

IN THE SUPREME COURT OF THE
STATE OF MISSOURI

In re

ERIC F. KAYIRA,

Attorney-Respondent.

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Case No. SC98531

BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

Mr. Kayira does not contest this Court's jurisdiction. This is a lawyer discipline case. Therefore, as stated in Informant's Brief, this Court has jurisdiction over this case pursuant to Article V, Section 5 of the Missouri Constitution; Missouri Supreme Court Rule 5; 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

Eric Kayira is the sole owner of Kayira Law, LLC, an entertainment and media law firm in St. Louis County, Missouri. He appears before this Court as respondent to charges relating to operation of the firm's trust account. Mr. Kayira has admitted much of the conduct alleged and accepted responsibility for his actions. Mr. Kayira has also ensured that each client and third party has received all funds to which he or she is entitled.

This Brief addresses demonstrates why Mr. Kayira's law license should only be suspended indefinitely based upon the nature of the violation at issue and Mr. Kayira's strong evidence in mitigation including moral character, recognition by his legal peers, significant community service, absence of a selfish or dishonest motive, and medical conditions including alcoholism and clinical depression.

STATEMENT OF FACTS

Consistent with Missouri Supreme Court Rule 84.04(c) and (f), Mr. Kayira offers the following Statement of Facts.

Background. Mr. Kayira was born in Nashville, Tennessee on July 19, 1969. (App. 260)¹ He obtained his undergraduate degree from Hampton University in Hampton, Virginia, in 1992 and graduated from Saint Louis University School of Law in 1998. (App. 262) Prior to attending law school, Mr. Kayira was a senior staff member and chief speech writer for Governor Mel Carnahan from 1993 to 1995. (App. 262)

Mr. Kayira was admitted to the Missouri Bar in April 2000. (App. 189-90) Mr. Kayira's bar number is 50672. Mr. Kayira has previously received a tax suspension from this Court in 2014, and guidance (cautionary) letters in October 15, 2012 and May 11, 2015. (*Id.*) Mr. Kayira has no other prior discipline.

Law Firm Practice. Mr. Kayira began his law career working at the St. Louis firm of White Coleman & Associates from 1998 to approximately 2001. (App. 264) Mr. Kayira then joined Lathrop & Gage in St. Louis in 2001 as an associate and later an "of counsel" attorney. (*Id.*) Leaving Lathrop & Gage in 2006, Mr. Kayira moved to Blackwell Sanders Peper Martin LLP, where Mr. Kayira was promoted to partner. (App. 264-65) In 2008, Mr. Kayira left Blackwell Sanders Peper Martin LLP to start his own law firm, now Kayira Law, LLC. (App. 265)

¹ Citations to the appendix are denoted by the appropriate Appendix page, for example "App. (page number)."

Mr. Kayira primarily practices entertainment and media law, including handling transactional and litigation matters. (App. 193) For a brief period several years ago, Mr. Kayira also handled personal injury and probate matters, the type of matters discussed in greater detail in this Brief. (*Id.*)

Local community and legal community involvement. Mr. Kayira has been an active volunteer in the St. Louis community and bar, including serving as vice-president of the Mound City Bar Association and on the board of directors for the Black Repertory Theatre. (App. 268) Mr. Kayira has also worked with Story Stitchers, an organization helping disadvantaged youth overcome gun violence and their circumstances, and with Dress for Success, which provides people with clothes to wear on job interviews. (App. 268-71) Additionally, Mr. Kayira has also coached his children’s baseball and softball teams. (App. 271-72)

Along with his extensive community involvement, Mr. Kayira is also an active volunteer in efforts to assist and improve the legal profession. He has presented continuing legal education programs on a number of subjects including at the South by Southwest® (SXSW) festival in Austin, Texas. (App. 273) Mr. Kayira has also presented for the Black Entertainment Sports Law Association, including at its national conference. (App. 273-74)

References for good character. Mr. Kayira was also recognized as a *Best Lawyer in America* from approximately 2004 through 2019. (App. 267-68) Mr. Kayira submitted written character references, including from his associate Irene Costas and a lifelong friend and attorney Robert Kenney. (App. 280-81) Ms. Costa described Mr. Kayira as having a “superior legal mind” who offered “new and creative solutions” to clients’ legal problems.

Ms. Costa also said she has “never hesitated to refer a family member or close friend to [Mr. Kayira] for legal services.” (App. 1000) Ms. Costa also writes about Mr. Kayira’s “strong spiritual belief that family is more important than work,” and the personal problems and stress that Mr. Kayira has encountered. (*Id.*) Ms. Costa trusted in Mr. Kayira’s ability to “recognize [his] past mistakes and make corrections.” (*Id.*)

Mr. Kenney meanwhile has known Mr. Kayira for 30 years, and described him as a “caring and loving father,” a “good and loyal friend,” and a lawyer with a “keen intellect and great legal mind.” (App. 999) Although conceding that Mr. Kayira had made admitted practices in managing his firm, Mr. Kenney trusted that such mistakes “will not happen again,” and asked that Mr. Kayira be allowed to “continue practicing and serving clients.” (*Id.*) Both character references reported their positive experiences with Mr. Kayira, as well as Mr. Kayira’s solid reputation in the legal community. (App. 281-82)

Probate matter involving Estate of Milton Brookings. From on or about July 25, 2012, until December 2015, Mr. Kayira was counsel of record for Carmen House as the personal representative of the estate of Milton Brookings, a matter pending before Commissioner Patrick J. Connaghan in the City of St. Louis Probate Court. (App. 195-96) The estate of Milton Brookings was a supervised estate, which requires probate court authorization for decisions relating to the distribution of assets of the estate, including to the beneficiaries of the estate. (App. 196)

As part of Mr. Kayira’s representation of Milton Brookings’ personal representative Carmen House, Mr. Kayira filed two lawsuits in the City of St. Louis. (App. 197-98) One lawsuit was filed against Bank of America pertaining to funds of a decedent. (App. 198)

This lawsuit against Bank of America was ultimately removed to federal court. (*Id.*) The other lawsuit was filed against Carol Brookings Hasapopoulos, the aunt of the personal representative Carmen House. (*Id.*) Both related to funds that Ms. Hasapopoulos withdrew from Bank of America with Ms. House present, and from which Ms. House herself received funds after Ms. Hasapopoulos's withdrawal. (App. 253-55)

Mr. Kayira admitted during the disciplinary proceeding that, at the time Kayira Law filed the two lawsuits, he did not understand that there were special probate court requirements that should have been satisfied before Kayira Law commenced litigation on behalf of a supervised estate. (App. 199-201) Mr. Kayira now understands the additional requirements regarding a supervised estate. Further, upon learning of the requirements for supervised estates, Mr. Kayira made reasonable efforts to comply with those requirements. On or about February 5, 2013, Mr. Kayira obtained probate court approval to retain \$1,510.75 in attorney fees previously received from the personal representative Carmen House for legal services the Mr. Kayira rendered to the estate prior to that time. (App. 207-08)

The parties to the federal lawsuit against Bank of America settled the case for \$12,500 in August 2013. (App. 199-200) Bank of America then issued payment in the settlement amount (\$12,500) to Mr. Kayira's law firm. (Ap. 202) On or about August 8, 2013, Mr. Kayira deposited the settlement check in the amount of \$12,500 from the Bank of America lawsuit into Kayira Law's operating account. (App. 205) Mr. Kayira made this deposit into his firm's operating account because he believed, based upon his conversations with the personal representative Ms. House that Kayira Law should retain the \$12,500

payment as fees the firm had earned through legal work it had provided to the estate. (App. 206, 248) Mr. Kayira and Ms. House had discussed that Mr. Kayira would receive the Bank of America settlement funds as payment of attorney fees owed to Kayira Law prior to the drafting of the Bank of America settlement agreement. (App. 248-49)

When receiving the Bank of America settlement funds in August 2013, Mr. Kayira believed it was appropriate for him to retain the \$12,500 settlement as payment for legal fees when the personal representative had authorized that payment – particularly since the personal representative was also the *sole beneficiary* of the estate. (App. 199, 206, 208) However, Mr. Kayira now admits that he should not have accepted the \$12,500 Bank of America settlement from a supervised estate without the probate court’s approval. (App. 250-51)

At a subsequent court hearing, Commissioner Connaghan notified Mr. Kayira that Kayira Law should not have accepted the fee payment without probate court approval. (App. 249-50) Mr. Kayira, however, did not also realize that Commissioner Connaghan had also ordered the \$12,500 to be paid into the registry of the probate court. (App. 250-51, 257) Mr. Kayira instead admitted that he wrongly anticipated Commissioner Connaghan would order Kayira Law to show cause why Kayira Law should be permitted to retain the funds, and that Kayira Law could then file a response to explain the entire situation. (App. 250-51, 257)

On or about December 13, 2016, Mr. Kayira reimbursed the Estate of Milton Brookings for the \$12,500 in settlement proceeds. Mr. Kayira issued a check in the amount of \$12,500 to repay the principal, and a second check in the amount \$3,375 to repay the

interest that the estate through new counsel claimed was due. (App. 219, 251-52) Mr. Kayira therefore fully remediated the error resulting from his receipt of the \$12,500 as payment for fees that Ms. House agreed to pay. Mr. Kayira's refunding of fees also meant that Ms. House had received almost two years of legal services in two lawsuits from Kayira Law while paying the firm virtually no fees. (App. 990-998)

Trust account matters. In July 2017, as part of its investigation of the House complaint, the Office of Chief Disciplinary Counsel conducted an audit of Kayira Law's trust and operating accounts. (App. 103, 105) Mr. Kayira stipulated to the admission of the account transaction spreadsheets that resulted from this investigation. (App. 103-05)

The audit found – and Mr. Kayira admitted – that Mr. Kayira had made numerous mistakes in the operation of his client trust account, including (a) depositing funds into the firm's operating account when the funds should have been deposited into the firm's trust account; (b) transferring funds from the operating account to the trust account, thus commingling funds; (c) using funds in the trust account to cover payments due to and for other clients; and (d) failing to wait until funds became good before disbursing them. (110-16, 118-21, 132-34, 138, 140, 146-51, 243-44)² Mr. Kayira also left earned fees in the trust account, instead of sweeping those funds into his operating account. (App. 147-48) Finally, Mr. Kayira admitted that he had not properly reconciled his account during the period under audit, nor did he maintain proper records for his trust account. (App. 235)

² The rule requiring lawyers to hold funds in their trust account for 10 days was adopted by this Court in January 2019. (App. 169-70)

Since the audit, Mr. Kayira has implemented measures to ensure that his accounts comply with the Missouri Rules. (App. 239-40, 275-76)

Mr. Kayira admitted that, during the audit period, Kayira Law received a \$50,000 settlement payment for client Thomas Kepler in March 2013, but – due to an error that caused Mr. Kayira to overlook the funds had not been disbursed – Kayira Law did not disburse the settlement funds to Mr. Kepler until November 2014. (App. 122, 227-28) From March 2013 to November 2014, Mr. Kayira also admitted, Mr. Kepler’s funds were not preserved intact in Kayira Law’s trust account but were instead used for other purposes. (App. 122) When Mr. Kayira realized in November 2014 that Kayira Law had failed to timely disburse Mr. Kepler’s March 2013 settlement funds, Mr. Kayira also understood that he had lost control of his law practice. (App. 279-80)

Mr. Kayira has reviewed and remedied all problems relating to Kayira Law’s trust account. (App. 152, 1001-06) This includes that Mr. Kayira has paid \$303.00 to client Ronald Brooks – the sole client Ms. Dillon had indicated might still be owed money – despite Mr. Kayira’s good faith belief that the \$303.00 had been properly retained as reimbursement for fees incurred on Mr. Brooks’ matter. (*Id.*)

Mental health issues. During the disciplinary hearing, Mr. Kayira testified that, during the period in which his firm’s trust account was subject to audit, he was experiencing significant personal difficulties. (App. 237-41, 264-65) Mr. Kayira was involved in divorce proceedings in 2011-12 including a custody dispute for his three minor children. (*Id.*) Mr. Kayira also experienced depressive episodes during this period, and began abusing alcohol.

Both the depression and alcohol abuse negatively impacted Mr. Kayira's law practice and ability to operate his law practice. (*Id.*)

Mr. Kayira continued to deal with problems relating to depression and alcohol abuse through April 2019, when Mr. Kayira attempted suicide. (App. 238) While receiving medical treatment for this suicide attempt, Mr. Kayira learned that his depressive episodes were a part of an undiagnosed mental condition and he also recognized he was an alcoholic. (*Id.*)

Following the disciplinary hearing, Mr. Kayira learned that he had been suffering under the mental condition of Bipolar Disorder for years, including the preceding periods which manifests itself in Mr. Kayira's alcoholic tendencies, impulsive-risk taking behaviors, and periods of depression. Through his subsequent and comprehensive mental health treatments thereafter, Mr. Kayira believes he was suffering under his undiagnosed or treated Bipolar Disorder throughout his mistakes related to the management and accounting of his law practice. Mr. Kayira continues to undergo counseling-therapy and medical treatment for his mental health and condition. Mr. Kayira did not exercise the procedures under Missouri Supreme Court Rule 5.285 regarding giving notice of such a condition. Had he been fully aware of the extent of his mental health conditions prior to the hearing, Mr. Kayira believes he would have done so.

Remedial measures and improvements to law practice. Since April 2019, Mr. Kayira has made considerable progress in addressing the problems with his law practice and ability to operate his law practice, including problems to the Kayira Law trust account. At the time of the disciplinary hearing, Mr. Kayira had maintained sobriety for eight

months. At the time of the filing of this Brief, Mr. Kayira has maintained sobriety for over a year. Mr. Kayira also continues to receive counseling therapy; medical treatment and support for his mental health.

Mr. Kayira has obtained education and taken other steps to ensure that his trust account complies with the Missouri Rules of Professional Conduct. (App. 239-240, 275-76) As of the time of the disciplinary hearing and also today, Mr. Kayira's law firm operates in compliance with the Missouri Rules relating to trust accounting. (App. 276)

In addition to seeking help for the problems that preceded this proceeding, Mr. Kayira has consistently admitted to the misconduct throughout the audit and disciplinary process. (App. 245) Kelly Dillon, paralegal for the Informant, acknowledged that Mr. Kayira was cooperative in his dealings with her. (App. 186) Further, the Informant admits in its Brief that Mr. Kayira was remorseful for his conduct. (Informant's Brief at 44) In its Conclusions of Law, the Disciplinary Hearing Panel also found that Mr. Kayira was remorseful and cooperative throughout the proceeding. (App. 1109)

Hearing Panel Recommends Disbarment. On January 2, 2020, a Hearing Panel heard the Informant's case against Mr. Kayira. (App. 95) On March 17, 2020, the Hearing Panel issued its decision, recommending disbarment. (App. 1067-1112) The Informant accepted the recommendation on March 18, 2020. (App. 1114) Mr. Kayira rejected the Hearing Panel's recommendation on April 15, 2020, resulting in this proceeding. (App. 1115-16)

POINT RELIED UPON

1. MR. KAYIRA'S CONDUCT AND EVIDENCE OF MITIGATION
SUPPORT IMPOSITION OF AN INDEFINITE SUSPENSION.

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

In re Belz, 258 S.W.2d 39 (Mo. 2008)

In re Kwado Jones Armano, Case No. SC9601 (Mo. Oct. 4, 2011)

In re Fisher, Case No. SC97694 (June 4, 2019)

In re Bluebaum, Case No. SC97919 (October 15, 2019)

ARGUMENT

Preliminary Statement. Mr. Kayira has largely stipulated to the conduct at issue in this case. Mr. Kayira admits that he made mistakes with the handling of client property – including with regard to the Brookings Estate and the Kepler Settlement – and has taken steps to learn from this incident to ensure it does not happen again. Therefore, the only real question before this Court is what sanction it should impose upon Mr. Kayira.

As set forth below, prior precedent and the mitigating factors in this case support imposition of an indefinite suspension, with Mr. Kayira able to apply for reinstatement of his law license after a period of at least twelve but not more than twenty-four months, not disbarment.

Standard of Review. In matters of professional misconduct, the Court reviews the record of the disciplinary hearing and the evidence *de novo*. *In re Wiles*, 107 S.W.3d 228, 228 (Mo. 2003). This Court then “decides the facts *de novo*, independently determining all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law.” *In re Eisenstein*, 485 S.W.3d 759, 762 (Mo. 2016). “Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed.” *Eisenstein*, 485 S.W.3d at 762. A Hearing Panel’s “findings of fact, conclusions of law, and recommendations are advisory, and this Court may reject any or all of [the Hearing Panel’s] recommendation.” *Id.*

Standard 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. 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 850, 860 (Mo. 2009). Consideration is given to the nature of the conduct at issue, as well as any evidence in aggravation or mitigation. ABA Standard for Imposing Lawyer Sanctions 9.1.

**POINT RELIED #1: Mr. Kayira’s Conduct and Evidence in
Mitigation Support Imposition of an Indefinite Suspension.**

An indefinite suspension is an appropriate sanction for two reasons. First, an indefinite suspension is appropriate based upon Mr. Kayira’s conduct. Specifically, while admittedly his conduct may be near the upper end, Mr. Kayira’s conduct is consistent with prior situations where this Court has previously imposed a suspension or other lesser penalty. Second, even if Mr. Kayira’s conduct did merit a more severe penalty than suspension – which it does not – Mr. Kayira’s extraordinary mitigating evidence should cause this Court to impose an indefinite suspension and not a more serious penalty.

Background for Imposition of Penalty. In discussing the appropriate sanction, this Court should be attentive to the evidence presented to the Hearing Panel of the following:

- (a) Mr. Kayira has admitted that he mishandled client property and failed to handle matters relating to the Estate of Milton Brookings in a competent manner. Mr. Kayira made and admitted mistakes, but his mistakes were not with the purpose to defraud (App. 245);

- (b) Mr. Kayira fully repaid the amounts due (plus additional funds) to Ms. House, even though this effectively resulted in Ms. House receiving substantial amounts of free legal services (App. 219, 251-52, 990-998);
- (c) Mr. Kayira was also cooperative with the OCDC trust account audit, and has admitted substantial errors in how he managed his trust account (App. 186, 245, 1109; *see also* Informant Brief at 44);
- (d) Mr. Kayira was generally cooperative and forthcoming with the OCDC investigation. (App. 186, 1109);
- (e) Mr. Kayira's misconduct was a consequence of Mr. Kayira's mental health, and was unintentional and without malice or selfish motive (App. 237-41, 264-65); and
- (f) Mr. Kayira and his law practice were suffering under significant pressure, mainly due to Mr. Kayira's extensive personal and mental health issue. (App. 237-41, 264-65)

With these uncontested facts in mind, we turn now to legal support that an indefinite suspension should be sufficient in this case, as well as the two reasons that an indefinite suspension – and not disbarment – is appropriate.

Available Formal Sanctions for Misconduct. As this Court is well aware, the Rules governing Missouri Lawyer discipline proceedings – all part of Missouri Supreme Court Rule 5 – establish six different types of discipline a lawyer might receive. Two are informal: an admonition (a largely private letter identifying the error) and diversion (an agreed course of rehabilitative and practice-improvement actions, which technically are

not actually considered discipline). Four forms of sanction are formal discipline: public reprimand, probation, suspension, and disbarment. Any formal discipline is a serious matter, a sanction that only this Court may impose and that is imposed annually on only a few Missouri lawyers.

Mr. Kayira's Conduct Warrants an Indefinite Suspension. Mr. Kayira's misconduct was unintentional and without malice or selfish motive, but Mr. Kayira admittedly used and failed to preserve and properly disburse funds belonging to multiple clients. Such mishandling of client funds constitutes serious violations often resulting in the most serious sanctions. Contrary to suggestions in cases such as *In re Shaeffer*, 824 S.W.2d 1, 5 (Mo. 1992); *In re Williams*, 711 S.W.2d 518, 521 (Mo. 1986), however, misappropriation of client funds does not always result in disbarment. Rather, extensive precedent from this Court that suggests that is not *always* true, including at least twelve cases within the last six years that all involved violations of Rule 4-1.15 but ended with suspensions. Such precedent indicate imposition of an indefinite suspension against Mr. Kayira would be appropriate.

For example, in *In re Miller*, 568 S.W.2d 246 (Mo. 1978), this Court imposed a reprimand despite concluding the lawyer Miller had misappropriated \$30,000 in client funds purportedly held in trust for a client, and also caused the client to transfer an interest in real estate to the client's wife. Additionally, in *In re Elliott*, 694 S.W.2d 262 (Mo. 1985), this Court only reprimanded a lawyer where the lawyer – in addition to maintaining poor records and having insufficient funds in the account – mishandled deposits, failed to forward payments to a client promptly, and failed to respond to client inquiries.

Recently, this Court in *In re Kwado Jones Armano*, Case No. SC9601 (Mo. Oct. 4, 2011), this Court only reprimanded Armano for violations of Rule 4-1.15(c) and 4-1.15(d) for – in the words of the Office of Chief Disciplinary Counsel – “routinely using his trust account for personal banking.” Likewise, this Court in *In re Thomas Christian Cox*, Case No. SC86837 (Dec. 20, 2017) imposed a reprimand against attorney Cox despite Cox repeatedly placing advanced fees (of as much as \$17,000 and \$20,000) into his operating account, and also paying personal expenses from his trust account. Cox also failed to maintain a balance on his trust account sufficient to pay trust account checks issued to third parties.

Perhaps this Court’s decision from 2008 in *In re Belz*, 258 S.W.2d 39 (Mo. 2008) is the most factually applicable, and thus the punishment should also be applicable to Mr. Kayira’s case. In *Belz*, the attorney suffered from mental health issues – not dissimilar from Mr. Kayira’s – that resulted in attorney Belz improperly using funds from his law firm’s trust account, of which ultimately Belz repaid. Despite the hearing panel rejecting Belz’s mental health as a mitigating factor,³ this Court found that mitigating evidence persuasive in not disbaring Belz for misappropriating client funds. This Court was also influenced by Belz’s remorse and continuing mental health treatment which should help prevent the misconduct’s reoccurrence.

³ The *Belz* case was decided before this Court adopted Rule 5.285 relating to disclosure of a respondent’s mental health issues.

Other cases decided by this Court similarly suggest that a suspension is warranted for Mr. Kayira's conduct. In *In re Coleman*, 295 S.W.3d 857 (Mo. 2009), this Court imposed a stayed suspension despite conduct that includes misappropriation of client funds – including specifically paying personal obligations out of settlement proceeds – by a lawyer who had previously been admonished twice and reprimanded once. *Coleman* should be seen as supporting a punishment of suspension for Mr. Kayira, particularly considering that Mr. Kayira's only prior discipline arose from non-payment of taxes.

Moreover, throughout the past six years there have been numerous cases where a lawyer was found to have violated Rule 4-1.15 – often coupled with other provisions in the Missouri Rules of Professional Conduct – and received sanctions of indefinite suspension or less. These cases include *In re Sanchez*, Case No. SC98064 (June 2, 2020) (violation of Rules 4-1.15(c) and 4-8.4(a)); *In re Hollon*, Case No. SC98297 (March 17, 2020) (default suspension for violations of Rule 4-1.15(a), (c), (d), (f), and 4-8.4(c)); *In re Cartier*, Case No. SC98141 (February 4, 2020) (reciprocal suspension for violation of Rules 4-1.6, 4-1.15(a), (f), (h), 4-1.2(a), 4-1.4, 4-3.3, 4-3.4(c), 4-7.1, 4-8.1(b), 4-8.4(c), and (d)); *In re Sheehan*, Case No. SC98027 (November 19, 2019) (violation of Rules 4-1.1, 4-1.3, and 4-1.15); *In re Bluebaum*, Case No. SC97919 (October 15, 2019) (violation of Rules 4-1.3, 4-1.4, 4-1.15, 4-8.1, 4-8.4(a), 4-8.4(c), and 4-8.4(d)); *In re Deines*, Case No. SC97874 (July 22, 2019) (reciprocal suspension for violation of Rules 4-1.1, 4-1.3, 4-1.4, 4-1.15, 4-1.16(d), 4-3.2, 4-8.1(c), and 4-8.4(d)); *In re Schiffman*, Case No. SC97770 (June 4, 2019) (reciprocal suspension for violation of Rules 4-1.1, 4-1.2, 4-1.3, 4-1.4, 4-1.15, and 4-8.1(b)); *In re Fisher*, Case No. SC97694 (June 4, 2019) (violation of Rules 4-1.3, 4-1.4, 4-

1.15, 4-8.4(c), and (d)); *In re Salus*, Case No. SC97549 (December 27, 2018) (reciprocal suspension for violation of Rules 4-1.4(a), 4-1.15(a), (c), 4-1.16(d), 4-8.1(c), and 4-8.4(c)); *In re Davis*, Case No. SC97446 (October 30, 2018) (violations of Rules 4-1.3, 4-1.15(a), (f), (d), 4-1.16(d), and 4-8.4(c)); *In re Netterville IV*, Case No. SC97066 (May 22, 2018) (violations of Rules 4-1.1, 4-1.3, 4-1.4, 4-1.15, and 4-8.4(a)); *In re Gerecke*, Case No. SC96571 (November 21, 2017) (violation of Rules 4-1.15 and 4-8.4(c)); *In re Dorsey*, Case No. SC96287 (October 5, 2017) (reciprocal suspension for violation of Rules 4-1.15(a), (d) and (f)); *In re Crawford*, Case No. SC96010 (September 12, 2017) (violation of Rule 4-1.15(a), (b) and (f)); *In re Yonke*, Case No. SC96563 (August 15, 2017) (violation of Rule 4-1.15); *In re Pottenger*, Case No. SC96561 (August 15, 2017) (violation of Rule 4-1.15); *In re Sheth*, Case No. SC95382 (March 15, 2016) (violation of Rule 4-1.15 and 4-8.4); *In re Lander*, Case No. SC95263 (January 26, 2016) (violation of Rules 4-1.15 and 4-8.1); *In re Harsley*, Case No. SC94909 (September 22, 2015) (violation of Rules 4-1.3 and 4-1.15); *In re Laverentz*, Case No. SC95028 (June 18, 2015) (violation of Rules 4-1.15 and 4-5.3); *In re McNabb*, Case No. SC94671 (February 3, 2015) (violation of Rules 4-1.3, 4-1.4, 4-1.15 and 4-8.1); *In re Mandelbaum*, Case No. SC93964 (October 28, 2014) (violation of Rules 4-1.8(e) and 4-1.15); *In re DeVoto*, Case No. SC94017 (September 30, 2014) (violation of Rules 4-1.3, 4-1.5, 4-1.15, 4-8.1 and 4-8.4).

To review a few recent cases, in 2019 this Court imposed an indefinite suspension with no leave to apply for reinstatement for a period of six months in *In re Bluebaum*, Case No. SC97919 (October 15, 2019), against a lawyer who had commingled personal funds with client funds, failed to communicate with clients, withdrew funds as fees that had not

been earned, and was not cooperative with the OCDC, including not responding to complaints or requests for trust account information. The attorney in *Bluebaum* avoided a more serious sanction despite having a stayed suspension imposed in March 2014 for improper in-person solicitations and failure to return a client's file after termination, as well as conduct prejudicial to the administration of justice. Like Mr. Kayira, attorney Bluebaum suffered from significant mental health issues, which included a hospitalization for suicide attempts and anxiety in 2016. However, unlike attorney Bluebaum, Mr. Kayira never became unresponsive or failed to complete representation of his clients – even when Mr. Kayira was going through very difficult personal trials.

Also, in 2019, in *In re Fisher*, Case No. SC97694 (June 4, 2019), this Court imposed an indefinite suspension with no leave to apply for reinstatement for a period of six months on a lawyer who practiced law without a trust account, did not maintain trust account records, withdrew cash from her trust account, kept earned fees in her trust account, commingled funds, failed to reconcile trust account did not repay owed funds at the time of the Disciplinary Panel Hearing, failed to pay a lien from a settlement fund, and misappropriated client funds. The most egregious misconduct by attorney Fisher was that she failed to pay a third-party money owed from settlement proceeds and then spent those funds after leaving the funds in her trust account. *Fisher* again supports that this Court should only suspend Mr. Kayira.

Mr. Kayira admits that this is a case for serious sanction under the ABA Standards, including ABA Standard for Imposing Lawyer Sanctions 4.1, because he should have known he was mishandling client funds, and this caused potential injury to his clients. Mr.

Kayira argues that ABA Standard for Imposing Lawyer Sanctions 4.12 provides guidance on why he should only be indefinitely suspended. ABA Standard 4.12 states:

“Suspension is generally appropriate when a lawyer knows or should know that she is dealing improperly with client property and causes injury or potential injury to a client.”

This should be the applicable standard in this case. Uncontroverted facts show that Mr. Kayira mistakenly used funds belonging to clients for his own personal use, as well as for paying other clients and third-parties. Mr. Kayira *should* have known that he was dealing with client property improperly, but due to his mental health-related issues, which spilled over and affected his practice of law, he did not realize her error until it was too late. Mr. Kayira’s testimony and interactions with OCDC supports this.

Mitigating Factors Support Imposing an Indefinite Suspension. Finally, the mitigating factors here should cause the Court to impose no penalty greater than an indefinite suspension on Mr. Kayira.

ABA Standard 9.1 (quoted above) specifically directs consideration of mitigating factors when assessing the appropriate sanction for mishandling client property. ABA Standard for Imposing Lawyer Sanctions 9.32 lists numerous mitigating factors that support imposition of a lighter sanction than facts, circumstances, and precedent might otherwise indicate:

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;

- (d) timely good faith effort to make restitution or to rectify consequences or misconduct;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) character or reputation
- (h) physical disability;
- (i) mental disability or chemical dependency including alcoholism or drug abuse [];
- (j) delay in disciplinary proceedings;
- (k) imposition of other penalties or sanctions;
- (l) remorse; and
- (m) remoteness of prior offenses.

Mr. Kayira's evidence demonstrates that mitigation is appropriate under ABA Standard 9.32 because of Mr. Kayira's respected legal career, as attested to by his character references and achievements; his significant community service and involvement with his children's extracurricular activities; absence of a dishonest or selfish motive; medical conditions, specifically the mental health related – clinical depression, alcoholism, and bipolar disorder. (App. 237, 264-65) Further, Mr. Kayira has been candid, forthcoming, remorseful, and otherwise cooperative throughout the disciplinary process. (App. 186-87) The Informant agrees that Mr. Kayira's cooperative attitude toward the proceedings, full

disclosure to the disciplinary board, and character reputation are all mitigating factors that should be considered. (*Id.*)

Any discipline Mr. Kayira may face should be reduced or mitigated because (a) Mr. Kayira has gained additional education and now better understands trust account operations, and knowledge pertaining to requirements for a supervised estate; (b) Mr. Kayira has modified his practices in handling client and third-party funds to ensure all his actions comply with his obligations under Missouri law; and (c) Mr. Kayira has sought treatment and continues to seek medical treatment for his mental health. (App. 238) Further, this Court should keep in mind that the purpose of the Court in sanctioning attorneys should not be for punishment but for protecting the public from dishonest attorneys. *See In re Mentrup*, 665 S.W.2d 324, 325 (Mo. 1984).

Conclusion. Mr. Kayira asks that the Court issue an order suspending his license for an indefinite period with Mr. Kayira able to apply for reinstatement of his law license after a period of at least twelve months but not more than twenty-four months.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Missouri Supreme Court Rule 55.03. It was drafted using Microsoft Word. The font is Times New Roman, proportional 13-point font, which includes serifs. The brief complies with Missouri Supreme Court Rule 84.06(b) in that it contains 5765 words.

/s/ Michael P. Downey