IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
KWADWO JONES ARMANO,	**)**	**Supreme Court #SC91601**
	)	
Respondent.	**)**	

INFORMANT'S BRIEF

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL

SAM S. PHILLIPS #30458
DEPUTY CHIEF DISCIPLINARY COUNSEL
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400
Sam.Phillips@courts.mo.gov

ATTORNEYS FOR INFORMANT

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Kwadwo Jones Armano, Respondent, was licensed to practice law in Missouri in 1990. He practices in St. Louis. In 2005, the Region X Disciplinary Committee issued an admonition to Mr. Armano; the admonition determined that Mr. Armano violated these rules: Rule 4-1.3 (diligence) in that he failed to perform any work on behalf of his client for over two years; Rule 4-1.4 (client communication) in that he did not reasonably communicate with his client and failed to return his client's complaint; Rule 4-5.5 (unauthorized practice of law) in that he practiced law after failing to complete his mandatory continuing legal education reporting requirements; and Rule 4-8.1 in that he failed to respond to lawful requests for information from the Chief Disciplinary Counsel and the Region X Disciplinary Committee. Mr. Armano accepted the admonition. He was not disciplined before that case and he has not been disciplined since that case. **App. 130-132**.

In April 2010, the Office of Chief Disciplinary Counsel (OCDC) received three notices from Commerce Bank that Mr. Armano's trust account was overdrawn. Those notices were provided per the bank's obligation under Rule 4-1.15. **App. 119-120; 122-123**.

The Office of Chief Disciplinary Counsel asked Mr. Armano to explain the overdraft. **App. 121**. Mr. Armano said that on the day before he wrote the $500.00 check that bounced, he was told by Commerce Bank that his trust account held $7,173.99. **App. 8**. He reported to the OCDC that he later learned the bank's information was inaccurate. **App. 117**.

In addition to the $500.00 check (payable to himself) that caused an overdraft, Mr. Armano wrote a check for $1,725.00 to Chowning Heating and Cooling for work on a house that Mr. Armano was rehabilitating for sale. The bank twice attempted to process that check, but there were insufficient funds; the bank therefore notified the OCDC of those two overdrafts. **App. 11; 25; 44; 78-80**.

The OCDC asked Mr. Armano for additional bank records and client records. Mr. Armano responded after some delay, providing more records. **App. 88**. Additional investigation and requests for information led to Mr. Armano supplying records for two clients whose funds were to have been held in his trust account at the time of his overdraft. **App. 74-75**.

The OCDC's subsequent audit revealed the following: Mr. Armano's $500.00 check that led to the bank's overdraft notice was written to himself. **App. 11; 45**. At the time he wrote that check, he was routinely using his trust account for personal banking. **App. 11**; **34-50**. Checks written on his trust account during that period (April – June 2010) primarily related to a home on Westminster Place in St. Louis that Mr. Armano owned and was preparing for sale. Trust account payments were made to landscaping companies, cash, Home Depot, Lowes, and Laclede Gas. Additionally, Mr. Armano wrote checks for many thousands of dollars to himself, with check memos indicating the Westminster Place address. **App. 34-50; 84**.

Mr. Armano did deposit funds ($195,000.00) from the sale of the Westminster Place house on April 20, 2010. **App. 78-80; 102**. The checks to remodel Mr. Armano's

house were made before he sold the house and, of course, before he received the proceeds from the house sale. They were made, at times, with client funds. **App. 12**.

Mr. Armano represented two clients during the Spring of 2010 whose funds were placed into his trust account. Upon settling a $10,000.00 personal injury claim for Mark Thurman in February 2010, Mr. Armano promptly wrote a $5,000.00 check to Mr. Thurman, dated February 25, 2011. **App. 11-12; 78; 90-94**. He agreed to withhold $1,667.00 with a promise to negotiate a pending claim held by a hospital held against Mr. Thurman for treatment related to the case. The remaining funds were then held in Mr. Armano's trust account. **App. 90**. But before Mr. Armano completed his negotiations with the hospital, he wrote checks from his trust account for his personal use. Those personal checks caused overdrafts in his trust account. Mr. Armano was, therefore, using Mr. Thurman's money for his own use. **App. 12; 93**.

Mr. Armano eventually settled Thurman's lien with the hospital for $1,850.00 but before he paid the hospital, he sent Mr. Thurman a check for $2,000.00. **App. 92**.

The payments to Thurman and his hospital were made after Mr. Armano deposited his $195,000.00 house sale proceeds into his trust account. **App. 92; 94**. Until he made that deposit, his account had been in a negative balance for about ten days. **App. 78-80**.

In a second case in March 2010, Mr. Armano settled a personal injury case for his client, Brian Harris, for $7,000.00. **App. 95**. In that case, Mr. Armano paid his client $3,000.00 per an agreement. He withheld $1,667.67 to negotiate with Mr. Harris' medical provider. **App. 95; 106**.

At least one of the medical liens was settled by August 3, 2010, according to Mr. Armano. **App. 68**. Before paying the medical providers, Mr. Armano spent the remainder of Harris' funds that were to be held in his trust account; Harris' funds were used for Mr. Armano's rehabilitation project on his house on Westminster Place. **App. 11-12**.

On March 4, 2010, Mr. Armano also deposited $8,200.00 into his trust account for Ben Asare, a client/relative purchasing of a car. Mr. Armano agreed to hold the funds in escrow. **App. 78-80; 100-101**. He spent those funds before making payments to the car seller. **App. 11; 78-80**. He was able to replenish his trust account before the obligations came due by selling his Westminster Place house. **App. 12**.

Mr. Armano stipulated that his conduct consisted of commingling personal funds and client funds, in violation of Rule 4-1.15(c). And, he stipulated that he violated Rule 4-1.15(d) by failing to maintain adequate records. **App. 13**. He explained that he knew that he was making personal payments from his trust account, but that the payments were made with the belief that funds in the trust account belonged to him. **App. 8**.

The Stipulation accurately reflects Mr. Armano's violations of Rule 4-1.15 (trust accounting) in Paragraphs 17 and 18 in the "Stipulation as to Facts," but incorrectly reflects Rule 4-1.5 (fees) in the Stipulation's "Conclusions of Law." That error was corrected in a February 16, 2011, letter from the Region X Special Representative. **App. 133-134**.

Informant and Respondent agreed that a Public Reprimand is an appropriate sanction in this case. **App. 13-14.** The parties' stipulation explains that recommendation

with the following: "Mitigating factors include that no clients were ever aware or damaged by the violation, and that Respondent has only received one other complaint which resulted in an admonition in 2005." **App. 14**.

POINT RELIED ON

I.

THE COURT SHOULD PUBLICLY REPRIMAND RESPONDENT FOR VIOLATING RULE 4-1.15 BECAUSE:

RESPONDENT HAS ADMITTED THAT VIOLATION;

AND,

A PUBLIC REPRIMAND IS APPROPRIATE UNDER APPLICATION OF BOTH THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS AND MISSOURI CASE GUIDANCE.

In re Belz, 258 S.W.3d 38 (Mo. banc 2008)

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

In re Coleman, 295 S.W.3d 857 (Mo. banc 2009)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

Rule 4-1.15

ARGUMENT

I.

THE COURT SHOULD PUBLICLY REPRIMAND RESPONDENT FOR VIOLATING RULE 4-1.15 BECAUSE:

RESPONDENT HAS ADMITTED THAT VIOLATION;

AND,

A PUBLIC REPRIMAND IS APPROPRIATE UNDER APPLICATION OF BOTH THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS AND MISSOURI CASE GUIDANCE.

Respondent has admitted that his conduct constitutes violations of Rule 4-1.15(c) and 4-1.15(d). In light of that admission, the brief will address the recommended sanction.

Sanction analysis commonly derives from several sources: parties' recommendations or stipulations; hearing panel recommendations; applicable rules, e.g. Rule 5.225 (the probation rule); application of the ABA Standards for Imposing Lawyer Sanctions; consideration of previous Missouri Supreme Court decisions for consistency; and, other jurisdictions' decisions. The parties agree that a Public Reprimand is an appropriate sanction in this case. **App. 10-126**. The disciplinary hearing panel also approved that recommendation. **App. 127-129**. In deciding what sanctions to recommend, the OCDC and the Regional Disciplinary Committees routinely consider all those sources, whether they are reaching a stipulation or whether in more adversarial

settings. As importantly, the OCDC attempts to consider the Court's many unreported decisions made in stipulated and contested cases. Recognizing the uniqueness of each case, patterns and trends are nevertheless apparent. As with reported decisions, the OCDC attempts to analyze each unreported decision, considering the particular facts, the level of harm, the level of intent, and the nature of the violations, as well as both mitigating and aggravating circumstances. Using all sources, the analysis is then applied to each new case. The recommended sanction is made with an assumption that consistent sanctions in common cases have, over time, become de facto standards, even without reported decisions. Of course, each case is unique; certain facts require deviation from standards. It is the goal of the OCDC to recommend sanctions in accord with those apparent standards and to justify or explain any deviations from the standards.

In the instant case, Informant's recommendation of a Public Reprimand in a case involving a trust account violation requires an explanation. In short, the recommendation is based on a belief that a Public Reprimand will protect the public because it will remind Mr. Armano that he must avoid using his trust account to hold personal assets and that he is professionally responsible for reconciling any account where client funds may be held.

Most trust account violations result in disbarment, suspension or stayed suspension with a period of probation intended to improve the attorneys' practice methods. But, in the eighteen months since the Overdraft Notification Rule was implemented, the OCDC has learned that some cases are difficult to pigeonhole, at least until more standards are developed. In the instant case, disbarment is not appropriate because there is neither evidence of intentional theft nor evidence that Mr. Armano knew

or should have known that he was using client funds. See ABA Standard 4.11 and *In re Williams*, 711 S.W.2d 518 (Mo. banc 1986). And, under the ABA Standard 4.12, it appears that suspension is not the default sanction. ABA Standard 4.12 sets the bar at suspension for commingling when a lawyer knows or should know that he is dealing improperly with client money and causes injury or potential injury to a client. Mr. Armano knew that he was concurrently using his trust account for personal and client funds. But, it does not appear that he knew that his placement of personal funds in his trust account was inherently improper. As to harm, Informant takes the position that commingling client and personal funds inherently creates injury or potential injury to a client. At the least, client funds become subject to attorneys' creditors' attachment efforts when they are commingled. As is apparent from these facts, attorneys who fail to maintain complete records and reconcile their trust accounts put client funds at risk of misallocation.

Per ABA Standard 4.13, reprimands can be used when lawyers are merely negligent in dealing with client funds and cause injury or potential injury to a client. The Commentary to Standard 4.13 clarifies: "…lawyers who are grossly negligent in failing to establish proper accounting procedures should be suspended: reprimand is appropriate for lawyers who simply fail to follow their established procedures." ABA Standard 4.13 Commentary. For further guidance, the Commentary to Standard 4.14 holds that: "An admonition would be appropriate, for example, when a lawyer's sloppy bookkeeping practices make it difficult to determine the state of a client trust account, but where all client funds are actually properly maintained." Standard 4.14 Commentary. Mr. Armano

was clearly negligent in failing to reconcile his accounts. Had he done so, he would have known that he had insufficient funds of any kind when he wrote the checks that caused the overdrafts that instigated this case. And, Mr. Armano's sloppy bookkeeping is worrisome. But, the OCDC did not find gross negligence. Consequently, application of ABA Standards would seem to permit a Public Reprimand in this case.

Until 2009, almost all Missouri disciplinary cases involving trust account violations were initiated by client complaints. And, most of those cases involved some known financial loss or dishonesty. Until the 2009 implementation of the Overdraft Notification Rule, few trust account cases were decided by the Supreme Court unless more serious violations were found. Under those circumstances, little guidance can be found for sanctions in less serious cases, leaving the ABA Standards as the next best source for sanction analysis.

While disbarment is the presumptive sanction in Missouri cases involving intentional misappropriation, deviations from that standard can come into play. For instance, in 2008, a majority of the Court found that certain unique mitigating circumstances, such as a diagnosed bi-polar condition causing the misappropriation, could result in a suspension. *In re Belz*, 258 S.W.3d 38 (Mo. banc 2008).

Additionally, within the last several years, the Court has also issued opinions for stayed suspensions (with probation) in contested certain cases involving apparently unintentional commingling. The *Coleman* and *Wiles* cases can be distinguished from the instant case by those lawyers' significant disciplinary histories. Attorney Wiles had been previously admonished for four diligence violations, five communication violations, one

safeguarding client property violation, and one violation for engaging in conduct prejudicial to the administration of justice. *In re Wiles*, 107 S.W.3d 228 (Mo. banc 2003). And, he had received two more admonitions from Kansas disciplinary authorities. *Wiles*, at 229. The opinion did not describe the new conduct that led to discipline, other than noting that Mr. Wiles had been censured in Kansas. *Wiles*, at 228.

The more recent decision involving probation provides additional guidance. In that 2009 opinion, the Court granted probation to Missouri attorney Larry Coleman. *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009). Mr. Coleman had been admonished in 1990 for violations involving communication and unreasonable fees. Later, in 1999, he was admonished for diligence and communication violations. Finally, in 2008, the Court publicly reprimanded him for "violations regarding diligence, unreasonable fees and conduct prejudicial to the administration of justice." *Coleman*, at 859. In the 2009 case leading to probation, the Court found that Mr. Coleman violated these Rules:

- Mr. Coleman violated Rule 4-1.2 by preparing a retainer agreement giving him "exclusive right to when and for how much to settle" his client's case. And, he violated that Rule by actually agreeing with his client's opponent to settle her case against her specific direction. *Coleman*, at 864.
- Mr. Coleman violated Rule 4-1.15(c) by commingling his own funds with client funds in his trust account and by failing to keep adequate trust account records. *Coleman*, at 866.

- Mr. Coleman violated Rule 4-1.16 by failing to notify his client at the time of his withdrawal from her case and by failing to take steps to mitigate his withdrawal. *Coleman*, at 866-867.
- That misconduct also led to a finding that Mr. Coleman violated Rule 4-8.4 in that it wasted judicial resources and was prejudicial to the administration of justice. *Coleman*, at 868.
- Upon application of the ABA Sanction Standards, the Court determined that a suspension was an appropriate sanction. *Coleman*, at 869-871.

Mr. Armano received one admonition in 2005 for violations involving communication, diligence, failure to respond to disciplinary authorities and practicing law while suspended for MCLE non-compliance. **App. 130-132**.

CONCLUSION

Informant asks the Court to enter the following order:

WHEREAS, in this Court the Disciplinary Hearing Panel approved a stipulation, the parties' filed the complete record, the parties fully briefed and argued said cause, and the parties having agreed that a Public Reprimand is the appropriate sanction.

Now at this day, the Court being sufficiently advised of and concerning the premises and having considered the statement of acceptance of the Disciplinary Hearing Panel decision pursuant to Rule 5.19(c), the Court finds that, in March and April 2010, Kwadwo Jones Armano, Respondent, Missouri Bar Number 39976, violated Rule 4-1.15 by commingling client and personal funds in his trust account, by failing to reconcile his trust account, and by writing checks for personal items from his trust account before insuring that funds were available. Respondent is publicly reprimanded for that violation and ordered to carefully review Rule 4-1.15, to study the Trust Accounting Manual prepared by the Missouri Lawyer Trust Account Foundation, and to examine his trust accounting practices to assure future compliance with the Rules of Professional Conduct.

Respectfully submitted,

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel

By: _____

Sam S. Phillips #30458
Deputy Chief Disciplinary Counsel
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400 – Phone
(573) 635-2240 – Fax
Sam.Phillips@courts.mo.gov

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2011, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

Kwadwo Jones Armano
34 N. Brentwood, #212
St. Louis, MO 63105-3746

_____
Sam S. Phillips

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 3,098 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Trend Micro software was used to scan the disk for viruses and that it is virus free.

_____
Sam S. Phillips

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