trust account. But, again, her understanding of the trust account rule regarding money owed to third parties was intended to apply to all third parties. She was intent on assuring that these third parties were properly paid. A608

Most importantly, at no time were Attorney Sullivant's clients' funds at risk or mishandled. All clients received all the funds owed them in a timely manner.

Insufficient Funds in Trust Account

Attorney Sullivant's trust account was overdrawn on three occasions. On another occasion, while no overdraft occurred, a check she wrote could not clear her trust account because her trust account balance was $4,685 and the check presented was for $7,200. None of these events involved misuse or misappropriation of client funds. None caused any injury, financial or otherwise, to any client. All these occasions were the results of mistakes, some of which Attorney Sullivant acknowledges she could have and should

have avoided.

Issue 1

On June 24, 2009, a Wednesday, a check on Attorney Sullivant's trust account for $7,200 was presented for payment. The trust account had a balance of $4,685. A33. This check was not paid on first presentment because Ms. Sullivant's bank put a hold on funds for eleven days and she did not take that into account when she paid off all the bills. The $7,200 check was re-presented and honored five days later on Monday, June 29, after the eleven days had lapsed Sullivant A633.

Issue 2

The trust account statement for January 2010 showed a negative balance of $88.45 on January 27 and an ending balance three days later of $152.80. A48. In this instance Attorney Sullivant had directed her bank to make two transfers from two separate accounts. Rather than following this directive, and in error, the bank made both transfers from the trust account. A633 (l. 8-25). This resulted in the trust account negative balance.

Attorney Sullivant recognized the bank error and notified the bank in writing of its error prior to any knowledge by her of the negative trust account balance or of any notice from the bank. A634 l, 1-6.

Issue 3

The check that caused the overdraft was to pay a municipal court fine for a client. Attorney Sullivant had asked for assistance from an attorney with whom she shared office space in Independence. A634. Another check to the US Postal Service for $64.35

was presented on January 27 that increased the overdraft. Attorney Sullivant had left checks signed by her with this attorney for specific reasons. The attorney mistakenly used a trust account check from Attorney Sullivant for pay the municipal fine of $175 for her client rather than an operating account check, contrary to her directions to him. This resulted in the original overdraft. *Id.* A635 (l. 7-12).

Issue 4.

In September 2010 the trust account became overdrawn again due to a deposit made by one of Attorney Sullivant's clients, Brian Harrison. A635 (l. 23-25); A636 (l. 1- 25). Attorney Sullivant had settled a claim for Mr. Harrison. He was in dire need of money and wanted it as soon as possible. Attorney Sullivant had never sent a client a check to deposit in her trust account before, but she did this time to try to accommodate her client, believing it would result in the client more quickly obtaining his settlement proceeds. A639

Attorney Sullivant properly endorsed the settlement check to be payable to her trust account as shown at A479,637. She believed that when Mr. Harrison made the deposit of the $3,800 check it would be credited to her trust account, consistent with her endorsement on the back of the check. A638 However, the bank deposited the endorsed check into her operating account, rather than as endorsed to her trust account.

Without knowing about the bank's mistake, Attorney Sullivant proceeded to write two checks from her trust account based on that deposit, one to herself and one to Mr. Harrison for his share of the settlement proceeds. A639 By the time of Attorney Sullivant's December 2010 deposition. Mr. Harrison had been paid his settlement

proceeds in full. A639(.5-7).

Acknowledgement by Attorney Sullivant

Again, although these overdrafts were not the result of misappropriation of client funds, Attorney Sullivant recognizes some of these instances could have been avoided. The June 24, 2009 event resulted because Attorney Sullivant failed to anticipate a bank hold on funds for five days. The January 2010 event resulted from Attorney Sullivant entrusting signed trust account checks to another attorney whose practice is separate from hers.

While the other attorney's actions did not breach Attorney Sullivant's trust by using her trust checks for improper purposes, he did fail to pay the fine from operating account, as Ms. Sullivant had directed; and, for that, she is ultimately responsible. The September 2010 event also resulted because she entrusted a deposit to the trust account to a client. The bank error caused the check to be deposited into her operating account, rather than as endorsed to her trust account, but Attorney Sullivant must accept that she is ultimately responsible for the use of her trust account.

She acknowledges when she entrusts authority to use trust checks or make trust deposits, she not only runs the risk that mistakes will be made but also, that client funds could be diverted, leaving her financially responsible and in violation of Rule 4-1.15. Attorney Sullivant acknowledged at the June 22, 2011 hearing that she understood that the trust account issues are problematic and should not have occurred. A219 . Attorney Sullivant is prepared to accept this Court's judgment regarding the trust account events.

In her deposition, Attorney Sullivant testified that she did recognize the need for improvement in her trust account handling methods. In an effort to assure she correctly understands all rules related to trust account rules and procedures, she has attended and completed continuing legal education courses directly and specifically related to trust account management. She attend these continuing legal education courses prior to her deposition. A640, 641. She asks that these efforts be considered in mitigation. Attorney Sullivant also respectfully requests that this Court consider her lack of experience; her lack of any intentional wrongdoing; the fact that no client funds were misappropriated; her sincere remorse; and, the actions she took to quickly correct any deficiencies.

THE FACTS DO NOT SHOW ATTORNEY SULLIVANT LACKS THE LEGAL KNOWLEDGE, SKILL, THOROUGHNESS AND PREPARATION REASONABLY NECESSARY TO REPRESENT HER CLIENTS

Informant charged in the Count IX of the Amended Information that Attorney Sullivant lacks competence to represent clients for seven specific reasons, discussed below:

Malpractice Claims

Informant argues Respondent's two malpractice claims demonstrate a violation of the Rules of Professional Conduct, specifically Rule 4-1.1, which states "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." In making this argument, Informant equates existence of legal malpractice claims with incompetence in representation. To further this claim, Informant

includes a new uncharged claim that one case's settlement for an undisclosed sum proves Respondent failed to provide competent representation.

Informant has failed to provide the Court any conduct engaged in by Respondent that would equal incompetent representation. The record contains no testimony, documents or findings from the malpractice lawsuits to show what they were about or what conduct allegedly fell below the standard of care. Without more, the fact finder is left to ponder the many unanswered questions raised by this claim:

- What were the allegations in the two filed suits?
- Were any of the allegations true?
- If some were true, do they prove incompetence under 4-1.1 and if so, how?
- If a suit for legal malpractice is evidence of incompetence under Rule 4-1.1, why doesn't this Court require every attorney licensed by Missouri to report to it every time a legal malpractice suit is filed against him or her?
- Is this Court ready to change the law to declare that every actual finding of legal malpractice means that the attorney who was sued is incompetent and that upon every such finding, a disciplinary proceeding will soon follow?

While these questions suggest possible safeguards for the general public, they are not a part of the current requirements of this state. Informant's claim about the malpractice claims and settlement invite a radical shift for this Court that should be declined. These allegations do not prove that Respondent has engaged in activity that creates a violation under Rule 4-1.1.

On a similar quest, Informant tries to argue acknowledging another possible claim

for which an attorney gives notice to her insurer demonstrates a violation of Rule 4-1.1, whereby a lawyer must provide competent representation. Here, the facts indicate Attorney Sullivant recognized a *potential* claim against her by her clients in *Arnold v. Chand* and sought to withdraw from representation on that basis and ~~then~~ reported the possible claim to her professional liability carrier. Many would argue Respondent's conduct is precisely the kind of conduct this Court would encourage -- an appropriate evaluation by an attorney of a potential claim followed by remedial action.

Respondent points to the obvious here -- acknowledging a possible claim is not the same as admitting malpractice or admitting a violation of the Rules of Professional Conduct. Putting the liability carrier on notice of a possible claim also is not an admission of malpractice or a violation of the Rules. An attorney's failure to recognize the inherent conflict between herself and her clients under these circumstances could lead to a much bigger problem for the clients and the attorney as could failure to report a possible claim. Attorney Sullivant's actions in this respect not only are **not** below the standard of care for an attorney and **not** a violation of the Rules of Professional Conduct, but they reflect conduct this Court should embrace.

Overall, these claims seem to support the conclusion that in Informant's mind, Attorney Sullivant could never do any right. In response, Attorney Sullivant argues the allegations as charged by Informant are unsustainable under the facts and the law and should be rejected. Attorney Sullivant further submits that any evidence supporting this allegation falls far short of the preponderance of the evidence required and accordingly the charge should be rejected.

Professional Liability Insurance

Informant also suggests to this Court that Respondent has become unfit to practice law because she no longer maintains malpractice insurance. This alleged violation apparently stems from Respondent's call to the Office of Chief Disciplinary Office, advising that her carrier had terminated her insurance as a result of two claims and seeking direction and referrals. A234.

States differ in how they view the necessity of malpractice insurance. According to the American Bar Association Standing Committee on Client Protection's report entitled State Implementation of ABA *Model Court Rule on Insurance Disclosure, August 9, 2011* (A1-R – A12-R), seven states require attorneys to disclose directly to their clients whether they carry malpractice insurance. *Id.* at 1. Seventeen states require attorneys to disclose on their annual registration statement if they are covered by malpractice insurance and to notify the court within 30 days if coverage lapses. *Id.* at 1. Thirteen states make such information available to the public through various means. A1-R - A12-R. Six states have decided specifically not to adopt the Model Rule. A1-R – A12-R. Missouri is not on any of those lists.

Despite this fact, Informant urges that Attorney Sullivant's lack of insurance proves she is not competent to represent clients under Rule 4-1.1. Informant adds to this claim for the first time in his brief that in the absence of insurance, Attorney Sullivant "poses an even greater risk to the public."

Informant has failed to establish that Attorney Sullivant poses any risk to the public. Moreover, Informant attempts to hold Attorney Sullivant to a standard that has

never been adopted by this court – that every lawyer licensed in the state of Missouri must maintain professional liability insurance. Attorney Sullivant respectfully requests this Court to reject this claim.

Financial Difficulties

To support the claim Respondent's financial difficulties are getting in the way of her providing representation competently and diligently, Informant points to evidence Respondent withdrew from three cases in five months.

Respondent submits this evidence is insufficient to establish this claim. In addition, there is no suggestion in the record that Respondent's financial difficulties in any way led to the trust account issues. While Attorney Sullivant does not minimize the importance of maintaining client property in her trust account, the errors she committed did not stem from her financial difficulties and did not affect her ability to provide adequate representation to her clients.

Medical Condition

In Count IX of the Amended Information Informant also asserted Respondent violated Rule 4-1.1 when she moved to withdraw from a case, claiming a medical condition may have contributed to her failure to designate experts and provide discovery in a timely manner. It is unclear if Informant has abandoned this claim because he offered no further evidence at the hearing to substantiate this claim. This apparent decision may reflect the realization that Informant's strenuous objection at the hearing below to any evidence related to Attorney Sullivant's medical or mental condition would be undermined by trying to make her medical condition evidence of lack of competence

under Rule 4-1.1. Regardless, insufficient proof is offered to establish Respondent's withdrawal was conduct in violation of Rule 4-1.1.

Virginia Residence

Informant suggests that by living in Virginia, Respondent has been unable to manage her Missouri law practice, resulting in violations of the rules of professional conduct including her inability to provide competent representation. In addition, Informant argues Respondent's out-of-state residency has prejudiced the administration of justice.

Informant relied on the initial fact pled – Virginia residency alone –but on appeal has added a new list of new allegations claimed to satisfy his burden of proof:

- She had no office assistants
- She did not have "Appt. only " on letterhead
- She used a disbarred lawyer for paralegal services
- She allowed the disbarred lawyer to sign her name with her knowledge and authority
- Three trust account checks bounced.
- She allowed 80-year-old mother-in-law to hold signed check from her trust account
- She allowed her office assistant to embezzle money from her
- She allowed an office assistant opportunity to misuse her trust account
- She did not have a proper registered agent within the state of Missouri

Even considering these new uncharged claims, none demonstrates in what fashion Respondent's ability to provide competent and diligent representation has been compromised. In addition, no evidence is cited as to how these claims serve to be prejudicial to the administration of justice.

Attorney Sullivant has conceded it has not been an easy road trying to maintain her practice while she was temporarily relocated to Virginia. Doing so posed a number of challenges financially and logistically. These problems have been problems incurred by Respondent personally, not problems passed on to her clients or the general Missouri Bar at large. As such, Respondent argues these challenges do not create the necessary proof by a preponderance of the evidence to support that Respondent's ability to practice law competently and diligently has been compromised. The place of residence and absence of support staff do not make Attorney Sullivant incompetent to represent clients under Rule 4-1.1.

Informant offers no evidence of client dissatisfaction due to Attorney Sullivant's location in Virginia or to having no office staff. While it is possible that these circumstances could affect the quality of representation, Informant has failed to offer the evidence required to show that these factors have affected the quality of representation required under Rule 4-1.1.

The most telling evidence on this issue came from Respondent's client, Caleb Horner, who testified at the disciplinary hearing. He said he became Respondent's ~~her~~ client about June 2008 following his employment termination. A260, A263. He testified that Attorney Sullivant told him she was traveling back and forth to Washington,

and he does not think his representation has been compromised because she wasn't in Kansas City. A260, 261. More often than not, Mr. Horner testified that he met Attorney Sullivant outside of her office than in, A261, and that they communicate frequently by text message and email. A261. He further confirmed that probably over a year before the July 2011 hearing Attorney Sullivant told him she was limiting the number of cases she was taking and declined to take on representation of a friend of his because of that. A261, 262. Mr. Horner stated that he is satisfied with the work Attorney Sullivant has done for him. A262 (p. 436, l. 10-13). He also noted that Attorney Sullivant has agreed to represent him for free in other cases where he is a defendant and couldn't afford to hire an attorney for these cases. A266

In addition, Mr. Horner testified that whenever Attorney Sullivant asked a colleague to cover a court appearance for her with regard to Mr. Horner's case, she always consulted with Mr. Horner in advance of the event. A262 According to Mr. Horner, he believed that the colleague who appeared in lieu of Attorney Sullivant on his case was a separate attorney and not part of the Sullivant Law Firm. A263

In addition, Informant has failed to take into account that after being presented with various limitations in her continued practice, Respondent made the conscious decision to downsize her caseload and has not taken any new cases in more than a year. She reduced that caseload to approximately 12 cases in the summer of 2011.

As a result of the foregoing, Informant has failed to provide the necessary proof to establish Attorney Sullivant's location outside Missouri has affected her ability to

provide competent representation to her clients or has served to impede the administration of justice.

Informant may try to argue he has produced proof of a violation of competence by pointing to the laundry list of new claims he has added for the first time in his brief, including:

- Respondent caused a voluntary dismissal in two cases.
- Respondent caused a dismissal in Dunn
- Respondent did not take an opposing party's deposition in Kemper v. Rodgers.
- She had and conceded difficulty in preparing for disciplinary hearing.
- She had the wrong date for the continued hearing.

The unfairness of prosecuting and adjudicating misconduct on events that were never charged before Informant submitted this brief in this case, as discussed earlier, taints these allegations as well, and Respondent renews those objections now. Respondent point outs out she had no meaningful opportunity to consider these new claims before the hearing below and prepare to respond by refreshing her recollection of events or bringing witnesses and documents so she could answer questions then and now in connection with the new allegations raised for the first time on appeal. Because these allegations violate the basic premise of due process to afford Respondent an opportunity to be advised before trial of the claims against her so that she may prepare to meet them, this Court should not consider them.

Totality of the circumstance

Although Informant has not proven any of the individual claims in Count IX of the Amended Information or the new claims he attempts to insert in his Brief, he asks the court to consider the claims as a whole and somehow conclude that the sum is greater than its parts. Informant cites no case for the proposition that specific discrete instances, none of which violates the Rules of Professional Conduct, can be aggregated to become a violation. Attorney Sullivant urges this Court not to adopt such a vague theory and not to impose discipline based on these claims.

F. Due Process Requires that This Court's Limit Its Review Only to Those Matters Specified in the Amended Information.

With no need for sophisticated analysis, this Court recognized in *In re Smith* that even attorneys in disciplinary proceedings deserve fundamental fairness. If courts do not insist that attorneys in disciplinary proceedings are treated fairly, that message leaves little hope for everyone else.

In 1912, citing 18 cases for the point, this Court declared, "The right of an attorney to practice law is a valuable property right, which cannot be taken from him by an arbitrary act of the court, but only upon a judicial hearing on charges legally presented, in which he is given a full and fair opportunity to be heard in his own defense." *State v. McElhinney*, 148 S.W.1139. Forty-six years later, the United States Supreme Court noted that an attorney in disciplinary proceedings is entitled to procedural due process, "which includes fair notice of the charge." *In re Ruffalo*, 390 U.S. 544, 550; 88 S.Ct.

122, 20 L.Ed2d 117 (1968), also quoting *Randall v. Brigham*, 7 Wall. 523, 540 that "notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence."

The particular deficiency in *Ruffalo* is much like some of the due process deficiencies here. Attorney Ruffalo showed up for his disciplinary hearing on charges he solicited FELA plaintiffs as clients through Mr. Orlando. During the hearing both Ruffalo and Orlando testified that Orlando did not solicit clients for Ruffalo but merely investigated FELA cases for him. Testimony on the third day of hearings also revealed that some of Orlando's investigations included cases where his employer, the Baltimore & Ohio Railroad, was the defendant. Immediately thereafter, the Ohio disciplinary board added a new charge against Ruffalo based on his hiring Orlando to investigate Orlando's employer. Counsel for Ruffalo objected that his client "has a right to know beforehand what the charges are against him and be heard on those charges." 300 U.S. at 546. Counsel for the disciplinary board said he would stipulate that the only facts he would introduce in support of the new charge was the testimony just given in open court by Ruffalo. In reversing Ruffalo's disbarment, the Court said, "How the charge would have been met had it been originally included in those leveled against petitioner . . . no one knows. This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *Id*. at 551-552.

As in *Ruffalo,* testimony given by Attorney Sullivant at her hearings is being used as the basis for new claims but unlike *Ruffalo* Attorney Sullivant received no notice of

the new claims until she read Informant's brief in this Court. The U.S. Supreme Court found that bringing new claims against an attorney during the hearing violated Ruffalo's procedural due process rights. In the case before this Court, Informant not only has included new claims on appeal of which Attorney Sullivant had no notice but he also uses her self-representation at the hearings as the basis for a new claim. Surely these even more extreme acts merit the same conclusion the *Ruffalo* court reached – a denial of procedural due process and a rejection of the imposed discipline as a result.

This Court rejected a due process challenge in an attorney discipline matter in *In re Mills*, 539 S.W.2d 447 (Mo.banc 1976), saying "His claim that by this proceeding he is being denied a valuable property right without due process of law is without merit. Rule 5 affords him due process and it has been followed faithfully in this case." Id. At 450. Current Rule 5.11(c) provides that "[a]ny number of acts may be charged in the same information, but each act must be separately stated." The acts for which Informant seeks discipline that were not charged or separately stated are:

1. Violation of Rule 4-3.4(c) – willful disobedience of a court order – Informant's Brief at 68, 69, 76, 95,117.
2. Lawsuits dismissed involuntarily "primarily for delinquencies in pretrial matters."
3. Not taking deposition of party prior to trial
4. Seeking to withdraw from representation for three clients, citing personal difficulties
5. Settlement of malpractice case with confidential payment
6. No malpractice insurance

7. Unpreparedness for the disciplinary hearings/incompetence in self-representation
8. Failed to file own state tax returns
9. No office staff
10. Permitting "a free-lance paralegal who was disbarred" to sign her name with specific authority but him no specifically signifying his authority to do so.
11. Financial difficulties
12. Pattern of combative relationships with opposing counsel, co-counsel and members of the judiciary.

Numbers 2-12 above at Informant's Brief at 47-52, 99-104.

Although consideration of any of these new claims violates Respondent's right to due process under the United States and Missouri constitutions, some facts relating to these new claims may be helpful.

Wes Sechtem

Attorney Sullivant's employment on an assignment by assignment basis of Wes Sechtem as a paralegal has drawn Informant's special disdain. The only evidence about Mr. Sechtem's interaction with clients came from Mr. Horner, who said that his interaction with Mr. Sechtem had been to give Mr. Sechtem documents requested by Attorney Sullivant on maybe a half dozen occasions. A265. Mr. Horner understood from Attorney Sullivant that things in Mr. Sechtem's past prevented him from being an attorney but he did not know that Mr. Sechtem has been disbarred. A266. According to Mr. Horner, Mr. Sechtem was extremely supportive and kind to him every time they came into contact and Mr. Horner is not concerned about the disbarment. A266.

Informant's only specific complaint about Mr. Sechtem is that Attorney Sullivant has given specific authority to Mr. Sechtem " to sign her name to specific documents" but he did so "without specifically signifying his authority to do so." It is possible that this practice is not a good idea. Informant has presented no facts or law to establish that this practice demonstrates that Attorney Sullivant is not competent to represent clients under Rule 4-1.1.

Notwithstanding Informant's personal disapproval of Mr. Sechtem, he was unable to find any evidence that Mr. Sechtem violated any Rule in his work for Attorney Sullivant or that she violated any Rule in her work with Mr. Sechtem. Informant identifies no harm that has come from Mr. Sechtem signing Attorney Sullivant's name on documents with her express permission. No violation of Rule 4-1.1 with regard to Mr. Sechtem has been proven by a preponderance of the evidence and this claim also should be rejected.

"Pattern of Combative Relationships"

Informant's "evidence" about Attorney's "combative relationships" is perhaps the worst example of efforts to try Attorney Sullivant "by ambush" depriving her a meaningful opportunity to respond. The new allegation is itself part of pattern by Informant, rather than an appropriate basis on which to discipline Attorney Sullivant. This allegation did not appear in Count IX of the Amended Information or anywhere else before the hearing below. As discussed more fully below, this is among new allegations and claims that violate Attorney Sullivant's due process rights and should not be considered in this proceeding.

Informant notes that the hearing panel made explicit findings about Attorney Sullivant's "aggressive and negative attitude and demeanor." Informant's Brief at 103. He also characterized her as "disruptive and unprofessional" *Id.* Whether intentional or not, conduct in the proceeding below created an atmosphere of ambush and personal animus directed at Attorney Sullivant which appears to continue in this appeal.

Apparently undisputed is that Attorney Sullivant arrived at the June 12, 2011 hearing feeling and being unprepared. She knew what was alleged in the Amended Information filed March 12, 2010. She knew what topics she had been asked about at her deposition on December 8, 2010. She knew the specifics of conduct and claims that were part of the negotiation between Informant and her prior counsel, Mr. Russell, in February and March 2011. While she felt ill-prepared to adequately defend herself when the hearing began on June 22, she had no idea that she would be facing new claims and allegations during the hearing and on appeal.

Attorney Sullivant came to the hearing on June 22, knowing that Informant had "vehemently" objected to her Motion for Continuance and accused her of bad faith and being unfit to practice based on that Motion. Upon commencement of the hearing three days later, she learned that Informant was dismissing Counts II, III and V of his Amended Petition. Even though she had spent time preparing to defend all nine counts of the Amended Information, she thought Informant's dismissal of one-third of the Amended Information, that meant she would be facing fewer allegations and assertions of violating the Rules of Professional Conduct, not more. Then her interrogation began.

Mr. Odrowski (to Ms. Leonard, panel chair): . . . I mean, I'm not sure if this is

going to be directly on point to that testimony, and . . . if it's not, you'll let me know.

Mr. Odrowski: But it seems to me that – do you acknowledge that you've had a number of unhappy clients?

A: No, I don't acknowledge I have an unhappy lot of clients. I think, if anything, I've made a lot of clients relay happy when no lawyer would take their case and when we go and get verdicts that are crazy compared to the zero that was offered at the table . . .

Ms. Leonard: You don't agree that you haven't had any unhappy clients?

A: I think every lawyer has an unhappy client, yes. I think that, by and large, my clients are happy.

Q (by Mr. Odrowski): Is Mr. Herzog that's suing you, is he a happy client?

A: I don't know if he is happy. He is not happy with the result that he got from his judge, so he is not happy with that.

Q: Has anyone else besides Mr. Herzog ever filed a complaint against you in a formal fashion"

A: Well, what are you referring to?

Q: Well, I'm referring to is there anyone, any client, that has made a written report that they were unhappy with your services?

Ms. Sullivant: And I would just object and my basis for my objecting would be improper—improper subject matter because Mr. Odrowski has an exclusivity relationship with OCDC. He would have access that no other person in the community would have. At this time, for the third or fourth time, improperly he's attempting to rely upon privileged information that for all practical purposes does not exist in the outside world.

Ms. Leonard: Well, Ms. Sullivant, you have opened the door to, except for a rare occasion, your clients are happy, and Mr. Odrowski has asked you if any of your clients have filed or have written any complaints about you. I don't think he's asked you if anything specifically was filed with the OCDC. He hasn't asked you the results of that. He's asked you if you have knowledge –

Ms. Sullivant: yes.'

Ms. Leonard: - - that you've had clients that have been unhappy with your services and they placed that in writing.

Ms. Sullivant: Yes, I have had clients – I have had clients that have been unhappy with my representation and have placed it in writing.

Q (by Mr. Odrowski): Have you had judges that have been unhappy with your courtroom demeanor that have made rulings against you personally?

A: If you're referring to Judge – unhappy with me in the courtroom and have made a ruling? No, I have not had a judge that was unhappy with me and made rulings. I've had some judges unhappy with me. Yes, I have.

Q: Did Judge Montgomery in the Herzog case make a ruling against you personally?

A: He held me in contempt.

Q: Did he put you in jail?

A: He did put me in jail.

Q: How long did you serve in jail?

A: About two hours. For my client, I might add, willing to go to jail for my

client.

A284-285. Questioning about Mr. Herzog and Judge Montgomery consumed 4 ½ transcript pages. Attorney Sullivant did object again at A285 that this interrogation was on "a collateral issue."

Then came questioning about a different case and event that lasted more than two transcript pages. A286. Next subject—"How do you feel your reputation is against – or your reputation is without opposing counsel in the cases?" A286. Then the questioning asked about any other judges "critical of your performance"? A285 for a page and a half. Then another objection by Attorney Sullivant, "My objection is that Mr. Odrowski is using an exclusive position that he holds with OCDC to know that there's been one previous complaint and that it resulted in a – it resulted with lawyers involved in the case making probable –making affidavits, and so it was removed from the disciplinary section. So I did not receive a discipline, nor did I receive any recourse as far as discipline is concerned, but Mr. Odrowski is set and determined to tell you that. So with that being said, I would say it is absolutely improper for Mr. Odrowski to use his position as a prosecutor in this case to now try to introduce information to this panel regarding information that is not a public record that he gleaned from that investigation that was closed by the OCDC." A287.

Asked by the chair of the panel if the information he had regarding a transcript of something that occurred before Judge Scott Wright is because of his interactions with the OCDC, Mr. Odrowski answered: I know of it – yeah, that's how I know about it.

Ms. Leonard: And was there any – is it in her disciplinary record?

Mr. Odrowski: To my knowledge, there is no disciplinary record. A287

Then questioning along these same lines resumed.

Nothing about these topics can be found in the Amended Information or Attorney Sullivant's deposition. Informant had never in written or spoken word alleged that Attorney Sullivant's conduct in those cases was at issue. Instead Informant chose to raise these matters for the first time at the hearings in June or July 2011. One reasonable inference could be that Informant knew that Attorney Sullivant was not prepared for the claims she knew about, had no reason to be prepared to litigate these new claims and cases before the hearing panel, would be unprepared to respond to questions about other cases never before mentioned in these proceedings and that he raised these issues, knowing she would be surprised and hoping that he could provoke her by this tactic. Attorney Sullivant was already struggling in her self-representation as noted by Informant in his effort in this Court to prove her violation of Rule 4-1.1. Not only did Attorney Sullivant have no opportunity to refresh her recollection about the events but more importantly she had no chance to bring in witnesses or documents to refute any of the questions raised. She was left to scramble to try to respond to these new issues and in effect, to try those cases within this case without aid of forethought, witnesses or documents.

As per *In re Smith*, supra, Attorney Sullivant should not have been "required nor expected to defend against charges not contained in the information." 749 S.W.2d at 414. If Informant believed that Attorney Sullivant engaged in a pattern of behavior violating the Rules of Professional Conduct, he should have lodged those charges.

In support of this uncharged claim, Informant lists the sanction imposed on Attorney Sullivant by Judge Fenner as evidence of combative relationships. Nothing in the evidence suggests Attorney Sullivant was combative with Judge Fenner. The email to the defense attorney Pat Hulla in which she called him a jerk was rude but unless the mere use of that word in writing is per se combative, that email does not evidence combativeness, nor a pattern. Attorney Sullivant acknowledges she should not have used that word.

Attorney Sullivant again asks this Court not to consider uncharged acts and violations on this appeal.

Lack of Preparation for Disciplinary Hearing

At the extreme of uncharged acts is Informant's attempt to indict Attorney Sullivant for her lack of preparation in representing herself at the disciplinary hearings on June 22 and July 12, 2011.

"The adage that 'a lawyer who represents himself has a fool for a client' is the product of years of experience by seasoned litigations." Kay v. Ehrler, 499 U.S. 432, 438 (1991). The Supreme Court noted, "Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. . . he is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictated the proper tactical response to unforeseen developments in the courtroom." *Id.* at 437. Even without the factors of unfair surprise and lack of due process, Attorney Sullivant had little chance to be

effective in representing herself.

Of course, it was not possible for Informant to charge Attorney with this conduct before the hearings because the faulted conduct had not yet occurred.

While Informant claims Attorney Sullivant had 18 months to prepare for her hearings, he ignores the fact that she was represented by counsel for some of that period and that her counsel withdrew from representation on March 18, 2011. Attorney Sullivant did not spend 18 months thinking she was going to represent herself. Informant's claim also ignores the facts already discussed – that Informant did not disclose to Attorney Sullivant in advance the many new charges and claims he planned to assert at the hearing or on appeal.

When her counsel withdrew, Attorney Sullivant tried to retain other counsel but could not because there were unwilling to take on her representation with so little time until the trial of the issues. Although prior counsel withdrew on March 18, 2011, the hearing panel did not set a new trial date until 60 days later on May17, 2011. The new date announced then was June 22, 2011. A120. Caught between panic and paralysis, Attorney Sullivant alternatively tried to prepare to represent herself while representing her other clients. On June 17, 2011 Attorney Sullivant communicated with Mr. Odrowski and the chair of the hearing panel, "This is a courtesy email this morning advising you I will be filing a Motion later today to continue the trial setting. While I have made a good faith effort to secure additional counsel in a short period of time, and when that was not fruitful, began preparing for the trial myself, I must concede I cannot be adequately prepared to go forward on Wednesday. I will be memorializing the events in a formal

motion, but wanted to make sure you were aware as soon as possible of my intentions." A132.

Informant answered quickly. "Informant **vehemently** opposes any further attempt by Respondent to delay the disciplinary hearing in this matter. The information was first served in January 2010. . . . Respondent's current pro se status is of her own doing. . . . An 11th hour attempt to continue this matter due to Respondent's lack of preparation for trial when it has been pending for nearly 18 months is in **bad faith** and is a further indication of **Respondent's lack of fitness to practice law** in Missouri. It **further suggestive of the danger Respondent poses** to the public and the risk to the integrity of the legal profession, posed by allowing her to continue to practice in this state, at least without adequate monitoring and supervision. . . ." A132 (Emphasis added).

Attorney Sullivant's Motion noted that the previous hearing date of February 28, 2011 was delayed because five days before, Informant approached her counsel about a proposed disposition of the case. Those negotiations continued until they failed March 5. A122-124. A new date was set for May 24, 2001 but did not go forward because no notice of the setting was provided to Attorney Sullivant. The June 22 date was then set on May 12, 2011. A124. Attorney offered several reasons for a continuance but the one pertinent here is that she was not able to prepare adequately for the hearing which could lead to the loss of her law license. She also objected to the "personal opinions" expressed by Mr. Odrowski in his email. A129. In his response Informant reiterated that Attorney Sullivant's motion for continuance was made in bad faith "to attempt to obstruct this proceeding" and was an indication that she is not fit to practice law in the state. A136.

He also noted that Attorney Sullivant did not object to the withdrawal of her prior counsel A135, suggesting she had the power to coerce representation by Mr. Russell.

Perhaps Attorney Sullivant should have known from Informant's response to her request for a continuance that every move by her would end up as a new uncharged claim.

For these reasons and because of a lack of fundamental fairness and due process as set out below, this Court should not consider a claim that Attorney Sullivant's unpreparedness at her hearing below supports any discipline.

None of these uncharged claims should be considered by this Court for purposes of finding a violation or for purposes of determining discipline. Their injection into this case violated Attorney Sullivant's constitutional due process rights and unfairly biased the panel below. They should be rejected in their entirety by this Court. .

II.

ATTORNEY SULLIVANT RECOGNIZES SHE IS SUBJECT TO DISCIPLINE FOR VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT BUT DISPUTES THAT A THREE-YEAR SUSPENSION IS WARRANTED UNDER THE FACTS HERE, UNDER THE ABA GUIDELINES OR UNDER THIS COURT'S RULINGS IN OTHER DISCIPLINE CASES BECAUSE:

(A) ATTORNEY SULLIVANT TOOK REMEDIAL ACTION WITHIN TWO BUSINESS DAYS AFTER SHE FAILED TO DISCLOSE HER TAX SUSPENSION TO JUDGE ROLDAN IN AN UNSCHEDULED PHONE CONFERENCE;

(B) THE ABA STANDARD OF SUSPENSION IS NOT APPROPRIATE WHERE THE ATTORNEY TAKES REMEDIAL ACTION TO PROVIDE THE INFORMATION WITHHELD;

(C) NUMEROUS MITIGATING CIRCUMSTANCES AND THE LACK OF AGGRAVATING CIRCUMSTANCES SUPPORT THE IMPOSITION OF A LESSER SANCTION;

(D) THE FACTS SUPPORT THE CONCLUSION THAT ATTORNEY SULLIVANT DOES NOT PRESENT A GRAVE RISK OF HARM TO THE PUBLIC.

The facts do not prove that Attorney Sullivant **knowingly** made a **false** statement to Judge Roldan May 28, 2009. In Rule 4-1.0(g) this Court provides that "knowingly" "connotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." No evidence or reasonable inference establishes by a preponderance of the evidence that Attorney Sullivant had actual knowledge of a false statement being made. All the evidence in this case supports her belief that her reinstatement was imminent.

In addition, the circumstances of her discussion with Judge Roldan also are uncontroverted. Attorney Sullivant had no advance knowledge she would be speaking with Judge Roldan on May 28. When she returned a call to his chambers, she did not know that she would be placed on the line with Judge Roldan and her opposing counsel. When she was placed on the line for a general discussion of matters related to the trial, she should have disclosed her suspension and told the judge and her opposing counsel

why she believed the trial could go forward. She did not. However, after this surprise call, Attorney Sullivant then called OCDC to find out if her suspension had been lifted or would be by Monday. Upon learning that her suspension would remain effective until at least Monday, she advised her opposing counsel that she would not be able to proceed to trial on Monday and she tried to reach Judge Roldan by phone and email.

Most importantly, Attorney Sullivant arrived at Court on Monday morning and told Judge Roldan her license was suspended and she could not go forward. As the section of the ABA Standards quoted by Informant clearly states, suspension is generally appropriate when a lawyer knows false information is being placed before the court or that material information is improperly being withheld *"and takes no remedial action..."* **ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, 6.12.**

Attorney Sullivant took remedial action. That fact is undisputed. She told her opposing counsel the next day, thereby saving him and his client time and money that might have been spent over the weekend in preparation. She tried to tell the judge's chambers that next day as well. (Contrary to the panel's finding, the record does not support that opposing counsel worked on the case the Saturday before trial. Opposing counsel did not testify and no one else had personal knowledge of what opposing counsel did on that Saturday.) Attorney Sullivant then showed up in Court Monday to tell the judge that her license was suspended. If Attorney Sullivant had been motivated by selfish interests, she would have done things very differently. First of all, she would have noticed up and taken a deposition before that Monday because no one would have been the wiser. Informant attacks Attorney's stated desire to take the deposition early on the

morning of trial as a sham. It was just the opposite; she knew she should not notice up and conduct a deposition when her license was suspended, so she hoped to do the next best thing – take a short deposition right before trial. Second, if she were indifferent and defiant, she would have told her opposing counsel and the judge nothing. Instead, she would have shown up on Monday morning and tried the case. Had she done that, much if not all of this particular proceeding would not have occurred. Even when no one was watching closely and no one else would probably ever know, she reported her suspension to Judge Roldan. These facts do not merit a finding of a knowingly made false statement and certainly not a three- year suspension.

Informant has failed to prove by a preponderance of the evidence that Attorney Sullivant's statement to Judge Fenner was untrue or knowingly made. In addition, Attorney Sullivant offered to provide financial documents for Judge Fenner's review, which she testified would have included her firm's operating and trust accounts and all of her personal bank accounts. Judge Fenner declined Attorney Sullivant's offer. Judge Fenner also could have required Attorney Sullivant to submit even more financial information to him, but did not. A person who is seeking to mislead or deceive does not offer up the relevant documents which could prove the deception. Informant also suggests that opposing counsel Patrick Hulla was damaged by Attorney Sulllivant's statement because he apparently believed her statement about inability to pay. But Mr. Hulla's email to Attorney Sullivant challenging her representation by noting that she apparently could afford airfare to a board meeting at Jerry Spence's ranch in August 2009 shows that he was no longer relying on the representation, These facts do not permit a

conclusion that opposing counsel has or has not been harmed by Attorney Sullivant's true statement. No discipline is justified based on Attorney Sullivant's statement to Judge Fenner.

Informant also erroneously states that suspension is also the baseline sanction for most of the other alleged misconduct. Citing ABA Standard 4.12 for his claim, informant does not claim that the commingling to which Attorney Sullivant now admits caused injury to any of Attorney Sullivant's client. No evidence supports such a contention. The two clients who had funds in Attorney Sullivant's trust account in mid-2009 both received all their money on a prompt basis. Informant repeatedly uses the word "misappropriated" to describe Attorney Sullivant's actions, yet no misappropriation ever occurred. Informant claims client Dunn "came within hours" of having her settlement proceeds misdirected. That suggestion is akin to saying someone came within hours of being in a car wreck. The undisputed facts are that Attorney Sullivant worked very hard to see that her clients and all those vendors and creditors who had performed worked on the Wallace and Dunn cases over several years, were paid promptly upon receipt of funds.

Informant cites *In re Coleman,* 295 S.W.3d 857 (Mo.2009) for the proposition that commingling of funds warrants a suspension. Coleman is indeed instructive for determining what is proper discipline here. At the time of the 2009 opinion, Mr. Coleman had practiced law for 32 years. Three times during those 32 years, in 1990, 1998 and 2008, Mr. Coleman was disciplined for multiple failures to communicate with a client, multiple instances of unreasonable fees, multiple instances of lack of diligence in

representing clients and conduct prejudicial to the administration of justice. *Id.* The violations found in 2009 included Rule 4-1.2 (accepting a settlement offer without his client's consent and pursuing a motion to enforce the settlement despite his client's refusal to settle); Rule 4-.17(conflicts of interest with his client by entering into agreements with clients giving him the exclusive right to settle three cases and by taking direct, adverse actions contrary to his client's expressed wishes) 4-1.15 (failing to keep his personal funds separate from his trust account); 4-1.16 (failing to take reasonable steps to protect his client's interest on termination of representation);and 4-8.4 (misconduct by violating other rules of professional conduct and by conduct prejudicial to the administration of justice.) *Id.* .

This Court first focused on an attorney's duties owed to his clients and specified that Rules 4-1.15, -1.7 and in part 4-8.4 represented duties owed to his clients. This Court also noted that Rules 4-8.4 and 4-1.16 represented duties owed to the legal system and the legal profession. *Id* at 869. The next inquiry was the attorney's mental state while committing the violation: was it intentional, knowing or negligent, followed by evaluation of actual injury to the client as well as potential injury to the client, public and legal system or profession that is "reasonably foreseeable" at the time of the conduct? *Id.* at 869--870. The final step for the Court was to consider aggravating and mitigating factors. *Id*. at 870.

OCDC in applying the factors to Mr. Coleman, urged that the most serious instances of misconduct were the failures to follow client directives, creating a conflict of interest and mishandling client funds. The Court found the violations of 4-1.12, 4-1.7

and 4-1.15 to be knowing conduct. The injury to one of Mr. Coleman's clients included requiring the client's affirmative act to protest her attorney's effort to enforce his settlement and ultimately to the dismissal of that case. *Id.* at 870-871. The aggravating circumstance was three prior disciplines, and the mitigating factor was the absence of dishonest motive. This Court noted that Mr. Coleman's did not intend to violate the rules and was "reluctant to accept that his actions are improper and prohibited." *Id*. at 870.

This Court determined that, while the nature of Mr. Coleman's conduct justified suspension without leave to reapply for one year, "the standards provide for lesser discipline where the behavior was not intentional." *Id.* at 871 "Mr. Coleman's actions arose out of an ignorance of the rules of professional conduct instead of an intention to violate the rules, and it is likely his misconduct can be remedied by education and supervision." *Id*. So, despite three other encounters with OCDC and 32 years of practice, this Court found that Mr. Coleman's transgressions arose because of his ignorance of the rules.

In finding that the violations made Mr. Coleman "a proper subject for probation", the Court ordered Mr. Coleman suspended from the practice without leave to reapply for one year but stayed execution of his suspension while he served a year of probation. *Id.*

To evaluate what discipline in appropriate for Attorney Sullivant, it is important to compare Mr. Coleman's trust account violations with Attorney Sullivant's. From January to July 2008 he regularly deposited settlement proceeds into his trust account "for purposes of allowing the settlement checks to clear." *Id*. at 866. After each check cleared Mr. Coleman paid the client the client's part and then "regularly paid personal

obligations" out of his portion still in his trust account. *Id.* Mr. Coleman argued that no violation of Rule 4-1.15 occurred because the only funds in the trust account after he paid his clients were his. "Mr. Coleman misunderstands Rule 4-1.15(c). Rule 4-1.15(c) explicitly states that there must be an account for client and third-party funds that is keep separate from any account holding an attorney's own funds. While it may be true that Ms. Coleman did not misuse funds by using client funds to pay personal bills or convert any client funds, he did use his IOLTA account for personal use. That is strictly prohibited." *Id.* The Court also said the argument only his money was in his trust account when he wrote personal checks was factually incorrect and called the circumstances of Mr. Coleman's trust account "a classic example of prohibited commingling of attorney and client funds." *Id.*

What *Coleman* teaches is this:

• Whereas Mr. Coleman admitted that he used his trust account to write personal checks, Attorney Sullivant believed that, aside from her clients, third parties had claims to the money in her trust account and those are the persons or entities to which she was writing checks, bringing, she believed, her actions within Rule 4-1.15. In addition, Informant did not offer the fee agreements in *Dunn* and *Wallace* to determine whether expenses in their cases were to be paid out of client funds or attorney funds.

• Whereas Mr. Coleman had been licensed to practice for 32 years , Attorney Sullivant had been in private practice with a trust account for 8 years. Despite his much longer experience in the profession, this Court found that his use of his trust account to write personal checks was not intentional but arose "out of an ignorance of the rules of

professional conduct."

• Whereas Mr. Coleman had been disciplined three times before the 2009 opinion for conduct that placed his clients and the public at risk – unreasonable fees, lack of diligence in representing his clients, failure to communicate with his clients; Ms. Sullivant has not been disciplined previously for anything.

Although this Court did not discuss the following factors in aggravation of Mr. Coleman's conduct, from the facts it could be argued that these factors were present in addition to prior disciplinary offenses:

• dishonest or selfish motive – Mr. Coleman presented for signature multiple agreements to a client which contained the following language, 'you (the client) agree that I shall have the exclusive right to determine when and for how much to settle this case. *That way I am not held hostage to an agreement I disagree with*." *Id*. at 860 (Emphasis added). No discussion appears in *Coleman* about this fact, but one reasonable evaluation is that Mr. Coleman wanted to be able to determine when and how much he got paid and did not want to be hindered by the inconvenience of finding out what his client wanted. That would seem to be a selfish motive.

• a pattern of misconduct. Mr. Coleman had been disciplined three times before, in part for repeated violations of the same rules. That suggests a pattern.

• multiple offenses. OCDC proved multiple offenses on four occasions by Mr. Coleman.

• refusal to acknowledge wrongful nature of his conduct. This Court noted that Mr. Coleman was "reluctant to accept that his actions are improper and prohibited." *Id.*

at 870.

•vulnerability of victim. The Court did not provide much information about the particular client involved but she was an individual and apparently not a sophisticated consumer of legal services.

• substantial experience in the practice of law. Mr. Coleman had been a lawyer for 32 years.

Other cases cited by Informant to support a suspension for commingling are distinguishable in important ways. The attorney in *In re Forge*, 747 S.W.2d 141 (Mo banc 1988), did not deposit personal funds in his trust account and write checks on this trust account for personal expenses. The attorney obtained $1,500 from his client to pay for a trial transcript and cost of an appeal. The attorney never ordered the transcript, failed to pursue an appeal, which was dismissed for failure to prosecute, never used any e funds to pay trial court costs, failed to respond to his client's inquiries, and failed to appear at the disciplinary hearing or communicate with the disciplinary committee. Even more significant, the attorney never placed the client's check in his trust account. Instead he deposited it into a personal checking account and wrote personal checks out of that account after the $1,500 had been deposited. In that personal account, the balance dipped below $1,500 on at least three occasions, meaning that the client's property was diminished and used by the attorney for personal expenses while the $1,500 was in his possession. The facts in this case have no commonality with those in *Forge* except that the charge was commingling.

In re Barr, 796 S.W.2d 617 (Mo. banc 1990) involved a lawyer who did not

maintain a trust account, who deposited a settlement check into an out-of-state account without the client's permission, claimed entitlement to hold onto the funds because of a claimed lien on the funds from previous legal work for the client but never provided proof of time spent or agreements with the client as to such fees owed him. *Id*. at 620. Again, the similarities between Barr and this case are almost non-existent. Similarly, the key facts in *In re Phillips*, 767 S.W.2d 16 (Mo. banc1989) were the receipt by attorney Phillips of two checks through garnishment for his client, the deposit of those checks into Phillips' general office account and the failure to ever pay the client any part of the proceeds. *Id*. at 17. In addition, the client asked repeatedly about the status of efforts to collect past due child support and was never apprised of the facts. Finally, *In re Houtchens*, 555 S.W.2d 24 (Mo. banc 1977) involved multiple occurrences of obtaining money for several clients and failing to pay over amounts owed to clients for an extended period of time or until the eve of the disciplinary proceedings. *Id*. at 25-26. The opinion does not mention a trust account or commingling.

Next Informant argues that the unauthorized practice of law by Attorney Sullivant was "knowing" and justifies suspension. The facts of this case demonstrate a negligent, rather than a knowing, violation of the unauthorized practice of law. Attorney Sullivant tried to determine what she could and could not do after she found out about here suspension. She sought advice from ethics counsel Sara Rittman. She spoke to personnel at the Supreme Court. She looked at case law, which provided only generalities. She deliberately chose not to conduct depositions, meet with clients, take on new clients or appear in court. These activities suggests Attorney Sullivant's actions were at worse

negligent, meaning that she failed "to heed a substantial risk that circumstances exist or that a result will follow, which failure deviates from the standard of care that a reasonable lawyer would exercise in the situation." ABA STANDARDS, III., Definitions.

Also adding to this conclusion are the various parts of Rule 5 and the conduct of the OCDC that suggested that tax suspensions were, indeed, different from other suspensions, including, notably, retroactive suspension. *In re Reza*, 743 S.W.2d 411 (Mo. 1988), relied upon to support suspension for unauthorized practice, differs significantly from the facts here. In *Reza*, this Court determined that an indefinite suspension with leave to apply for reinstatement in **six months** was the proper discipline for the following violations of the Rules:

- failure to file suit for client to establish lien
- multiple misleading statements to client about progress of matter
- failure to respond to correspondence from Bar Committee
- failure to file a brief with the Supreme Court appeal of discipline finding
- continuing to practice law for four years after being suspended for failing to pay enrollment fees for four consecutive years.

In addition to the length of time the attorney engaged in unauthorized practice, his violations were made worse by the fact that in April 1986 he was advised by letter not only of his delinquency, his obligation to apply for reinstatement but specifically that if he was still practicing law he was subject to disciplinary action without regard to the pending complaint involving his client. The attorney nevertheless appeared on a docket and on behalf of client in a Judge's chambers **the day before** his disciplinary hearing. For

all of this conduct, including four years of unauthorized practice right up to the day of his hearing, this Court imposed the suspension with leave to reapply in six months.

With regard to Informant's claim of willful disobedience of a court order, this court should not consider this claim because it was not charged or revealed until Informant's brief in this appeal. If the Court were to consider this uncharged claim, Informant has failed to prove by a preponderance of the evidence that Attorney Sullivant's failure to pay the $12,500 sanction has been willful. The evidence that argues against a finding of willfulness is the same evidence that demonstrates that Attorney Sullivant made no misrepresentation to Judge Fenner and certainly no knowing misrepresentation. Under ABA STANDARD 6.22, suspension is appropriate when a lawyer knows that she is violating a court order or rule and causes injury or potential injury to a client or party or causes interference or potential interference with a legal proceeding. Informant offers no case supporting suspension under facts similar to these. Informant also offers no discussion of whether an attorney can be disciplined for failing to follow a court order when the lawyer lacks the ability to follow the order and how a lack of ability is determined when the issue is payment of money. Informant also cites no case for the proposition that payment of a sanction supersedes all other debts, regardless of the kind of debt and how long it has been owing.

Suspension also is called for, according to Informant, because of Attorney Sullivant's lack of professional competence. ABA STANDARD 4.54, cited by Informant, does not support Informant's claim, stating that suspension is generally appropriate "when a lawyer engages in an area of practice in which the lawyer knows she

is not competent, and causes injury or potential injury to a client." Informant neither charged nor proved that Attorney Sullivant has injured any client because she engaged in an area of practice in which she knew she was not competent. Missing a deadline or getting a bad result in a case does not mean the lawyer was not competent and knew it. Acknowledging that given specific circumstances limited in time might affect her ability to represent clients at a specific time in a specific manner is not evidence of incompetence. Rather, it is evidence of self-awareness and the obligation to protect the clients' interests. In addition, Informant improperly attempted to prove this claim by injecting the mere existence of two malpractice claims and using disputes with judges or counsel in matters not properly before the panel and complaints by clients not validated by the disciplinary process and also not properly before the panel. Informant has failed to charge much of the conduct complained of and has failed to prove by a preponderance of the evidence that Attorney Sullivant violated Rule 4-1.1, and therefore, no discipline under that Rule is appropriate.

Probation, Informant has concluded, is not available to Attorney Sullivant in these circumstances because she has relocated to Virginia and no longer has a Missouri or presence. While Attorney Sullivant currently resides in Virginia, she still has legal matters pending in the Kansas City area for her clients. For that reason, she must travel to Kansas City from time to time to meet with clients, appear in court, conduct or defend depositions, interview witnesses, etc. Attorney Sullivant is more than willing to adjust her travel to Kansas City to permit meaningful monitoring and supervision. She also knows that she can be meaningfully monitored and supervised by telephone, fax, email

and Skype. Making these ways for monitoring and supervising effective is a matter of willingness by both parties, and Attorney Sullivant is willing to do what needs to be done to make this work. Informant suggests that Attorney Sullivant must be disciplined more severely because she "has had her chance to turn around her law practice during a suspension" and is not deserving of another chance. Informant's Brief at 113. Informant's suspension from March to June 2009 was not due to any violation of the Rules of Professional Conduct indicating she needed to "turn her practice around." It was due to her failure to assure that her state tax return were filed. Attorney Sullivant is not the first nor will she be the last who trusted her spouse to do what he said he would do and to believe him when he assured that he had done what he said he would do. Attorney Sullivant is ultimately responsible for assuring that her tax returns are filed, but failure to do so is not an indication that she needed to turn her practice around.

The final aspect of Attorney Sullivant's conduct on which Informant focuses is, in a nutshell, her attitude. The record refutes Informant's statement that Attorney Sullivant refuses to acknowledge any form of misconduct. First of all, she has acknowledged before this Court unauthorized practice in state court, lack of candor to Judge Roldan and commingling of assets. Like Mr. Coleman, *supra*, she has been "reluctant to accept that h[er] actions are improper and prohibited." The record also reflects that many of the instances where she refused to acquiesce in Informant's choice of words or conclusions were times when her prior counsel, Robert Russell, objected. A511, A576

The disciplinary panel's conclusion about Attorney Sullivant's demeanor also is noted by Informant. Counsel lacks the advantage, as does this Court, of having observed

the proceedings below. What can be found in the record, however, are the numerous occasions when counsel for OCDC used uncharged and improper information to surprise Attorney Sullivant. Attorney Sullivant's responses may have appeared to be hostile and negative because to Attorney Sullivant it appeared that she was being taken advantage of by a process that was unfair. She was asked about mere allegations of malpractice on which no claim of misconduct was alleged; events in cases out of which no claim of professional misconduct had been or ever was alleged; previous disciplinary investigations in which Mr. Odrowski was unsuccessful in obtaining findings of probable cause or discipline; why she thought a disbarred lawyer deserved to be paid for his work as a paralegal; how much her husband paid for a home in Virginia. If Attorney Sullivant's demeanor was not in keeping with the expectations of this disciplinary process, she did not perceive that she was alone in that regard.

Informant suggests that probation is not fitting here because Attorney Sullivant does not want to improve and because she already attended ethics school "with no improvement in her law practice management and professional capabilities." Informant's Brief at 113. Attorney Sullivant expressed regret several times over how she had acted and decisions she made. She also undertook to find and attend CLEs specific to professional responsibility and practice management. Attorney Sullivant testified about her passion for helping people and sticking up for the little guy no one else wants to help. That speaks most eloquently of her desire to "get her practice back on track." Her failure to embrace this process which she perceives has denied her fundamental fairness should not keep her from continuing to practice law and help her clients.

The evaluation of aggravating and mitigating factors by Informant fails to credit a single positive point to Attorney Sullivant.

Absence or Presence of Dishonest or Selfish Motive: Absence. Informant turns the act of paying other attorneys, a paralegal, creditors/vendors and lenders who provided goods, services and funding to the *Dunn* and *Wallace* cases for years with no payment into a selfish and dishonest act. Paying bills generally is considered a good thing, a responsible act, a keeping of a promise. In this proceeding that act not only is deemed selfish but also dishonest. Similarly, Attorney Sullivant's statement to Judge Fenner about her financial condition was "obviously motivated by Respondent's desire to avoid payment." *Id.* at 114. For what other purpose would an individual assert he lacks the financial ability to pay if not to avoid payment? Attorney Sullivant's statement was not dishonest. This Court pointed out in *Coleman* that it is unlikely that Mr. Coleman would have filed a motion in court to enforce a settlement agreement despite his client's refusal to settle if he knew that such an agreement violated the rules of professional misconduct, and likewise unlikely he would have written a check on his trust account to pay his fees and costs in his previous disciplinary proceeding if he had known that doing so violated the rules of professional conduct. 295 S.W.2d at 871, n. 11. That logic seems equally applicable here: it is unlikely that Attorney Sullivant would have offered her financial records to Judge Fenner if her motivation was dishonest and selfishness.

With respect to her lack of candor with Judge Roldan, Attorney Sullivant admitted that she did not tell anyone about her tax suspension because she was embarrassed and humiliated,. The undisputed fact remains, however, that, despite those feelings she did

tell her opposing counsel on May 29 and Judge Roldan on June 1 of her tax suspension. Had her motivation been selfish and dishonest, she would have kept her silence in the hope, fairly likely, that no one would ever know of her tax suspension.

Presence of Absence of a Pattern of Misconduct: No Pattern: Informant claims Attorney Sullivant's commingling of her fees with proceeds due her clients shows a pattern. In fact, a review of the trust account in June and July 2009 shows the resolution of two long pending cases, payment to the clients and third parties including attorneys, paralegal, consultants, experts, other vendors and service providers who provided goods, services and financing of the cases over several years, and then payment of remaining funds to herself as fees. A 30-45 day event does not show a pattern. Similarly, this Court found no pattern in Mr. Coleman's use of his trust account where he admitted using that account to pay personal expenses, not expenses associated with the case for which the funds were paid. Informant also tries to create a pattern of lack of candor, citing the events with Judges Roldan and Fenner. If Attorney Sullivant's lack of candor with Judge Roldan on May 28 is part of a pattern, then her disclosure of her suspension to Judge Roldan four days later also is part of a pattern of honesty. Attorney Sullivant's statement to Judge Fenner cannot be part of a pattern because the evidence weighs much more heavily on the side on truthfulness than on lack of candor. The entirety of the evidence, not only from Attorney Sullivant's testimony but also from the testimony of Scott Sullivant and Molly Crews, shows Attorney Sullivant's financial problems ran deep and wide. Informant even acknowledges Attorney Sullivant's financial difficulties when he thinks it supports one of his other claims.

Multiple Offenses: This aggravating factor is present. Attorney Sullivant acknowledges multiple offenses: unauthorized practice of law in state court, commingling her funds with client funds; lack of candor to Judge Roldan.

Bad Faith Obstruction of the Disciplinary Proceedings: Not Present. Informant has proven neither bad faith by Attorney Sullivant nor obstruction. Informant claims Attorney Sullivant should be disciplined for incompetent self-representation at the disciplinary panel hearing, and at the same time should have her discipline enhanced because of her efforts to obtain more time to be better prepared to represent herself or to obtain representation so as to avoid being incompetent.

While Informant notes that the hearing panel made "an express finding" in this regard, neither the panel's findings nor Informant's brief actually identifies a single instance of bad faith obstruction or "very aggressive and negative attitude and demeanor", making it impossible for Attorney Sullivant to respond to or for this Court to review. The cases relied on by Informant also provide no clarity for this case. This Court in *In re Madison*, 282 S.W.2d 360 (Mo. banc 2009) found an aggravating circumstance in the attorney's decision to take "fairly in-depth video depositions" of two judges, stating his intention to ask one judge personal questions about why she had been unable to attend court on a morning set for trial and also to depose her husband so the attorney "could get to the truth" of why she was not at court that day. Counsel for the judges tried to negotiate about the scope of the depositions but the attorney refused. He also refused to sign an affidavit agreeing he would refrain from using the videotaped deposition for any purpose other than the disciplinary hearing. These refusals by the

attorney led counsel for the judges to seek and obtain a protective order limiting the scope of the depositions and their use outside of the disciplinary proceeding and prohibiting a deposition of the judge's husband. After all of this activity and further negotiations with the attorney about the depositions, the attorney then failed to show up for the deposition and called to advise that he did not intend to show up, only after the attorneys, judges and the presiding officer all had arrived and were waiting on the attorney. The presiding officer advised the attorney by phone that any future discovery would have to be arranged through him. The attorney then began shouting and would not allow anyone to interject, leading to the presiding officer's termination of the call. Next the attorney filed a motion to disqualify the presiding officer and suggested that the officer was part of the "evil" conspiracy in which one of the judges was involved. This Court noted that even before it, the attorney refused to acknowledge any wrongdoing and agreed that the attorney's "inappropriate and uncooperative conduct toward the panel, his lack of respect for the tribunal shown though his shouting at the presiding officer and his failure to attend a deposition he had scheduled are properly considered as additional matters in aggravation." The court also noted that these matters in aggravation are a continuation of the pattern the attorney established in letters to two judges of blaming any setback on a conspiracy against him. *Id.* Attorney Sullivant's conduct in seeking more time before her disciplinary hearing in no way compares to that of Mr. Madison. She simply filed motions. She did not shout at anyone. She did not show disrespect for the tribunal. She did not put the presiding officer and other counsel and witnesses through fruitless negotiations about discovery she then failed to conduct. She did not claim a

conspiracy. *Madison* provides no useful example for this case.

Refusal to acknowledge wrongful nature of conduct: Attorney Sullivant does acknowledge she engaged in unauthorized practice in state court, she commingled funds and she failed to disclose her tax suspension to Judge Roldan in a telephone call on May 28. Attorney Sullivant continues to believe she was not engaged in the unauthorized practice of law in federal court. She also denies that her statement to Judge Fenner about her financial circumstances was untrue. Attorney Sullivant cannot be accused of refusing throughout this proceeding to admit that her failure to pay the sanction imposed by Judge Fenner was willful disobedience of a court order because she only learned that she was accused of this when she saw it asserted for the first time in Informant's brief to this Court. She does deny this claim before this court but believes its consideration on this appeal is improper and a denial of due process. Attorney Sullivant also continues to deny that she is incompetent to represent her clients or that she has represented her clients, knowing that she was incompetent. Attorney Sullivant believes that her refusal to make these acknowledgments is no greater than that in *In re Coleman* and not unreasonable under the circumstances.

Substantial Experience in the Practice of Law: Again Attorney Sullivant notes that her 11 years of experience at the time of the conduct charged and her almost eight years of experience in a practice where a trust account is used pales compared to the 32 years' experience and three prior disciplines Mr. Coleman had in In re Coleman, Attorney Sullivant acknowledges that she was not a new attorney when the conduct in this matter occurred but she also notes that her experience with a trust account was limited as was

her understanding of unauthorized practice, both of which might have been greater with more years of experience.

CONCLUSION

Attorney Sullivant admits violations of the Rules of Professional Conduct. She understands that the kind and duration of discipline is within the sound discretion of this Court and she does not presume to tell this Court how it should exercise its discretion in this matter. Based on review of the cases cited by Informant as well as cases cited by Attorney Sullivant, the recommendation of a suspension for three years appears excessive given the facts before this Court. Many of these cases involve discipline much less than a three year suspension, even when the attorney has been disciplined multiple times before:

● *In re Houtchens*, 555 S.W.2d 24 (Mo. Banc 1977): Forged client's signatures on settlement agreements, kept money and put it in personal account. Indefinite suspension with leave to re-apply in three years.

● *In re Forge*, 747 S.W.2d 141 (Mo banc 1988): commingled by depositing client funds into personal account with wife; failure to account to client for funds; initial failures to co-operate with Committee and "after his decision to co-operate, testimony which hardly skimmed the surface of the truth *Id*. at 144, violations of 4-8.4 (c) and (d). Suspended for six months.

● *In re Reza*, 743 S.W.2d 411 (Mo. Banc 1988): Neglect of matter entrusted to him; unauthorized practice of law during four years of suspension for failing to pay dues; failure to co-operate. Suspended six months with condition on reinstatement.

● *In re Barr*, 796 S.W.2d 617 (Mo. Banc 1990); Rule 4-1.1 Competence; Rule 4-

1.3 Diligence; Rule 4-1.4 Communication; commingling by placing settlement check in out of state account without consent of client and refusing to remit because of an unsubstantiated claim of a lien. Suspended indefinitely with leave to reapply in six months.

● *In re Disney*, 922 S.W. 2d 12 (Mo banc 1996): Rule 4-8.4(c) conduct involving dishonesty, fraud, deceit or misrepresentation for a pattern of "less than trustworthy behavior" *Id*. at 15, for failing to record note and deed, failing to insure building as promised, failing to pay property taxes on time, failing to make payments on note, failing to disclose collateral agreement and actual distribution of loan funds. Suspended with leave to reapply in six months.

● *In re Cupples*, 979 S.W.2d 932 (Mo. Banc 1998): Rule 8.4(c) for concealing that he was conducting private law practice while engaged full-time with a law firm, using firm resources for personal gain and exposing firm to potential malpractice liability. Second discipline. Indefinitely suspension with leave to app for reinstatement in six months.

● *In re Snyder*, 35 S.W.3d 380 (Mo. banc 2000): Rule 4-1.8 failure to provide client a written explanation of fee arrangement; pursuit of attorney's fees materially limited representation of his client's interests in violation of Rule 4-1.7(b); failure to fully disclose adverse pecuniary interest to client in violation of Rule 4-1.8(a); incompetent representation in violation of Rule 4-1.1 Indefinite suspension with leave to apply for reinstatement in six months.

● *In re Carey/In re Danis*, 89 S.W.3d 477 (Mo. banc 2002): Representing another

person in a substantially related matter adverse to interest of former client in violation of Rule 4-1.9(a) and 4-8.4(a); making false discovery responses in violation of Rules 4-3.3, 4-8.4(c) and (d), 4-3.4(a) and 4-3.4(d). Indefinite suspension with leave to apply for reinstatement in 1 year.

● *In re Zink*, 278 S.W.3d (Mo. Banc 2009): Violations of Rule 4-1.4 (a), 4-4.1, 4-8.4 (c) and (e), including intentionally lying to federal agents and the U.S. Attorney's office. Indefinite suspension with leave to apply in six months.

In addition to these cases which suggest a discipline much less than a three year suspension, the evidence in this case demonstrates that Attorney Sullivant tried at all times to protect the interest of her clients and always paid her clients the money they were owed in a timely manner. Attorney Sullivant's lapse in failing to disclose her suspension to Judge Roldan occurred when she unexpectedly found herself speaking to him by phone and which she promptly recognized she must correct and she did correct. Attorney Sullivant respectfully requests that this Court take these factors into consideration in reaching its decision.

Respectively submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June, 2012, a true and correct copy of the foregoing was served on Informant via the electronic filing system pursuant to Rule 103.08:

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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(c);

3. Contains 26,673 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Norton Antivirus software was used to scan the document for viruses and that it is virus free.

/s/Theresa L.F. Levings

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