IN THE SUPREME COURT OF MISSOURI
EN BANC

In re:	)	
DAVID R. SWIMMER,	)	Supreme Court No. 94235
Respondent.	)	

BRIEF OF RESPONDENT

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DAVID R. SWIMMER

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JURISDICTIONAL STATEMENT

This is a lawyer discipline case. Therefore, as Informant's Brief states, this Court has jurisdiction over this case pursuant to Article V, Section 5 of the Missouri Constitution; Missouri common law; and Missouri Revised Statute § 484.040. In addition, this Court has jurisdiction under its inherent authority to regulate the Missouri Bar.

CASE SUMMARY

In his more than forty years of law practice, David Swimmer has experienced bumps and bruises, including prior discipline and even a stayed suspension for unwise decisions and improper conduct Mr. Swimmer made almost a decade ago, before he retained a law practice management consultant. The violations that bring Mr. Swimmer before this Court now are, to be frank, not the sort of misconduct that generally leads to long suspension, even for someone who has a prior disciplinary record like his. Specifically:

- Mr. Swimmer caused an overdraft on his trust account when, too eager to pay a referral fee to the Bar Association of Metropolitan St. Louis (BAMSL), he drew funds from the check of a police officer client, only to have the police officer client's check bounce; and
- During the resulting investigation, the Office of Chief Disciplinary Counsel (OCDC) determined – and Mr. Swimmer admits – that, although he had ***not*** mishandled client funds, he had improperly left his own funds in his trust account to pay law practice expenses, based upon the incorrect advice of his accountant, also a licensed lawyer.

In addition, Informant (and the Hearing Panel) tries improperly to blame Mr. Swimmer for bad consequences a *pro se* plaintiff Margo Webster brings upon

herself after – as even Ms. Webster recognizes – Mr. Swimmer's representation of her had ended.

Mr. Swimmer asks that this Court punish him appropriately only for what he actually did wrong. An appropriate sanction would be of a reprimand or, at most, a stayed suspension and probation, as these penalties would be consistent with this Court's precedent based on the actual conduct at issue in this case and a proper consideration of Mr. Swimmer's prior disciplinary history.

STATEMENT OF FACTS

In accordance with Missouri Supreme Court Rule 84.04(f), Mr. Swimmer offers the following statement of facts as fair and concise:

Over forty years ago, in 1973, David R. Swimmer was admitted to practice law in Missouri. He has been a sole practitioner for thirty years, since 1984. (Transcript at 118, Informant's Record (Record) at 117) Mr. Swimmer is also an alcoholic who has attended Alcoholics Anonymous meetings and maintained his sobriety since May 16, 1982. (Transcript at 138, Record at 122)

Mr. Swimmer's Title VII law practice. Mr. Swimmer's law practice focuses on representing plaintiffs in Title VII employment discrimination claims. (Swimmer Testimony at 73, Record at 106) He has had such a practice for more than a decade, perhaps more than fifteen years. (*Id.*; *accord* Swimmer Testimony at 119, Record at 117)

Mr. Swimmer does not have a high dollar, prestigious practice. Rather, he describes his own practice as the "last house on the block." (Swimmer Testimony at 142, Record at 123) Mr. Swimmer elaborates:

> I'm the last house on the block. Virtually every one that I represent has been turned down by other attorneys or ha[s] been rebuffed in doing this. And some of those cases are just

> worthless, but you don't really know that until you start working hard on them.

(*Id.* at 142-43)

Due to the nature of his practice, Mr. Swimmer requires his clients to pay him an hourly fee for legal services. This is a contrast to most employment discrimination plaintiffs' lawyers, who cherry pick the best cases and – expecting a good return on their investment – agree to get paid a percentage of whatever they recover. (*Cf.* Letter from Jerome Diekemper, Record at 445)[1] Also in contrast to many employment discrimination plaintiffs' lawyers, Mr. Swimmer's ordinary fee arrangement is ***strictly*** time-based (hourly): when Mr. Swimmer recovers something for his client, the client alone receives that recovery. (*Cf.* Hourly Employment Contracts, Record at 209, 211, & 232)

Mr. Swimmer has experienced some success earning recoveries for his clients. He has settled more than fifty Title VII cases in the past three years, receiving some form of payment for his clients. (Swimmer Testimony at 143,

[1] Mr. Swimmer tendered the letter from Mr. Diekemper cited here and other letters contained at pages 444-46 of Informant's Record in an effort to supplement the record due to improper arguments made and evidence offered by Informant's counsel at the Hearing. The Hearing Panel denied Mr. Swimmer's effort to supplement the record. This issue is addressed more *infra.*

Record at 123) Clients praise the representation Mr. Swimmer provides to them. (*See, e.g.*, Record at 492 (letter from Swimmer client Roz Brooks)) Colleagues in the practice who are knowledgeable of Title VII cases – including lawyers that handle his client's cases on appeal and that mediate over his cases – describe Mr. Swimmer as a competent who provides credible representation and obtains reasonable outcomes for his clients. (Letters of Mr. Diekemper, Leonard Frankel and David Knierim, Record at 444-46)

Representation of Ms. Webster. One of the clients that Mr. Swimmer represented was Margo Webster. Three representations are relevant to this case.

First, on December 3, 2002, Ms. Webster retained Mr. Swimmer because she had been removed from her work at the Office of the Collector of Revenue, City of St. Louis, after co-workers claimed Ms. Webster had threatened to shoot a co-worker named Velma in a dispute over a man. (*See* Swimmer Testimony at 92-93, Record at 110-11; Webster Testimony at 159, Record at 127) Ms. Webster located Mr. Swimmer through BAMSL. (*Id.*) In addition to a $30 BAMSL referral fee, Ms. Webster was supposed to advance a $450 retainer and pay Mr. Swimmer $225 per hour for his legal services. (Webster Testimony at 177-78, Record at 132; *see also* December 2002 Hourly Employment Contract, Record at 209)[2] Instead,

[2] The Engagement Agreements in the Record – entered in 2002, 2004, and 2005, all before the issuance of Missouri Formal Ethics Opinion 128 (2010) –

Ms. Webster paid Mr. Swimmer only $250 to write a letter for her to her employer. (Webster Testimony at 159, Record at 127) Mr. Swimmer wrote and sent the letter, but according to Ms. Webster it "did not do any good." (*Id.*)

Second, on December 3, 2004, exactly two years after the first engagement, Ms. Webster retained Mr. Swimmer a second time to assist her in filing a charge with the Equal Employment Opportunity Commission (EEOC) related to the conditions of her employment at the Collector of Revenue. Ms. Webster was to advance a $550 retainer and pay Mr. Swimmer $285 per hour to assist her with a "Title VII Investigation." (Hourly Employment Contract dated December 3, 2004, Record at 211) Ms. Webster testified that she never advanced the retainer or paid Mr. Swimmer any money for this engagement. (Webster Testimony at 178, Record at 132) But Mr. Swimmer helped her nonetheless. (*See, e.g.*, Letters between Mr. Swimmer and the EEOC dated February 14, 2005; February 25, 2005; and March 15, 2005, Record at 220-22)

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describe each retainer as "non-refundable." In testimony, Mr. Swimmer explained that he would have refunded all or a portion of the retainer as appropriate. (Swimmer Testimony at 111, Record at 115) Mr. Swimmer also explained that he removed this language from his engagement agreements sometime between 2007 and 2009, while working with law practice management consultant Sara Reid. (*Id.* at 136, Record at 121)

The Title VII investigation resulted in the EEOC issuing Ms. Webster a "right-to-sue" letter dated March 31, 2005. (Record at 223; Swimmer Testimony at 105, Record at 113) Ms. Webster then had 90 days to file a lawsuit; failure to file within the 90-day period would cause her claims to be time-barred. (*Id.*; *see also* EEOC Dismissal and Notice of Rights dated March 31, 2005, Record at 223)

The third engagement letter related to Ms. Webster possibly engaging Mr. Swimmer to file a federal lawsuit based upon the right-to-sue letter. Shortly after receiving the EEOC right-to-sue letter, on April 7, 2005, Mr. Swimmer forwarded the right-to-sue letter to Ms. Webster with a cover letter indicating he was willing to represent Ms. Webster in pursuing a Title VII federal lawsuit. Mr. Swimmer's mailing provided Ms. Webster with certain "Homework," a half-page of questions she needed to answer. (Record at 227) Mr. Swimmer's cover letter also stated that Ms. Webster needed to pay a retainer of $1350, "broken down as $1,000 against $285 billable hours and $350 in filing and service fees," and warned her that federal courts "strictly construe" the 90-day deadline to file. Thus, the April 7 letter indicated, Ms. Webster should contact him substantially before the 90-day deadline if she wanted him to handle his case. (*Id.*)

Ms. Webster responded, indicating that she wanted to retain Mr. Swimmer to file suit and would do the homework. In her April 19, 2005 fax, Ms. Webster stated that she would be dropping off the Homework later that week. (*See* Fax from

Ms. Webster, Record at 229) Mr. Swimmer did not, however, receive Ms. Webster's Homework or tender of the full retainer and filing fee in April 2005. (Webster Testimony at 186-87, Record at 134; *Id.* at 191, Record at 135)

On May 19, Mr. Swimmer sent Ms. Webster a follow-up letter, warning Ms. Webster, "[Y]ou haven't retained this office yet." (Record at 231) Mr. Swimmer warned Ms. Webster that he "needed enough lead time . . . to complete a Complaint draft for you to review with [Ms. Webster] before [they] file." (*Id.*)

Mr. Swimmer did not, however, receive the Homework or the full retainer payment in May 2005. (Webster Testimony at 191-94, Record at 135-36) Further, although Ms. Webster was not completing the Homework and had missed a couple of meetings she scheduled with Mr. Swimmer, Mr. Swimmer had no indication that Ms. Webster was upset with his handling of her case. (Swimmer Testimony at 123-24; Record at 118)

On June 3, 2005, Ms. Webster executed the Hourly Employment Contract for Mr. Swimmer to file the Title VII lawsuit. (Record at 232) On or about that date, Ms. Webster also tendered $400 as an advance on the $1000 retainer and $350 filing fee. (Record at 235; Webster Testimony at 192, Record at 135)

But as of June 8, 2005, Mr. Swimmer still had not received the full retainer or Ms. Webster's Homework. So he sent Ms. Webster another letter, asking for the

retainer and completed Homework, and telling Ms. Webster *inter alia* that he needed the Homework "yesterday if not sooner." (Record at 233)

Ms. Webster finally tendered the final installment of the $1000 retainer to Mr. Swimmer on or about June 17, 2005. (Webster Testimony at 191-92, Record at 135; Record at 234, 236) Mr. Swimmer also demanded and Ms. Webster paid a $50 penalty after she failed to appear a second time for a meeting she scheduled with him. (Swimmer Testimony at 108, Record at 114) The retainer and $50 penalty were paid in two installments, the $400 installment paid on or about June 4 and a $650 installment paid on or about June 17, 2005. (Record at 235-36)

But as of June 17, 2005, Ms. Webster still had not provided the completed Homework or the $350 filing fee. So Mr. Swimmer sent her a third letter on June 21, 2005, telling Ms. Webster that he needed the Homework immediately. (Record at 237)

As the deadline approaches, Ms. Webster brings Mr. Swimmer her completed Homework. Ms. Webster claims that on June 26, 2005, approximately a week after Mr. Swimmer's June 21 letter, approximately 80 days after his initial April 7 letter, and 87 days after the March 31 date on the right-to-sue letter, she finally came to Mr. Swimmer's office unannounced to bring Mr. Swimmer the completed Homework. (Transcript at 193, Record at 135; *accord id.* at 167-68,

Record at 129) This was perhaps a week before the right-to-sue deadline would pass.

When meeting with Mr. Swimmer on June 26 (or so), Ms. Webster claimed that Mr. Swimmer told her, "I don't have time right now." (*Id.* at 169, Record at 129) Instead, Ms. Webster testified, Mr. Swimmer told her to keep her money (she says $100, presumably for the filing fee) in her pocket and to file the case herself if she wanted. (*Id.*) Mr. Swimmer, meanwhile, did not recall ever seeing the completed Homework June 2005 when he testified at the hearing, nine years later. (Swimmer testimony at 122 & 124, Record at 118)

Ms. Webster never paid Mr. Swimmer the $350 filing fee. (*Id*. at 122, Record at 118; Webster Testimony at 184, Record at 133)

Ms. Webster files her Title VII lawsuit *pro se.* Ms. Webster testified and the federal court docket confirms that Ms. Webster filed her Title VII lawsuit herself *pro se* on June 29, 2005. Ms. Webster testified that, after filing her Complaint *pro se*, she ***did not*** "keep in contact with Mr. Swimmer" until "after [she] did the second amendment." (Transcript at 170, Record at 129) Ms. Webster also testified that she knew Mr. Swimmer ***was not*** helping her on her case. (*Id.* at 194, Record at 136) Ms. Webster did, however, attach the completed Homework to her Complaint. (Record at 257-66)

Mr. Swimmer never filed any pleadings in Ms. Webster's federal lawsuit. (Swimmer Testimony at 125, Record at 119)

Ms. Webster's employment is suspended then terminated. In July 2005, after she had filed her lawsuit *pro se*, the Collector of Revenue apparently suspended Ms. Webster's employment. (IR at 330 (Affidavit of Myrna G. Robinett)) Then, slightly more than one month after Ms. Webster filed her lawsuit *pro se*, the Collector of Revenue terminated Ms. Webster's employment effective August 1, 2005. (Transcript at 174, Record at 131) Having already amended her Complaint once on July 12, 2005 (Record at 253), Ms. Webster filed a Second Amended Complaint *pro se* on August 17, 2005, to reflect her suspension and termination. (Record at 270)

Ms. Webster claims that, for the first time since she filed her lawsuit *pro se*, she contacted Mr. Swimmer after she filed the Second Amended Complaint. (Webster Testimony at 170, Record at 130) Mr. Swimmer does not remember such a call. (Swimmer Testimony at 112, Record at 115) Also, as previously noted, Mr. Swimmer never filed a pleading in Ms. Webster's federal lawsuit. (*Id.* at 125, Record at 119)

The Collector of Revenue obtains summary judgment. In March 2006, the Collector of Revenue filed a motion for summary judgment against Ms. Webster, seeking dismissal *inter alia* because the alleged conduct was not based on Ms.

Webster's race or gender, was not severe or pervasive enough to affect a term or condition of employment, and because Ms. Webster had failed to exhaust administrative remedies with regard to her suspension and termination. (Record at 286-87) Ms. Webster was still representing herself *pro se.* Apparently she did not respond to the Collector of Revenue's motion for summary judgment. Noting that Ms. Webster had not responded to the motion for summary judgment (Record at 335 n.3), the federal court granted that motion and dismissed Ms. Webster's case with prejudice on the basis that she had failed to exhaust her administrative remedies with respect to her suspension and termination, and because she had not alleged any pre-suspension adverse employment action or severe and pervasive harassment. (Record at 340-41) When dismissing Ms. Webster's case with prejudice, the federal court noted that it could also dismiss Ms. Webster's lawsuit because she had failed to make her initial disclosures, despite a court order to do so. (Record at 335-36 n.4)

Mr. Swimmer treats $1000 as earned fees. While Ms. Webster litigated her Title VII case *pro se*, Mr. Swimmer treated the $1000 retainer (and $50 fee for skipping a second meeting) that she paid in June 2005 as fees he had earned. At hearing, Mr. Swimmer explained that he had "spent more time [on her matter] than what she paid me for." (Swimmer Testimony at 110, Record at 115) Not recalling

exact details of a representation that ended nine years earlier, Mr. Swimmer further explained:

> Mr. Swimmer: I don't know whether we met. I know that I called her. I wrote letters. I'm telling you and anybody that wants to, it takes more time to get an uncooperative client to do things by certain deadlines than it does to actually sit down and plead documents.
>
> . . .
>
> Question: So today you can't sit here and hand me anything that demonstrates that you earned $1,050 between June 5th, 2005 and June 30th, 2005?
>
> Mr. Swimmer: Here is what I know. I met with the woman. I know that I have talked on the phone and placed telephone calls. I believe that I did research on the pleadings. I know that I wrote her letters, and I might have received some material from her.

(Swimmer Testimony at 111-12, Record at 115) Asked if had done anything wrong in his handling of Ms. Webster's case, Mr. Swimmer responded, "In retrospect, I should not have tried as long or as hard as I did. . . . I mean, she was

unwilling to do the homework necessary to get her case off the ground." (*Id.* at 142, Record at 123)

Silence from Ms. Webster for four years. During the pendency of her case and for almost four years after dismissed, Ms. Webster had no communications with Mr. Swimmer. She did not send Mr. Swimmer any communication indicating that she was unhappy with him. (*Id.* at 198-99, Record at 137; *see also* Swimmer Testimony at 125, Record at 119) Ms. Webster also never demanded her $1000 back. (Webster Testimony at 198, Record at 137)

Mr. Swimmer put on probation. Approximately two years after his representation of Ms. Webster ended, and for unrelated reasons, Mr. Swimmer received a six-month stayed suspension and was placed on one year of probation by this Court pursuant to a joint stipulation on September 25, 2007. The stayed suspension and probation were likely imposed because, in addition to the conduct that was the subject of the stipulation, Mr. Swimmer had received seven admonitions between June 1992 and May 2003. Those seven admonitions are: (1) in June 1992 relating to a contingency fee agreement; (2) in September 1992 for mishandling an adoption; (3) in January 1995 for failure to pay promptly a third party lienholder from settlement funds; (4) in August 1996 for mishandling fees arising from representation of a minor; (5) in May 2000 for lack of judgment in photographing a client; (6) in May 2000 for lack of judgment in asking to view

injuries on a client; and (7) in May 2003 for failure to correctly calculate the deadline of a right-to-sue letter and failure to promptly return a client's file.

Mr. Swimmer successfully completed his probation, as indicated in this Court's Order dated September 26, 2008.

Ms. Webster files her ethics complaint. Four years after her case was dismissed, and five years after Mr. Swimmer's representation, Ms. Webster out of the blue filed an ethics complaint against Mr. Swimmer. (Webster Testimony at 197, Record at 137) About the time that she filed her ethics complaint, Ms. Webster was receiving unemployment. (*Id.* at 176, Record at 131) She had not been able to secure a job roughly comparable to her position at the Collector of Revenue's office since she lost that position on August 1, 2005; instead, the positions she has found over the past nine years have generally been low paying and often temporary. (Webster Testimony at 175, Record at 131)

Practice improvement with Ms. Reid. In conjunction with his probation, Mr. Swimmer sought to receive guidance on how to improve his practice. Someone connected to OCDC – likely Informant's counsel or the Chief Disciplinary Counsel – recommended that Mr. Swimmer retain and Mr. Swimmer did retain law practice management consultant Sara Reid to assist in improving his practice. (Swimmer Testimony at 135, Record at 121) Ms. Reid gave Mr. Swimmer homework, which Mr. Swimmer did. Ms. Reid also reviewed Mr. Swimmer's practice-related

documents, such as his engagement letters. (*Id.* at 135-36). One consequence of Ms. Reid's retention is that Mr. Swimmer stopped referring to retainers as "nonrefundable" in his engagement agreements. (*Id.* at 136) Another consequence was that Ms. Reid helped clarify Mr. Swimmer's engagement agreements when he took on a limited scope engagement. (*Id.* at 136-37)

Mr. Swimmer ultimately worked with Ms. Reid for two years or more, from approximately 2007 to 2009 or 2010. (*Id.* at 135) Mr. Swimmer also paid Ms. Reid for this assistance. (*Id.*)

Trust Account overdraft. After working with Ms. Reid, Mr. Swimmer had no problems for about three years. Then, on or about March 14, 2012, Mr. Swimmer had an overdraft on his Trust Account. Mr. Swimmer had received referral of an employment discrimination case from the BAMSL Lawyer Referral Service. (Swimmer Testimony at 130, Record at 120) The client, a police officer, wrote Mr. Swimmer a check for his retainer. (*Id.*) Mr. Swimmer then deposited the check in his trust account and promptly and dutifully paid BAMSL its referral fee, ten percent of the retainer or $100. (*Id.*)

Unfortunately, the police officer client's check was initially not honored due to insufficient funds in the police officer client's account. (*Id.* at 130-31) This caused the $100 check to BAMSL to bring Mr. Swimmer's Trust Account to a negative balance of $13.84. (*Id.*; *see also* Dillon Testimony at 25, Record at 94; *id.*

at 57, Record at 102; Bank of America Overdraft Report dated March 26, 2012, Record at 197) Mr. Swimmer had unfortunately, not waited for the funds to be collected by his financial institution. (Swimmer Testimony at 132, Record at 120)

Notice of overdraft and response. The Trust Account overdraft caused notice to be sent on March 20, 2012, to the OCDC and to Mr. Swimmer. (Dillon Testimony at 19, Record at 92; Bank of America Overdraft Notice, Record at 97) On March 27, 2012, Mr. Swimmer sent a letter to OCDC, alerting OCDC to the fact that his trust account had been overdrawn. (Dillon Testimony at 26, Record at 94) Mr. Swimmer's letter indicated that he had some sort of overdraft protection, but did not explain why the overdraft had occurred. (Swimmer Letter dated March 27, 2012, Record at 200)

Meanwhile, on March 29, 2012, OCDC paralegal Kelly Dillon sent a letter to Mr. Swimmer, requesting an explanation for the $13.84 overdraft. (Dillon Testimony at 25-26, Record at 94; *see also* OCDC Letter dated March 29, 2012, Record at 199)

Upon receiving Ms. Dillon's letter on April 3, 2012, Mr. Swimmer sent a second letter to OCDC. This second letter provided a copy of his earlier correspondence, and it also attached a printout of his trust account activities from June 2011 to March 2012. (Record at 204-06) Later, upon request from Ms. Dillon, Mr. Swimmer submitted bank statements and copies of canceled checks and copies

of deposit slips. (Dillon Testimony at 30, Record at 95) Mr. Swimmer did not, however, provide copies of deposited items as requested, causing OCDC to subpoena his bank records. (*Id.*) (Separately, Mr. Swimmer explains that he did not have the deposited items, but offered to consent to or join in a subpoena so that OCDC could get those items.)

Errors in Trust Account operations. OCDC investigated Mr. Swimmer's trust account activities and ultimately found that Mr. Swimmer had made three kinds of errors in his handling of trust account funds. Those three kinds of errors were:

(1) Depositing checks consisting only of legal fees paid for past legal services into the trust account (Dillon Testimony at 34, 37-39, Record at 96-97);

(2) Using his firm's funds that were in the trust account to pay some firm-related expenses, instead of "sweeping" all his funds out into an operating account once the fees were earned (*Id.* at 31, 38, Record at 95, 97); and

(3) On two occasions, depositing checks constituting his own funds into his trust account, once because it was a payment from the U.S. Treasury that Mr. Swimmer was not sure how to handle,

and the second time to cover the March 2012 overdraft that caused the overdraft notification (*Id.* at 35-36, Record at 96).

Regarding payments made, as referenced in (2) *supra*, Mr. Swimmer paid $5,130 to Edward Jones; $75.27 to Office Max; $35 to Keith Haus; $25 to U. City Alterations; $30 to Befit Health; and $150 to St. Louis Mobile Tech. (*Id.* at 31, Record at 95)

Mr. Swimmer did not mishandle client funds. Ms. Dillon testified that she was not aware of any instance where Mr. Swimmer improperly withheld monies owed to a client. Ms. Dillon testified:

> Question: [A]re you aware of an instance where Mr. Swimmer withheld money that was intended for a client?
>
> Ms. Dillon: No. I'm not aware of any instances where he withheld money intended for a client.

(Dillon Testimony at 53-54, Record at 101) Later, Ms. Dillon confirmed:

> Question: [A]re you aware of any instance where Mr. Swimmer did not pay a client the moneys to which they are entitled?
>
> Ms. Dillon: I am not aware of any instances where he did not pay a client.

(*Id.* at 63-64, Record at 103) Ms. Dillon believed Mr. Swimmer did not have a

dishonest or selfish motive. (*Id.* at 65) She also admitted that he communicated with her and was cooperative in producing the bank records he possessed. (*Id.*)

Mr. Swimmer admitted this conduct, including admitting the specific payments listed above. (Swimmer Testimony at 127, Record at 119) He explained that his accountant had told him paying expenses directly from the trust account was appropriate, and that making payments in this fashion would make his firm's tax record-keeping easier. (*Id.* at 127-129, Record at 119-20) Mr. Swimmer further testified that he stopped making the identified errors when he learned those actions were incorrect. (*Id.* at 127, Record at 119)

Mr. Swimmer also testified that he had, to his knowledge, he never improperly used client funds in his trust account. Mr. Swimmer testified:

> Question: To your knowledge, have you ever improperly used client funds from your trust account?
>
> Mr. Swimmer: Never.
>
> …
>
> Question: [W]hen you were paying business expenses out of your trust account, to your knowledge, were those payments always made with funds that were actually part of the fees that you had left in the account?
>
> Mr. Swimmer: Yes.

(Swimmer Testimony at 137, Record at 122)

The Information is filed. On October 7, 2013, Informant brought a two-count Information against Mr. Swimmer for the conduct described *supra*. (Record at 1) Count I of the Information brought charges relating to Mr. Swimmer's handling of Trust Account funds. (*Id.* at 1) Count II charged that Mr. Swimmer had violated ethics rules in his representation of Ms. Webster. (*Id.* at 4) Only two specific client matters were referenced in the Information: the representation of Margo Webster (in Count II), and a reference to representation of the "Tegeler settlement" in Count I. (*Id.* at 2)

Mr. Swimmer answers and serves discovery. Mr. Swimmer answered the Information on November 20, 2013. (*Id.* at 42) At that time, Mr. Swimmer also served Requests for Production that included requests for all documents that "evidence or disprove any allegations in the Information" and "that Informant intends to use at any hearing or trial on the merits in this matter." (First Requests for Production of David R. Swimmer, Record at 39) Informant provided documents in response to Mr. Swimmer's Requests for Production, but did not file or state any objections.

Use of uncharged representations at hearing. This matter was tried before a Hearing Panel on March 4, 2014. (Record at 87) Less than two weeks before the Hearing, on or about February 23, 2014, Informant's counsel sent a letter to Mr.

Swimmer's counsel listing certain business records that Informant intended to use at the hearing. In addition, the letter stated:

> In addition, [Informant] may ask the panel to take judicial notice of the court decisions, opinions, and filed documents (available on Pacer or Lexis).
>
> 1. *Peyton v. AT&T Servs.,* Case No. 4:13CV00216 (E.D. MO)
> 2. *Hammonds v. Union Elec. Co.,* Case No. 4:11CV1476 (E.D. MO)
> 3. *Renfrow v. Sanborn Map Co.,* Case No. 4:10CV02295JCH (E.D. MO)
> 4. *Brooks v. Midwest Heart Group,* Case No. 4:10CV805SNLJ (E.D. MO)
> 5. *Brooks v. Midwest Heart Group*, 655 F.3d 796 (8th Cir. 2011)
> 6. *Smythe v. Potter*, Case No. 4:05CV1471FRB (E.D. MO)
> 7. *Lyons v. United States Postal Serv.,* Case No. 2:06CV17SNL (E.D. MO)

(Letter from Mr. Lapp dated February 23, 2014, at 1-2; Respondent's Supplemental Record at 1.)[3]

The dockets for these uncharged seven cases – at the trial and appellate court level – contain more than 200 entries. (Record at 452-91) Informant's Counsel, however, did not specify what entries he would be using, nor – despite Mr. Swimmer's request for production (Record at 39) – did Informant provide copies of documents it intended to use at hearing until the Hearing itself, when Informant's counsel gave Mr. Swimmer's counsel copies of certain opinions from those seven cases.

Accordingly, at the start of the Hearing, Mr. Swimmer through counsel objected to the use of any the pleadings from these seven uncharged cases to prove uncharged conduct. (Transcript at 7-8, Record at 89) Informant's counsel argued pleadings from the seven uncharged cases should be admitted to show the "level of competency and understanding of Mr. Swimmer with respect to EEOC procedure and Title VII law" and because the pleadings were relevant to "progressive discipline." (Transcript at 8-9, Record at 89-90) Despite the objections from Mr.

[3] Due apparently to a copying error, only the first page of Mr. Lapp's February 23 letter is included in Informant's Record. (*See* Record at 447-48) Accordingly, Mr. Swimmer is filing the full letter as a Supplemental Record with this Brief.

Swimmer's counsel, the Hearing Panel ultimately admitted the documents for "the purposes stated." (*Id.* at 90)

During the Hearing, Informant's counsel sought to examine Mr. Swimmer regarding two of the seven cases, *Peyton* (#1) and *Brooks* (#4 and 5). Mr. Swimmer objected through counsel, and it was agreed this objection would be a continuing objection (Transcript at 86, Record at 89), but Informant's counsel was allowed to proceed with questioning. (Transcript at 85-90 & 99-101, Record at 109-10, 112-13)

Mr. Swimmer then testified – truthfully and as supported by the docket for both *Peyton* (Record at 459) and *Brooks* (*id.* at 471-72) – that both the *Peyton* and *Brooks* cases had settled, with Mr. Swimmer's client receiving compensation for their claims. (Transcript at 99-100 & 133-34, Record at 112 & 121) Mr. Swimmer also introduced into evidence a letter to Mr. Swimmer from Ms. Brooks stating in part:

> Dear Mr. Swimmer,
>
> You have respectfully & graciously shown me that my case was not an easy case. An expensive case. You knew I was broke and you kept my costs down as low as possible. You continued to work very hard on my case. For you, Mr. Swimmer I have learned that it's not about the money [with] you, but about

> what's right. That makes you a man with integrity. That makes you an excellent lawyer.

(See Letter from Roz Brooks, Record at 492; see also Transcript at 133-34, Record at 121)

Subsequent to Mr. Swimmer's testimony and the admission of Ms. Brooks' letter, Informant's counsel did not make further references to *Peyton* or *Brooks*, including in Informant's closing statement. Instead, during closing argument, Informant's counsel referenced the uncharged *Lyons* (#7) and *Smythe (#6)* cases, which had not been referenced at any prior point in the hearing. (Transcript at 203-04, Record at 138) Informant's counsel claimed – without evidentiary support and over objection from Mr. Swimmer's counsel – that Mr. Swimmer had submitted inadequate affidavits in the *Lyons* case and failed to exhaust administrative remedies in the *Smythe* case. (*Id.*) Of course, because Informant's counsel held these arguments until after the close of evidence, Mr. Swimmer received no opportunity to explain why the affidavits had been found inadequate or remedies had been found unexhausted. *Cf.* Missouri Supreme Court Rule 4-3.4(e).

Request to supplement the Record. After the March 4 hearing, Mr. Swimmer moved the Hearing Panel to strike Informant's improper arguments regarding the *Peyton*, *Brooks*, *Lyons*, and *Smythe* cases. Alternatively, Mr. Swimmer requested that he be allowed to supplement the record to include letters from three

practitioners (including two mediators) knowledgeable of Mr. Swimmer's Title VII practice that Mr. Swimmer had demonstrated competency in handling Title VII matters. (Record at 434) Mr. Swimmer also explained that, had he received proper notice his conduct in the seven uncharged cases would be put at issue, he could have provided:

(a) Testimony from lawyers familiar with Mr. Swimmer's practice that Mr. Swimmer is in fact competent to represent clients in Title VII/Employment Discrimination cases;

(b) Testimony and other evidence that the result in *Lyons* was due to problems inherent in the client's case, as well as the refusal by the Eighth Circuit (but not other federal appellate courts) refuse to apply equitable tolling in Title VII cases, and not anything done by Mr. Swimmer; and

(c) The complete absence of a reference in the *Lyons* decisions, or on information and belief the other six uncharged cases, that Mr. Swimmer had engaged in any misconduct when handling those cases.

(Record at 440) The Hearing Panel denied Mr. Swimmer's request. (Record at 498)

Hearing Panel decision and rejection. On or about April 3, 2014, the Hearing Panel issued a decision recommending indefinite suspension with no right to reapply for eighteen months. (Record at 513). Upon receipt, Mr. Swimmer promptly filed a Notice pursuant to Rule 5.19(a) rejecting the Hearing Panel's recommendation. (Record at 543) Proceedings before this Court followed.

POINT RELIED ON

I. THE SUPREME COURT SHOULD DISCIPLINE MR. SWIMMER, BUT ONLY FOR ADMITTED TRUST ACCOUNT VIOLATIONS, BECAUSE MR. SWIMMER SATISFIED ALL OBLIGATIONS OWED TO MARGO WEBSTER.

II. CONSISTENT WITH THIS COURT'S PRIOR RULINGS, A REPRIMAND OR STAYED SUSPENSION WITH PROBATION IS ADEQUATE AND APPROPRIATE HERE TO PROTECT THE PUBLIC AND THE INTEGRITY OF THE BAR.

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

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

ARGUMENT

I. THE SUPREME COURT SHOULD DISCIPLINE MR. SWIMMER, BUT ONLY FOR ADMITTED TRUST ACCOUNT VIOLATIONS, BECAUSE MR. SWIMMER SATISFIED ALL OBLIGATIONS OWED TO MARGO WEBSTER

A. Mr. Swimmer admits the charged Trust Account violations.

Prior to and during the Hearing, Mr. Swimmer admitted to mishandling Trust Account funds. Specifically, Mr. Swimmer has and does concede that:

(1) On occasion, he deposited checks consisting only of legal fees for past legal services into his Trust Account;

(2) He used firm funds in the Trust Account to pay some practice-related expenses, instead of "sweeping" all firm funds out once they were earned; and

(3) On two occasions, he deposited checks constituting his own funds into his trust account, once because it was a payment from the U.S. Treasury that Mr. Swimmer was not sure how to handle, and the second time to cover the March 2012 overdraft that caused the overdraft notification.

Notably, however, both the OCDC and Mr. Swimmer agree that Mr. Swimmer only used his own funds to pay firm-related expenses. He never misused

client funds. Ms. Dillon testified that she was not aware of any instance where Mr. Swimmer improperly withheld monies owed to a client. Ms. Dillon testified:

> Question: ***[A]re you aware of an instance where Mr. Swimmer withheld money that was intended for a client?***
>
> Ms. Dillon: ***No.*** I'm not aware of any instances where he withheld money intended for a client.

(Dillon Testimony at 53-54, Record at 101 (Emphasis added)) Later, Ms. Dillon confirmed:

> Question: ***[A]re you aware of any instance where Mr. Swimmer did not pay a client the moneys to which they are entitled?***
>
> Ms. Dillon: ***I am not aware of any instances where he did not pay a client.***

(*Id.* at 63-64, Record at 103 (Emphasis added))

Mr. Swimmer also testified that he had, to his knowledge, never improperly used client funds in his trust account. Mr. Swimmer testified:

> Question: ***To your knowledge, have you ever improperly used client funds from your trust account?***
>
> Mr. Swimmer: ***Never.***

> Question: [W]hen you were paying business expenses out of your trust account, to your knowledge, were those payments always made with funds that were actually part of the fees that you had left in the account?
>
> Mr. Swimmer: Yes.

(Swimmer Testimony at 137, Record at 122 (Emphasis added))

B. Mr. Swimmer satisfied all obligations owed to Ms. Webster.

The uncontroverted evidence supports that Mr. Swimmer satisfied all obligations owed to Ms. Webster. In fact, Informant is focused upon whether Mr. Swimmer should have advised Ms. Webster to amend her EEOC charge to bring a retaliation claim. But this issue arose only after Ms. Webster was suspended and terminated, both of which occurred after Mr. Swimmer's representation of Ms. Webster had ended.

Everyone appears to agree that Mr. Swimmer performed competently in representing Ms. Webster on the engagement that commenced in December 2002, writing a letter challenging claims that Ms. Webster had threatened to shoot a co-worker, for which Ms. Webster paid Mr. Swimmer $250. (*Cf.* Webster Testimony at 159-60, Record at 127 (raising no issue with Mr. Swimmer's representation, other than the fact his letter ultimately did not improve her employment situation).

Also, everyone effectively agrees that Mr. Swimmer did nothing wrong with the second engagement. Ms. Webster signed an engagement agreement saying she would advance a $550 retainer and pay Mr. Swimmer $285 per hour to assist her with filing an EEOC complaint. (Record at 211) Ms. Webster and Mr. Swimmer disagree regarding who prepared the EEOC complaint. (*Compare* Webster Testimony at 163-64, Record at 128 (indicating she prepared the complaint unassisted) *with* Swimmer Testimony at 97-98, Record at 112 (indicating he assisted in preparing the complaint)) But it is clear that (a) Mr. Swimmer did provide Ms. Webster at least some assistance on the matter, as evidenced by his correspondence with the EEOC (Record at 220-22), and (b) Ms. Webster did not pay Mr. Swimmer anything for this engagement. (Webster Testimony at 178, Record at 132) The disagreement regarding who had what involvement in preparing the EEOC charge, therefore, is inconsequential to this proceeding and probably due to the passage of almost a decade between the engagement and testimony at Hearing. (As discussed *infra*, it is clear that Ms. Webster testified incorrectly at the Hearing on several matters, but Mr. Swimmer is not able to definitively prove she is wrong regarding who prepared her EEOC charge.)

Accordingly, the focus of the allegations is solely on the third engagement, the engagement that commenced sometime between receipt of the March 31, 2005, right-to-sue letter, and lasted until late June 2005, when Ms. Webster filed her Title

VII lawsuit *pro se*. From the outset, Mr. Swimmer told Ms. Webster that she would need to satisfy three conditions precedent before he undertake to file her Title VII lawsuit. Those three requirements were:

(1) Ms. Webster had to advance a $1000 retainer;

(2) Ms. Webster had to advance $350 in filing fees; and

(3) Ms. Webster had to complete the Homework that Mr. Swimmer had sent her regarding her Title VII lawsuit.

(Record at 227) Mr. Swimmer sent Ms. Webster repeated letters reminding her that she had not satisfied these three requirements, and warning her that the federal court was likely to strictly enforce the 90-day deadline for filing a Title VII lawsuit after receiving a right-to-sue letter. (*See, e.g.*, Record at 227, 231, 233, 237) Mr. Swimmer also warned Ms. Webster, for example, that although he "like[d her] as a person," she "hadn't retained this Office yet." (Letter dated May 19, 2005, Record at 231)

Ms. Webster recognizes and agrees that she did not satisfy the three requirements that Mr. Swimmer established. Although finally advancing the entire retainer on or about June 17 (Record at 234, 236), Ms. Webster ***never*** paid Mr. Swimmer the $350 filing fee. (Swimmer Testimony at 122, Record at 118) Further, despite repeated assurances to the contrary (*e.g.*, the fax dated April 19, 2005, Record at 229), the earliest that Ms. Webster attempted to give Mr. Swimmer the

required Homework was June 26, 2005, only days before Ms. Webster's 90-day window to file a Title VII action would close forever. (Webster Testimony at 193, Record at 135; *accord id.* at 167-68, Record at 129) Certainly, in these circumstances, it would be appropriate for Mr. Swimmer to tell Ms. Webster that he did not have adequate time to file her lawsuit, as Ms. Webster claims occurred. In fact, at most, that is what occurred. Ms. Webster claims that on June 26, 2005, Mr. Swimmer told her that he "d[idn]'t have time right now" to file the Title VII action) (Id. At 69, Record at 129) Mr. Swimmer does not even recall seeing the completed homework. (Simmer Testimony at 122 & 124, Record at 118)

But both Ms. Webster and Mr. Swimmer agree about what happened next: Ms. Webster proceeded to file her Title VII lawsuit *pro se*, and to litigate that lawsuit without Mr. Swimmer's assistance. Webster testified that she did not "keep in contact with Mr. Swimmer" after filing her complaint *pro se* until "after [she] did the second amendment." (Transcript at 170, Record at 129) Further, contrary to Informant's prediction (Transcript at 114, Record at 116), Ms. Webster testified that she knew Mr. Swimmer ***was not*** helping her on her case. (Webster Testimony at 194, Record at 136) Mr. Swimmer never filed a pleading in Ms. Webster's federal Title VII lawsuit. (Swimmer Testimony at 125, Record at 119)

Thus, after late June 2005, Ms. Webster knew that (a) she had not satisfied the requirements that Mr. Swimmer had established before he would file a Title

VII lawsuit for her; (b) that she was litigating her case *pro se*; and (c) that Mr. Swimmer was not helping her with her case. Mr. Swimmer's representation of Ms. Webster was at an end. Thus, Informant's argument that Mr. Swimmer should have advised Ms. Webster to amend her EEOC charge is irrelevant as well as likely inaccurate.[4] Mr. Swimmer did not represent Ms. Webster after late June 2005, and thus was not her lawyer when she was suspended from employment in July 2005 or terminated from employment in August 2005. (*Cf.* Record at 330 (Affidavit of Myrna G. Robinett stating dates of suspension and termination); Webster Testimony at 174, Record at 131(stating she was terminated August 1, 2005))

A lawyer owes no obligation to provide competent legal representation to a person who is not the lawyer's client. Accordingly, Mr. Swimmer did not violate any ethics obligations with regard to his representation of Ms. Webster, which

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[4] The EEOC issued the so-called right-to-sue letter when it closed its file on Ms. Webster's 2004 charge. (*See* Record at 223) Thus, if in fact Ms. Webster was required to exhaust administrative remedies before filing her retaliation claim – an issue that, to resolve, would require analysis of an extant but widely rejected judicially recognized exception to Title VII's exhaustion doctrine – Ms. Webster would have needed to file a new EEOC charge, not amended her earlier but now closed charge as Informant argues Mr. Swimmer should have advised.

ended in June 2009, or with regard to her handling of her Title VII case *pro se* after his representation ended.

Ms. Webster's testimony and additional claims lack credibility. Finally, lest this Court be distracted, it should be noted that many of Ms. Webster's assertions lack any credibility. During the Hearing, Ms. Webster claimed the sole legal proceeding in which she had ever been involved was her own Title VII lawsuit. (Webster Testimony at 177, Record at 132; *Id.* at 199, Record at 137) When later confronted with specific lawsuits, however, she admitted being sued by her landlord twice in 2004 and 2006, and by at least one other bill collector. (Webster Testimony at 199-200, Record at 137) Casenet suggests Ms. Webster has been involved in more than a half dozen lawsuits

Also, during the hearing, Ms. Webster gave graphic details of alleged harassment including the use of racial epithets against her when she was employed by the Collector of Revenue. (Webster Testimony at 161, Record at 128) Informant's counsel quotes this language extensively in its Brief, apparently convinced that Ms. Webster had a strong Title VII claim. (Informant's Brief at 16) But Ms. Webster wholly omits such details from her initial *pro se* Complaint and the Homework that Ms. Webster finally completed and attached to that *pro se* Complaint, as well as the First and Second Amendments to that Complaint. (Record at 239-67 & 270-85) These are the same Complaints that the federal court

dismissed, not only for failure to exhaust administrative remedies, but because Ms. Webster had failed to plead harassment of sufficient severe and pervasive harassment. (Record at 340-41) Such disparity suggests that, with the passage of almost a decade, it is Ms. Webster's imagination that has improved her case.

Deserving similar credence is Ms. Webster's claim that, in an August 2005 telephone call, Mr. Swimmer demanded $4,000 and that she put in a good word with some unspecified "bar association" for him to resume his representation of her. (Webster Testimony at 170, Record at 130; *see also id.* at 195, Record at 137) Such a demand would be completely illogical, both because Ms. Webster said she was calling Mr. Swimmer to report her employment with the Collector of Revenue had just been terminated (*cf. id.* at 196, Record at 136), and because a "good word" would likely provide Mr. Swimmer with no benefit. The alleged conversation is wholly undocumented. Further, Mr. Swimmer denies he ever made such a demand. (Swimmer Testimony at 112, Record at 115) Perhaps this is why the Hearing Panel's decision wholly only ignores the alleged incident, as it appears without factual underpinnings. This Court should likewise give it no credence.

II. CONSISTENT WITH THIS COURT'S PRIOR RULINGS, A STAYED SUSPENSION WITH PROBATION IS ADEQUATE AND APPROPRIATE HERE TO PROTECT THE PUBLIC AND THE INTEGRITY OF THE BAR.

Turning then to the matter of appropriate discipline, the aims of the Missouri lawyer discipline 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. 2009). Mr. Swimmer has admitted that he made errors in handling trust account funds. Specifically, both the OCDC and Mr. Swimmer agree:

(1) On occasion, Mr. Swimmer deposited checks consisting only of legal fees for past legal services into the trust account;

(2) Mr. Swimmer used his firm's funds that were in the trust account to pay some firm-related expenses, instead of "sweeping" all his funds out once they were earned; and

(3) On two occasions, including to cure the March 2012 $13.84 overdraft, Mr. Swimmer deposited checks constituting his own funds into his trust account.

These are the first violations Mr. Swimmer has committed in years, since he hired a law practice management advisor. Also, particularly because no client funds were misused, they are the type of conduct that ordinarily would result in

relatively limited discipline. Four more bases support a more limited sanction. They are:

1. The Applicable pre-2013 Rules governing Trust Accounts lacked clarity. Admittedly, Mr. Swimmer's actions listed above constitute mis-operation of a lawyer trust account. But everyone agrees that Mr. Swimmer did not improperly misappropriate or withhold from any funds to which any client or third-party was entitled. (Dillon Testimony at 53-54, Record at 101; *Id.* at 63-64, Record at 103) Further, Mr. Swimmer testified that he stopped such actions when he learned it was wrong. (*Id.* at 127, Record at 119)

The Trust Account rules prior to this Court's most recent 2013 amendments were often rather arcane and obscure. Although Mr. Swimmer admits errors in his Trust Account activities, for example, it is not exactly clear what provisions of the pre-2013 version of Rule 4-1.15 Mr. Swimmer may have violated. When asked what portion of the pre-2013 Trust Account rule made clear a lawyer should "sweep" all fees earned from the Trust Account, instead of leaving some funds in the account to pay practice-related expenses, the OCDC paralegal Ms. Dillon spent approximately 90 seconds looking before identifying Rule 4-1.15(j). (Dillon Testimony at 48-50, 52, Record at 99-100) And for years she has focused her work largely on trust account cases (Dillon Testimony at 18-19, Record at 92). Moreover, the provision Ms. Dillon identified starts with a discussion of how a

lawyer should handle funds subject to dispute, which would likely cause a lawyer to think the provision would only apply where there was a dispute regarding distribution of funds.

Such problems with interpretation, even by the OCDC paralegal who has spent years handling almost exclusively on Rule 4-1.15 trust account cases (Dillon Testimony at 21-22, Record at 93), should be considered when assessing sanctions after a sole practitioner like Mr. Swimmer admits that he retained some funds he had earned in his trust account and used those funds to pay practice-related expenses, but did so on the advice of his accountant, a Missouri-licensed attorney. (*Id.* at 127-129, Record at 119-20)

Further confusion is evident regarding whether Mr. Swimmer was correct to pay the BAMSL referral fee directly from his trust account. During her testimony, Ms. Dillon admitted the proper handling of funds needed to pay the BAMSL referral fee became a topic of discussion, one on which she had to consult counsel. (Dillon Testimony at 58, Record at 102) As a consequence of this discussion, Ms. Dillon and OCDC concluded it was "okay" for Mr. Swimmer to have issued a check from his trust account to pay the lawyer referral service. (*Id.*) Yet, curiously, Informant's Brief calls this exact same action an "admitted, improper personal payment." (Informant's Brief at 31) Ms. Dillon also admitted the 2010 version of Rule 4-1.15 did not make clear Mr. Swimmer's mistake in paying the BAMSL

referral fee too quickly, that the lawyer should wait until bank actual receives funds before making distributions of those funds. (Dillon Testimony at 56-57, Record at 101-102) This lack of clarity, and many others that existed under the pre-2013 version of Rule 4-1.15, has been fixed by the 2013 amendments.

Finally, OCDC and Informant challenge Mr. Swimmer's deposit of personal funds into his Trust Account in March 2012 to cover the overdraft that occurred when the police officer-client's check bounced. (*See, e.g.*, Transcript at 144-45, Record at 123-24) Such arguments leave undersigned counsel, who spends a considerable amount of time advising lawyers on trust account-related activities, unsure how to advise a lawyer who learns that for whatever reason an overdraft has occurred.

2. Mr. Swimmer has worked to improve his practice. It is undisputed here that, as soon as he learned certain of his trust account activities were in error, Mr. Swimmer ceased those practices. (Swimmer Testimony at 127, Record at 119) Also, from 2007 to 2009 or 2010, Mr. Swimmer had retained law practice management consultant Sara Reid for at least two years, paying her to help him improve his practice. (*Id*. at 135-37, Record at 121-22) In fact, should this Court determine that Mr. Swimmer did something wrong in his dealings with Ms. Webster – a point Mr. Swimmer vigorously contests – it should be remembered that his representation of her ended nine years ago, and three years before he

retained Ms. Reid. Mr. Swimmer believes Ms. Reid brought significant improvements to his practice.

3. Mr. Swimmer has cooperated and lacks a dishonest or selfish motive. There is also substantial evidence supporting mitigation in how Mr. Swimmer acted in this matter. Ms. Dillon testified that she believed Mr. Swimmer did not have a dishonest or selfish motive. (*Id.* at 65) She also admitted that he communicated with her and was generally cooperative. (*Id.*)

4. Mr. Swimmer has served the community. Mr. Swimmer submitted additional mitigating evidence regarding his service to the community. He has sponsored dozens of others fighting alcohol addiction through his involvement with Alcoholics Anonymous; volunteered at Mangrove, a psychiatric residence center for young people; and recently has volunteered weekly at Lift for Life Charter Academy, teaching drawing to at-risk youths. (Swimmer Testimony at 138-40, Record at 122) Mr. Swimmer also testified that on a weekly basis he provides several hours of *pro bono* legal assistance to people who call through BAMSL, primarily regarding Title VII matters. (*Id.* at 140)

Prior disciplinary history. Admittedly, Mr. Swimmer has a prior disciplinary history that includes a suspension and seven admonitions, but these prior sanctions should be considered in the proper light. The admonitions stretch over an eleven-year period, from June 1992 and May 2003. (Record at 18-32) Mr. Swimmer has

received no admonitions in almost a decade. Also, although Mr. Swimmer has previously been placed on probation in 2007, he successfully completed the probation in 2008, six years ago. Further, the probation was not for errors in trust account operation: Rule 4-1.15 is not cited in the Order imposing probation and the stayed suspension. (Record at 33) Thus, although prior instances of discipline support Mr. Swimmer receiving discipline more serious than a lawyer never disciplined before, neither Mr. Swimmer's disciplinary history nor the conduct in this case indicates a long suspension is necessary.

Precedent supports a reprimand. *In re Miller,* 568 S.W.2d 246 (Mo. 1978), supports imposition of a reprimand. In fact, the misconduct in *Miller* is more serious than the conduct here, because – unlike Mr. Swimmer – Mr. Miller had actually misappropriated $30,000 entrusted to his care. More recent cases where the Missouri Supreme Court has imposed a reprimand for trust account violations include *In re Gary Lee Collins*, Case No. SC93645 (Mo. Sept. 28, 2013)(violations of Rules 4-1.15, 4-1.15(d), 4-1.3, 4-3.2, and 4-8.1; *In re Luis Hess*, Case No. SC93013 (Mo. Jan. 29, 2013) (violations of Rules 4-1.15(c), (d) and (f)); *In re Thomas G. Glick*, Case No. SC92117 (Mo. Nov. 14, 2011); *In re Kwadwo Jones Armano*, Case No. SC9601 (Mo. Oct. 4, 2011); and *In re James M. Martin*, Case No. SC 91701 (Mo. Apr. 25, 2011). A reprimand is appropriate here because, although *Miller* and most of the other cases cited involved more serious trust

account activities than Mr. Swimmer's case – misuse of client funds, Mr. Swimmer has a prior discipline history these respondents apparently lack.

Precedent would also support a stayed suspension. Alternatively, should this Court conclude a more serious sanction should be imposed, at most the sanction should be a suspension stayed pending completion of probation. Such a penalty is appropriate under Missouri Rule 5.225 as well as *In re Coleman*, 295 S.W.3d 857 (Mo. 2009), and *In re Wiles*, 107 S.W.3d 228 (Mo. 2003). In *Coleman*, the Court found that Mr. Coleman had violated 4-1.2, 4-1.7, 4-1.15, 4-1.16, and 4-8.4, and had previously been admonished twice and reprimanded effectively concurrent with the conduct giving rise to the 2009 decision. Yet the court imposed only a stayed suspension upon Mr. Coleman.

In *Wiles*, meanwhile, this Court imposed only a stayed suspension where the lawyer was found to have violated the equivalent to Missouri Rules 1.3, 1.4, 1.5, and 1.15, and where the lawyer's prior discipline included two admonitions in Kansas and apparently eleven admonitions in Missouri for "four diligence rule violations (Rule 4-1.3), five communication rule violations (Rule 4-1.4), one safeguarding client property rule violation (Rule 4-1.15(b)), and one violation of the rule against engaging in conduct prejudicial to the administration of justice (Rule 4-8.4(d))."

Consistent with *Coleman* and *Wiles*, this Court has imposed probation and a stayed suspension for trust account violations in numerous recent cases. Over the last three years, there have been more than a dozen cases where a lawyer received a stayed suspension and probation for violating Rule 4-1.15 and other rules. Recent such cases include: (1) *In re Tate*, Case No. S93822 (Mo. Dec. 24, 2013) (violation of Rule 4-1.15 and Rule 4-8.4(d)); (2) *In re Carter*, Case No. SC93739 (Mo. Nov. 26, 2013) (violation of Rules 4-1.15 and Rules 4-1.8 and 4-8.4(c)); (3) *In re McGee,* Case No. SC93568 (Mo. Oct. 1, 2013) (violation of Rule 4-1.15 and Rules 4-1.9 and 4-8.1); (4) *In re Dotson*, Case No. SC93042 (Mo. Jan. 29, 2013) (violation of Rule 4-1.15 and Rule 4-8.4(c) and (d)); (5) *In re Thompson*, Case No. SC93025 (Mo. Dec. 21, 2012) (violation of Rule 4-1.15 and Rule 4-1.5); (6) *In re Peetz*, Case No. SC92968 (Mo. Dec. 18, 2012) (violation of Rule 4-1.15 and Rule 4-8.4(c)); (7) *In re Butler*, Case No. SC92781 (Mo. Sept. 25, 2012) (violation of Rule 4-1.15 and Rule 4-8.4(c) and (d)); (8) *In re Jamison*, Case No. SC92683 (Mo. Aug. 3, 2012) (violation of Rule 4-1.15 and Rule 4-5.3); (9) *In re Briegel*, Case No. SC92516 (Mo. May 29, 2012) (violation of Rule 4-1.15 and Rules 4-1.2, 4-1.3, 4-1.4, 4-8.1, and 4-8.4(c) and (d)); (10) *In re Swischer*, Case No. 92336 (Mo. May 29, 2012) (violation of Rule 4-1.15 and Rules 4-1.3, 4-1.4, 4-1.5, 4-3.2, 4-5.3, 4-8.1, and 4-8.4(d)); (11) *In re Harry*, Case No. SC92209 (Mo. Jan. 31, 2012) (violation of Rule 4-1.15 and Rules 4-1.1, 4-1.3, and 4-1.4(a)); (12) *In re Koenig*,

Case No. SC91685 (Mo. Oct. 25, 2011) (violation of Rule 4-1.15 and Rules 4-1.3, 4-1.4, and 4-8.4(c)); (13) *In re Pawloski*, Case No. SC91152 (Mo. May 17, 2011) (violation of Rule 4-1.15 and Rule 4-8.4(c)); and (14) *In re Blum*, Case No. SC90312 (Mo. Sept. 1, 2009) (violation of rules 4-1.15 and 4-1.3, 4-1.4, 4-1.8, 4-1.16, and 4-8.1).

Mr. Swimmer is eligible for probation. Mr. Swimmer is eligible for probation under Missouri Supreme Court Rule 5.225 because: (a) he is unlikely to harm the public during a period of probation and he can be adequately supervised; (b) he is able to perform legal services and is able to practice law without causing courts or profession to all into disrepute; and (c) he has not committed acts warranting disbarment. Further, in many of the dozen or so cases cited above, the Rules violations cited suggest potential harm to the disciplinary process, the Bar's reputation, or client's matters, factors not present here. Accordingly, Mr. Swimmer should receive what these lawyers received (a stayed suspension) or less, not more.

An eighteen-month suspension is inappropriate. Finally, Missouri precedent does not support a suspension with right to reapply in eighteen months is appropriate. After all, this Court has imposed only a suspension with right to reapply in six months where the respondent had been convicted for felony cocaine possession in *In re Shunk,* 847 S.W.2d 789, 791 (Mo. 1993); and where a respondent had sought an improper plea deal for a client and made false statements

to federal investigators in *In re Zink,* 278 S.W.3d 166 (Mo. 2009). Even with his prior discipline history, Mr. Swimmer's conduct would not rise to the level of such misconduct.

CONCLUSION

Based upon the foregoing, Mr. Swimmer respectfully requests that this Court reprimand him for his admitted violations of Rule 4-1.15, or at most impose a stayed suspension and probation, with terms of probation adequate in this Court's discretion to protect the public.

REQUEST FOR ORAL ARGUMENT

Mr. Swimmer believes that oral argument is appropriate for this case. The standard setting for a lawyer discipline case, allowing fifteen minutes of argument per side, should be sufficient.

WHEREFORE, respondent David R. Swimmer requests that this Court reprimand Mr. Swimmer for his admitted violations of Rule 4-1.15, or at most impose a stayed suspension and probation, with terms of probation adequate in this Court's discretion to protect the public; require Mr. Swimmer to pay the appropriate disciplinary fee and court costs awardable to Informant under Rule 5.19; or grant Mr. Swimmer any further relief that this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via the Court's electronic case filing system, on this 29th day of August, 2014, to:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03. It was drafted using Microsoft Word. The font is Times New Roman, proportional 14-point font, which includes serifs. The brief complies with Rule 84.06(b) in that it contains 10,437 words and 977 lines.

Dated: August 29, 2014

By: */s/ Michael P. Downey*