IN THE SUPREME COURT OF THE STATE OF MISSOURI

NO. SC96272

In re:	)	
	)	
LAMAR E. OTTSEN,	)	**Supreme Court No. SC96272**
	)	
Attorney-Respondent.	)	

BRIEF OF RESPONDENT

BEHR, MCCARTER & POTTER, P.C.

Anthony R. Behr #30808
John P. Torbitzky #65233
7777 Bonhomme, Suite 1400
Clayton, MO 63105
(314) 862-3800
(314) 862-3953 (fax)
abehr@bmplaw.com
jtorbitzky@bmplaw.com

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Supreme Court Rules **Page**

Other Authorities **Page**

CASE SUMMARY

Lamar "Larry" Ottsen is a well-respected attorney who has been practicing in the St. Louis area for more than 50 years with no prior discipline. Mr. Ottsen has led a distinguished and exemplary career, and has been recognized by his peers for both his outstanding ability and legal ethics.

Mr. Ottsen is now before this Court because he made unintentional and unknowing mistakes in the handling of his client trust account. Specifically, he acknowledges that he deposited earned fees into the trust account and allowed one such deposit to linger after it was earned. He further acknowledges that he failed to adequately supervise the reconciliation of the firm's client trust account on a monthly basis. As acknowledged by Informant's investigator, Mr. Ottsen never misappropriated funds, never used the trust account for personal or business expenses, did not knowingly or intentionally violate the Rules of Professional Conduct, and no clients complained or were harmed by the conduct.

A Disciplinary Hearing Panel heard the evidence in this matter, including considerable evidence in mitigation and evidence that Mr. Ottsen had taken numerous steps to remedy the issues that led to the violations. The Hearing Panel initially recommended a written admonition, which Mr. Ottsen accepted. When Informant rejected the admonition, the Hearing Panel issued its written decision recommending a reprimand. Informant promptly rejected the Hearing Panel's recommendation. Informant now argues that a stayed suspension is the appropriate sanction. In this brief, Mr. Ottsen demonstrates that such a severe punishment is unwarranted.

STATEMENT OF FACTS

The OCDC has characterized certain facts at issue in this proceeding in an argumentative, misleading manner to suggest that Mr. Ottsen "knowingly" violated the trust account requirements and to suggest that he was responsible for actions by other members of his firm (actions that are the subject of separate disciplinary proceedings). Accordingly, consistent with Missouri Supreme Court Rule 84.04(c) and (f), Mr. Ottsen offers the following Statement of Facts.

Mr. Ottsen is an established and well-respected member of the St. Louis legal community. App. 190. Mr. Ottsen attended Washington University School of Law, graduating in 1964. App. 179. He was then admitted to both the state and federal bars. App. 179. Mr. Ottsen began practicing law with a firm in downtown St. Louis before moving his practice to Clayton, Missouri, and starting his own firm in 1976. App. 179-180. That firm has undergone a number of changes before eventually becoming Ottsen, Leggat & Belz, where Mr. Ottsen currently practices. App. 180-181. Mr. Ottsen's full work history is stated on his resume. R. 682-683. Mr. Ottsen practices with his two law partners, Robert Leggat and Timothy Belz. App. 334.

Mr. Ottsen focuses his practice largely on corporate and transactional matters as well as estate planning. R. 4-5. Mr. Ottsen very rarely requires his clients to provide him with a retainer (R. 5), and he does not have frequent occasion to use the trust account in his practice (App. 185).

This case arises from a March 18, 2015 overdraft notice issued to Informant on the lawyer trust account of Ottsen, Leggat & Belz, L.C. (the "firm"). App. 334. The

overdraft occurred because an employee of the firm's landlord's cleaning staff stole funds through a series of unauthorized electronic withdrawals from the trust account over several months leading to a total of $22,500 in unauthorized withdrawals. App. 334.[1]

When Mr. Ottsen was notified of the overdraft, he was shocked. App. 137. When the firm first established its trust account with Commerce Bank more than 20 years ago, the written agreement with the bank required that two partners sign for any withdrawals. App. 136; R. 675. No electronic withdrawals were permitted to be made from the account. App. 136. Upon notification of the unauthorized withdrawals, Commerce Bank reversed the unlawful charges and restored the funds. App. 138-139; R. 538.

Informant began an investigation into the overdraft shortly after receiving notice thereof. Mr. Ottsen acknowledges that, beginning in October 2011 and continuing until the time of the overdraft, he failed to adequately ensure that the firm's trust account was reconciled on a monthly basis. Mr. Ottsen acknowledges that, on multiple occasions, he placed earned fees into the trust account. In all but one instance, Mr. Ottsen withdrew the earned fees shortly after they cleared. App. 186-188. In the one other instance, Mr. Ottsen left $1,168.25 of earned fees in the trust account until the date the overdraft occurred. App. 336. In that instance, Mr. Ottsen had served as the attorney for the

[1] Informant incorrectly states that it was Timothy Belz's attempt to withdraw $1,039.72 in earned fees that resulted in the overdraft. Informant's Brief, p. 6. For the record, it was three attempted unauthorized electronic withdrawals by the cleaning staff that resulted in the overdraft. R. 526-528.

guardian of the estate of a minor. Mr. Ottsen submitted a statement of his fees to the probate court for approval. In April 2012 (App. 336), while the approval was pending, he deposited a $3,500 check from the client into the trust account. App. 184-185. Mr. Ottsen then withdrew a portion of the fee that was certain to be approved by the Probate Court. App. 185. The Probate Court later approved the full fee, but Mr. Ottsen did not timely withdraw the remaining $1,168.25. App. 336.

With respect to the reconciliation of the trust account, Mr. Ottsen did not abandon the account. Prior to October 2011, Thomas Pulliam, a partner in the firm, was handling the trust account, including reconciling the account every month. App. 117-118, 127, 181. When Mr. Pulliam left the firm's employ, Mr. Ottsen and the other members of the firm believed that Mr. Pulliam transferred all of his bookkeeping responsibility to the firm's office manager, Mary Tucker. App. 118-119, 185-186. Mrs. Tucker had been employed by the firm for 25 years, and had handled the purchasing and check-writing for the firm. App. 127-128. She accounted for the expenses of the firm, and how they would be allocated among the partners. *Id.* In addition, the firm hired an accounting firm, the E&A CFO Group, to assist and supervise Mrs. Tucker with respect to the firm's bookkeeping. App. 119, 121, 129, 185-186. The accountant's engagement letter specifically indicates that the accounting firm was to provide supervisory/advisory services to Mrs. Tucker. App. 128-131; R. 609-611.

With respect to the deposit of earned fees into the trust account, Mr. Ottsen did not know that it was improper to do so at the time of the deposits. App. 183, 187-188, 191. The firm is an expense-sharing LLC, in which the partners keep their revenues in their

own separate bank accounts, which are held with different banks. The partners are charged by the firm on a regular basis for their share of expenses. App. 131-134. Based on the structure of the firm, Mr. Ottsen would, at times, receive checks for earned fees in the name of the firm. App. 186-188. For years, Commerce Bank permitted Mr. Ottsen to deposit checks made out to the firm into a business account in his name. *Id.* When the bank changed its policy, Mr. Ottsen began to deposit checks for earned fees made out in the firm's name into the firm trust account. *Id.* Mr. Ottsen would then write a check to himself to withdraw the earned fees from the trust account, and all checks were signed by two partners. App. 190, 136; R. 675. At the time he was using the trust account for this purpose, Mr. Ottsen did not know it was improper to do so, and did not understand it to be a violation of the Rules. App. 188-190.

Since the time of the overdraft, Mr. Ottsen, along with the other members of his firm, have taken substantial steps to correct the issues with the trust account. Mr. Ottsen, along with Mr. Belz and Mr. Leggat, have all taken a CLE course on the Fundamentals of Trust Accounting. App. 64-65, 186. They have also reviewed the Trust Account Handbook and were all trained on the proper use and keeping of a trust account by the Undersigned's office manager. App. 34, 107-108. This was all completed by October 2, 2015, more than two months before the Informations were filed. App. 34-36. In addition, the firm has placed attorneys at the firm, Timothy Belz and Matthew Belz, in charge of the trust account and monthly reconciliations. App. 108.

At the disciplinary hearing, Informant's investigator, Kelly Dillon, specifically testified that there is no evidence that Mr. Ottsen intentionally or knowingly violated any

trust account rules. App. 52-53. She further testified that: no clients were harmed by Mr. Ottsen's conduct (App. 53, 60-61, 61-62); no client funds were used for any personal or business expenses (App. 53, 54); Mr. Ottsen received no personal gain (App. 53); and there was no evidence of any dishonesty by Mr. Ottsen (App. 53). Ms. Dillon acknowledged that Mr. Ottsen was "absolutely" very cooperative throughout the matter. App. 34, 57-58. She further acknowledged that Mr. Ottsen, and the other members of his firm, took significant steps to rectify the issue with their trust accounting practice by completing a CLE course on the Fundamentals of Trust Accounting, reviewing the Trust Account Handbook, and undergoing training on trust accounting principles with the Undersigned's office manager. App. 34-35, 36.

Following the hearing, the Disciplinary Hearing Panel recommended that Mr. Ottsen receive a written admonition. App. 339-341. Mr. Ottsen received notice of the admonition a little more than eight months after the date of the hearing. Mr. Ottsen accepted the admonition, but Informant quickly rejected it. App. 342. The Hearing Panel then issued its written decision, finding that Mr. Ottsen should be reprimanded.[2] In its decision the Hearing Panel wrote:

[2] Pursuant to Missouri Supreme Court Rule 5.16(d), if a written admonition is rejected by the Office of Chief Disciplinary Counsel, the lowest level of discipline that the Hearing Panel may then award is a public reprimand. The Hearing Panel in this matter, therefore, issued the lowest level of discipline within its power at every stage of this proceeding.

> The Disciplinary Hearing Panel unanimously finds and concludes that there is no evidence whatsoever of any intent on the part of any Respondent to violate any Rule of Professional Conduct as discussed above; the unforeseen acts of third parties in connection with Respondents' failure to adequately supervise or monitor those activities caused the overdraft notification from Commerce Bank; no client suffered actual damage due to the Respondents' actions as set forth above; Respondents have done everything possible to give the Office of the Chief Disciplinary Counsel their full cooperation and have taken appropriate and adequate steps to prevent any further violations of the Rules of Professional Conduct dealing with trust accounts. Neither Respondents together nor any individual Respondent pose a threat of harm to any member of the public, and the likelihood of any repeat offense is extremely remote.

App. 347.

Upon receiving the Hearing Panel's decision, Informant quickly rejected the recommendation of a reprimand. These proceedings followed.

POINT RELIED ON

I. MR. OTTSEN'S CONDUCT AND THE EVIDENCE IN MITIGATION DO NOT SUPPORT IMPOSITON OF A STAYED SUSPENSION.

In re Miller, 568 S.W.2d 246 (Mo. banc 1978)

In re Elliot, 694 S.W.2d 262 (Mo. banc 1985)

In re Sheth, Case No. SC95382 (Mo. banc Mar. 15, 2016)

In re Eric Marvin Martin, Case No. SC96121 (Mo. banc Jan. 31, 2017)

ARGUMENT

Preliminary Statement

The question before this Court is what disciplinary action is appropriate in light of Mr. Ottsen's admitted mistakes with his trust account. Informant argues that a stayed suspension is appropriate. However, the imposition of such a drastic sanction on the facts at issue in this case is not supported by the Missouri Supreme Court Rules, this Court's precedent or the ABA Standards for Imposing Lawyer Sanctions.

To the contrary, the conduct at issue in this matter warrants nothing more than an admonition[3] and at worst a public reprimand. Each case cited below ending in a reprimand involves conduct more severe and widespread than in the case at bar, including one or more of the following: misappropriation of client funds, previous disciplinary

[3] While Missouri Supreme Court Rule 5.16 appears to limit the available discipline following rejection of a written admonition to no less than a public reprimand, that Rule, by its own terms, applies to the Disciplinary Hearing Panel. Missouri Supreme Court Rule 5.19 sets the procedures in this Court, and states that if the Court finds that professional misconduct has occurred, "it shall impose appropriate discipline," but is silent as to whether an admonition is available. Supreme Court Rule 5.33 provides that nothing in Rule 5 "shall be construed as a limitation upon the powers of this Court to govern the conduct of its officers[,]" thereby placing an admonition within the power of the Court to issue. This Court has issued admonitions in the past. *See In re Smith*, 749 S.W.2d 408 (Mo. banc 1988).

actions, benefit to the attorney, actual injury to clients, routine paying of personal and business expenses out of the trust account, lack of cooperation with OCDC investigators, and/or outright malpractice in conjunction with trust account issues.

Mr. Ottsen's conduct contains none of those features. As Informant's investigator, Kelly Dillon, testified, there was no actual injury to any client, no evidence that Mr. Ottsen used client funds for personal or business expenses, no evidence that he intentionally or knowingly violated any trust account rules, no personal gain, no dishonesty and no prior discipline. As Ms. Dillon testified, he was cooperative throughout, and he completed a CLE course on the Fundamental of Trust Accounting, reviewed the Trust Account Handbook, and completed training on trust accounting principles with the Undersigned's office manager. None of Mr. Ottsen's conduct places his morals or fitness to practice law at issue.

Accordingly, Mr. Ottsen respectfully requests that the Court consider adopting the Hearing Panel's original determination that a written admonition is the appropriate discipline. App. 340-341. *See In re Smith*, 749 S.W.2d 408 (Mo. banc 1988). This would be particularly appropriate given the evidence in mitigation, and Mr. Ottsen's reputation in the legal community. At worst, Mr. Ottsen's conduct warrants a reprimand.

Standards for Imposition of Discipline

The twin aims of the Missouri lawyer discipline system are "to protect the public and maintain the integrity of the legal profession," not to punish the lawyer. *In re Coleman*, 295 S.W.3d 857, 869 (Mo. banc 2009). In assessing the proper sanction, this Court has recognized that ABA Standards for Imposing Lawyer Sanctions (the "ABA

Standards") provide useful guidance for appropriate discipline. *In re Madison*, 282 S.W. 3d 350, 360 (Mo. banc 2009). Consideration is given to the nature of the conduct at issue, as well as any evidence in aggravation or mitigation. ABA Standard 9.1. "But the ABA Standards are merely guidance, and they do not supplant this Court's prior decisions." *In re Farris*, 472 S.W.3d 549, 563 (Mo. banc 2015).

I. MR. OTTSEN'S CONDUCT AND THE EVIDENCE IN MITIGATION DO NOT SUPPORT IMPOSITON OF A STAYED SUSPENSION.

A suspension, even if stayed, is not an appropriate sanction in this matter for two reasons. First, it is not warranted by Mr. Ottsen's conduct. Mr. Ottsen's conduct is less concerning than prior cases where this Court has imposed only a reprimand. Second, Mr. Ottsen's numerous mitigating circumstances should cause this Court to reject the OCDC's recommendation of a stayed suspension.

The Conduct at Issue

As set forth above, Mr. Ottsen has acknowledged failing to comply with three requirements regarding maintenance of the firm's trust account. First, he acknowledges that he failed to adequately ensure that the trust account was reconciled on a monthly basis. Second, he acknowledges depositing earned fees into the trust account where they would remain temporarily in order to re-route the payments from being payable to the firm to being payable to him. And third, he acknowledges that, on one occasion, he failed to sweep an earned fee from the trust account within a reasonable time. Mr. Ottsen made mistakes with his trust account, and he has acknowledged those mistakes.

However, contrary to Informant's assertions, Mr. Ottsen's conduct does not show a cavalier and careless attitude toward the firm's trust account.

Significantly, Informant's own investigator, Kelly Dillon, testified at the disciplinary hearing as follows:

- No clients were injured by Mr. Ottsen's conduct (App. 53, 60-61, 61-62);
- There is no evidence that Mr. Ottsen used any client funds for any personal or business expenses (App. 53, 54);
- There is no evidence that Mr. Ottsen intentionally or knowingly violated any trust account rules (App. 52-53);
- There is no evidence that Mr. Ottsen received any personal gain (App. 53);
- There is no evidence of any dishonesty by Mr. Ottsen (App. 53);
- Mr. Ottsen was "absolutely" very cooperative throughout the matter (App. 34, 57-58);
- Prior to the issuance of the Information in this matter, Mr. Ottsen completed a CLE course on the Fundamentals of Trust Accounting, reviewed the Trust Account Handbook, and completed training on trust accounting principles with the Undersigned's office manager (App. 34-35, 36); and
- Mr. Ottsen has no prior discipline (App. 37).

These facts are all uncontested.

Mr. Ottsen's Conduct Does Not Merit A Suspension, Even If Stayed, Under The Cases Cited By The OCDC

While Informant argues that a stayed suspension is appropriate based on the facts of this case, the cases Informant cites in support of its argument are inapposite and readily distinguishable. Informant relies on *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009), to suggest that leaving earned fees in the firm's trust account warrants a stayed suspension. But the conduct at issue in *Coleman* was far more egregious than the conduct at issue here, and involved the following conduct, all of which is absent from Mr. Ottsen's case:

- Mr. Coleman "regularly paid personal obligations out of his portion of settlement proceeds that remained in his IOLTA account" (*Id.* at 866);
- "When questioned about the identity of the owner of specific deposits, Mr. Coleman was unable to say to whom the money belonged" (*Id.*);
- Mr. Coleman was found to have violated Rules 4-1.2 and 4-1.7 by having a client execute a retainer agreement that gave him the exclusive right to settle the client's case (*Id.* at 863-865);
- Mr. Coleman was found to have violated Rule 4-1.16 by failing to notify his client that he had withdrawn from the client's case (*Id.* at 866-868); and
- Mr. Coleman had previously been issued two admonitions and a reprimand (*Id.* at 870).

Unlike Mr. Coleman, Mr. Ottsen took no deliberate action against his clients and caused no client harm. Mr. Ottsen did not know that his conduct was in violation of any

of the rules of professional conduct. Mr. Ottsen has no prior disciplinary record. Informant's assertion that Mr. Ottsen should receive the same discipline imposed in *Coleman* falls flat in light of the glaring differences between the two cases. Simply put, due to the vast disparity in the conduct involved and the absence of the aggravating factors at issue in *Coleman*, Mr. Ottsen should receive a substantially lesser sanction than that imposed in *Coleman*.

Informant relies on *In re Farris*, 472 S.W.3d 549 (Mo. banc 2015), for the limited purpose of demonstrating that the duty to safeguard a client's property is non-delegable and that Mr. Ottsen cannot rely on a law firm staff member to satisfy his obligation to reconcile the trust account without supervision. Mr. Ottsen has fully acknowledged this requirement since first learning of it in 2015 after the theft and overdraft occurred, and fully accepts responsibility for the failure to more adequately supervise the trust account. This Brief references Mrs. Tucker and the accounting firm only to demonstrate Mr. Ottsen's good faith belief that the trust account was being reconciled on a monthly basis. He did not abandon or walk away from the trust account. Mr. Ottsen now understands that the trust account was not being reconciled and acknowledges that this amounts to a violation of the trust account rules. However, this violation was based on a good faith, although mistaken, belief, and not a knowing, intentional failure on the part of Mr. Ottsen.

With no Missouri precedent for a stayed suspension in Mr. Ottsen's case, Informant cites two New Jersey cases to support its argument that a stayed suspension is appropriate here: *In re Gallo*, 568 A.2d 522 (N.J. 1989) and *In re Konopka*, 596 A.2d 733

(N.J. 1991). These cases are distinguishable on their facts, primarily because they both revolve around the misappropriation of client funds, which is not even alleged in the case at bar.

In *Gallo*, the respondent was found to have misappropriated client funds, in addition to improperly placing his own funds into his trust account. The Court found that Mr. Gallo used his trust account to pay various business expenses, failed to keep a running balance of the trust account, failed to use client ledger cards, and could never tell how much money was in the account, or whose it was. *Gallo*, 568 A.2d at 523. The respondent would deposit his own funds into the account if the balance became too low to permit payment of operating expenses. *Id.* On two occasions, checks drawn on the trust account and given to clients were returned for insufficient funds when presented for payment. *Id.* The court cited the cases of six separate clients who had their trust account balances invaded by Gallo. *Id.* at 524-525. The *Gallo* Court did not set forth in any detail its basis for determining that a suspension of three months was appropriate.

In re Konopka, the other New Jersey case, similarly involved the misappropriation of client funds and the use of a trust account in a manner so as to use client funds to make payments for business and personal expenses such that "at certain times there were deficits in the accounts of respondent's other clients." 596 A.2d at 733-34.

Both *Gallo* and *Konopka* are readily distinguishable, primarily because they involved misappropriation by the attorneys of client funds in order to pay business and personal expenses. This is more than just the mistaken deposit of earned fees into the trust account. In fact, unlike in *Gallo* and *Konopka*, and as admitted by Informant's

investigator, until the theft of funds by the firm's landlord's janitorial staff, the trust account always contained sufficient funds and no client could have been harmed by Mr. Ottsen's mistakes. App. 60-61, 84.

Even In Trust Account Cases In Which This Court Has Issued *Reprimands*, The Conduct Of The Attorneys Was More Egregious Than It Is In The Case At Bar

Generally, where the violations at issue are trust account violations with a relatively small potential for injury to clients, this Court has imposed a reprimand, rather than a more serious penalty. A close examination of this Court's precedent, however, demonstrates that the conduct at issue here warrants an even lesser sanction.

In *In re Miller*, 568 S.W.2d 246 (Mo. banc 1978), this Court found that an attorney had misappropriated approximately $30,000 of client's funds that were provided to him for safe keeping and made arrangements for his wife to take title to real estate in which his client had a security interest. The Court determined that the attorney had violated the Rules of Professional Conduct, but also noted the attorney's excellent professional reputation and long, distinguished legal career. *Id.* at 253. The Court, noting that "no general unfitness to practice law" had been shown by the actions of the attorney, held that "the appropriate order in this case, in order to protect the public and the other interests involved, is to publicly reprimand respondent" and issue certain conditions. *Id.* at 254. This was in spite of the $30,000 misappropriation.

Similarly, in *In re Elliot*, 694 S.W.2d 262 (Mo. banc 1985), this Court determined that an attorney: 1) failed to make prompt payments to a client; 2) failed to keep adequate records; 3) failed to prosecute a case; 4) mishandled a settlement deposit; 5) failed to

adequately respond to client inquiries; and 6) issued checks to a client without sufficient funds to pay them. The Court nevertheless held that a public reprimand was the appropriate sanction. *Id.* at 266.

The misconduct at issue in both *Miller* and *Elliot* is far and away more severe than the mistakes at issue here. The misappropriation of client funds at issue in *Miller* is much more severe than the mistakes made here and is entirely unacceptable. Similarly, in *Elliot*, the attorney's mishandling of funds coupled with his failure to respond to client inquires demands a much more severe disciplinary action than what is warranted here.

This Court's more recent precedent also demonstrates that reprimands are issued in cases more severe than the case at bar. In *In re Luis Hess*, Case No. SC93013 (Mo. banc. Jan. 29, 2013), this Court issued a reprimand where the OCDC and Mr. Hess stipulated to the following conduct: Mr. Hess "deposited personal funds into the Trust Account and deposited unearned advanced legal fees paid by his clients into the Operating Account"; "did not maintain full records reflecting the activity in his Trust Account, the source of funds being deposited into the Trust Account or documentation providing support and explanation for the withdrawal or disbursements of funds from the Trust Account"; "made payments relating to the general operation of his law practice from his Trust Account when such payments should have been made from Respondent's Operating Account"; and paid his rent out of his Trust Account, which caused an overdraft. In *Hess*, the OCDC stipulated that a reprimand was appropriate, relying in part on mitigating factors, including that the respondent did not know he was acting improperly in his mishandling of his bank accounts, that the respondent had no prior

discipline, and that there was an absence of a selfish or dishonest motive. This Court accepted the Joint Stipulation and ordered a public reprimand.

In another recent case, *In re Gary Lee Collins*, Case No. SC93645 (Mo. banc Sept. 18, 2013), this Court issued a reprimand with requirements for trust account violations. In a Joint Stipulation filed with this Court, Mr. Collins admitted that he had used his trust account as "a depository for credit card payments from clients." He would then transfer the funds to his operating account and use the funds to pay for certain client costs and expenses. In other words, he was placing client funds in his operating account. The case also differs from the one at bar in that Mr. Collins failed to file the record on appeal in a pending action in a timely manner, despite warnings from the court of appeals, and as a result, the court of appeals dismissed the appeal; he failed to respond to several OCDC requests for information and in fact told the OCDC he would not provide it; and the OCDC was required to subpoena bank records. Yet the OCDC recommended that a reprimand be ordered with the additional requirement that the respondent attend ethics school. This Court accepted the Joint Stipulation.

In *In re Kwadwo Jones Armano*, Case No. SC91601 (Mo. banc. Oct. 4, 2011), Mr. Armano routinely used his trust account to write checks related to real estate he owned, including checks to a landscaping company, Home Depot, Lowes, Laclede Gas, and "Cash." He used client funds to pay for remodeling the property he owned, and did not repay the amounts advanced until he sold the property and placed the proceeds in the trust account. This meant that Mr. Armano used client funds to pay for remodeling of the

property. The respondent had also had a prior admonition. Yet the OCDC argued in Mr. Armano's case that a reprimand was appropriate, and this Court concurred.

Just last year, in *In re Sheth*, Case No. SC95382 (Mo. banc Mar. 15, 2016), this Court issued a reprimand with requirements in yet another case involving trust account violations. According to the briefs filed with this Court, Mr. Sheth wrote two $5,000 checks out of his trust account on behalf of a client who had no money in the account, thus knowingly spending the trust account funds of other clients. When the account overdrafted, he put $7,000 of his own funds into the account to resolve the overdraft. He admitted that he knowingly wrote a check from his trust account that he did not have sufficient funds to cover. The OCDC then investigated the respondent and determined that, on several occasions, the respondent left his own funds in the trust account and used the account to pay business expenses. The respondent also admitted to not properly "sweeping" his own funds out of his trust account. The respondent stated that he did not know at the time that it was improper to advance costs and fees from his client trust account, and he did not know that it was improper to pay expenses from his trust account using his own funds or that he needed to sweep his own funds from the trust account. The OCDC encountered difficulty obtaining information from Mr. Sheth, and Ms. Dillon, the investigator, was able to reconcile only some of the trust account transactions. The OCDC admitted that there was no actual harm to clients and no client funds were ever used to pay Mr. Sheth's expenses, but the OCDC nevertheless argued that a stayed suspension was appropriate discipline. This Court rejected that request, and instead ordered a reprimand with requirements.

Finally, earlier this year, this Court again issued a reprimand with requirements for trust account violations. In *In re Eric Marvin Martin*, Case No. SC96121 (Mo. banc Jan. 31, 2017), the Disciplinary Hearing Panel had issued a written decision recommending a reprimand with requirements that both the OCDC and the respondent accepted. According to the Hearing Panel's decision, which was filed with this Court, the respondent in *Martin*: 1) failed to withdraw earned fees from his trust account; 2) deposited earned fees into his trust account; 3) failed to reconcile his trust account; 4) failed to wait a reasonable period of time for deposited funds to become good funds; and 5) in stark comparison to the case at bar, withdrew cash directly from his trust account and paid contractors for work done on his Florida condominium and to the Racquet Club out of his trust account. The panel noted that, for these negligent violations, an admonition would generally be the appropriate remedy, but because Mr. Martin had been issued cautionary letters regarding similar actions twice before, a reprimand was appropriate. This Court agreed and ordered a reprimand with requirements.

Taking both the old and recent precedents together, Mr. Ottsen's conduct is less serious than the cases in which this Court has issued reprimands. Mr. Ottsen did not know at the time that his actions were improper, no client was harmed by Mr. Ottsen's mistakes, and no client funds were ever used or misappropriated by Mr. Ottsen. Mr. Ottsen was simply negligent, and there was "little or no actual or potential injury" to any client. ABA Rule 4.14 (admonition).

The ABA Standards Do Not Support Suspension

This Court has previously recognized that "the ABA Standards are merely guidance, and they do not supplant this Court's prior decisions." *In re Farris,* 472 S.W.3d 549, 563 (Mo. 2015). Yet when they are applied to Mr. Ottsen, they point away from suspension and toward the original determination of the Hearing Panel, which was to issue a written admonition. ABA Standard 4.1, which governs mishandling of client property, states as follows:

> 4.1 Failure to Preserve the Client's Property
>
> Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:
>
> 4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.
>
> 4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
>
> 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.
>
> 4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

ABA Standards for Imposing Lawyer Sanctions (1992).

Despite the clear, uncontroverted evidence to the contrary, Informant argues that Mr. Ottsen either knew or should have known that his actions constituted violations of the rules of professional conduct or was "grossly negligent," and therefore he should be subject to a suspension pursuant to Standard 4.12 of the ABA's Standards for Imposition of Lawyer Sanctions. But 4.12 (suspension) says nothing about "gross negligence," and Informant's argument that Mr. Ottsen should be suspended because he was "grossly negligent" is not supported by Missouri case law, or the ABA Standards. Informant cites to Commentary from the ABA Standards to suggest that gross negligence in handling client property is grounds for suspension, but it cites no case law in which this Court has recognized or used the term "gross negligence" in a disciplinary action. Indeed, Missouri courts have "consistently refused to recognize differing degrees of negligence." *Edwards v. Gerstein*, 363 S.W.3d 155 (Mo. App. W.D. 2012).

The OCDC cites one case, *Florida Bar v. Weiss*, 586 So.2d 1051 (Fla. 1991), in support of its novel promotion of a "gross negligence" standard to support suspension. *Weiss* is in direct conflict with Missouri's rejection of "differing degrees of negligence" and also conflicts with this Court's decisions in *Hess*, *Collins*, *Armano*, *Sheth*, and *Martin*, discussed in detail above. While *Weiss* does not set forth a particularly detailed recitation of the misconduct at issue, it appears to be similar to the types of conduct set out in *Hess*, *Collins*, *Armano*, *Sheth*, and *Martin*. This Court apparently believed that such conduct was "negligent" and issued only reprimands.

Mr. Ottsen's testimony, the testimony of Kelly Dillon, and the evidence presented during the hearing in this matter demonstrate that Mr. Ottsen's mistakes with respect to

his trust account violations were, at worst, negligent conduct. Mr. Ottsen testified, and Informant's investigator concurred, that he did not know that his conduct violated the Rules of Professional Conduct. Had Mr. Ottsen known that his actions were problematic, he never would have taken them. This fact is made clear through the numerous actions Mr. Ottsen has taken to correct the problems and ensure that there will be no future issues with the firm's trust account. Ms. Dillon further testified that there was no actual harm to any of the firm's clients, and she testified to only minimal and speculative "potential harm" that could occur from the types of mistakes that Mr. Ottsen made.

The acknowledged mistakes made by Mr. Ottsen therefore support the issuance of an admonition under Standard 4.14, which states that an admonition "is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client."

Mitigating Factors

ABA Standard 9.1 specifically directs consideration of mitigating factors when assessing the appropriate sanction for mishandling client property. ABA Standard 9.3 then lists mitigating factors, which include:

> "(a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; . . . (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; . . . (g) character or reputation . . . (l) remorse."

As is fully set out in the Statement of Facts above, Mr. Ottsen has a long and distinguished legal career. As the Hearing Panel found, Mr. Ottsen has been a "highly regarded and respected" practicing attorney for many years. Mr. Ottsen has no prior disciplinary history. As stated in the Hearing Panel's Decision, Mr. Ottsen and the other members of his firm have

> contributed to the profession by conducting themselves according to the Rules of Professional Conduct until failing to keep up with changes in the Rules of Professional Ethics concerning lawyer's trust accounts and subsequently failing to comply completely with the new Rules. The parties suffered alarm, anxiety, and deep remorse upon being notified of the various violations contained in the Information filed herein. Respondents promptly responded appropriately, answered all allegations against them, and each of them individually, and immediately took steps to correct the improper handling of the law firm trust account. Respondents cooperated with the Office of the Chief Disciplinary Counsel and everyone involved in this matter from beginning to end. Respondents have completed courses of education regarding lawyer trust accounts voluntarily.

App. 347.

In light of the nature of Mr. Ottsen's conduct and Mr. Ottsen's considerable evidence in mitigation, this Court should not impose a stayed suspension. There is nothing to suggest that the protection of the public or the integrity of the bar require that Mr. Ottsen receive such a sanction.

Additional Conditions are Unnecessary

While Missouri Supreme Court Rule 5.16 permits this Court to issue sanctions with appropriate conditions and requirements, such action is unnecessary here. The Hearing Panel specifically recommended sanctions "without condition." In making this recommendation, the Hearing Panel recognized that Mr. Ottsen and the members of his firm "have taken appropriate and adequate steps to prevent any further violations of the Rules of Professional Conduct dealing with trust accounts." App. 347. Further, the Hearing Panel found that Mr. Ottsen did not "pose a threat of harm to any member of the public, and the likelihood of any repeat offense is extremely remote."

In light of the corrective action taken by Mr. Ottsen and the Hearing Panel's determination that he poses no future harm to the public or the profession, this Court need not impose additional conditions on the sanction ordered.

CONCLUSION

Mr. Ottsen's conduct does not warrant a stayed suspension, and none of the cases cited by Informant supports such a conclusion. Mr. Ottsen has cited several cases, more serious than his, in which this Court has recently issued reprimands.

Mr. Ottsen respectfully requests that the Court reject Informant's recommendation and that any sanction the Court imposes be substantially less than a stayed suspension. In light of all the factors, including ABA Rule 4.14, Mr. Ottsen respectfully requests that the Court consider imposing the sanction originally issued by the Disciplinary Hearing Panel, which was a written admonition.

Respectfully submitted,

BEHR, MCCARTER & POTTER, P.C.

/s/ Anthony R. Behr

Anthony R. Behr #30808
John P. Torbitzky #65233
7777 Bonhomme, Suite 1400
Clayton, MO 63105
(314) 862-3800
(314) 862-3953 (fax)
abehr@bmplaw.com
jtorbitzky@bmplaw.com

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

Comes now Counsel for Respondents, and hereby certifies that: (1) the brief includes the information required by Rule 55.03; (2) the brief complies with the limitations contained in Rule 84.06(b); (3) the brief contains 6,709 words, relying on the word processing system used to prepare this brief; and (4) the brief was prepared in 13 point Times New Roman font on Microsoft Word.

/s/ Anthony R. Behr

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the above and foregoing was served this 1st day of June, 2017, by operation of this Court's electronic filing system to:

Alan Pratzel
Office of Chief Disciplinary Counsel
3335 American Way
Jefferson City, Missouri 65109

and:

Barry J. Klinkhardt
Special Representative, Region XI
609 Audubon Place Ct.
Manchester, Missouri 63021

/s/ Anthony R. Behr