IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
J. C. HAMBRICK, JR.,	)	**Supreme Court #SC86005**
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

SHARON K. WEEDIN #30526
STAFF COUNSEL
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400

ATTORNEYS FOR INFORMANT

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STATEMENT OF JURISDICTION

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

STATEMENT OF FACTS

Disciplinary History

Respondent J. C. Hambrick was licensed in Missouri in 1979. **App. 3, 14**. Respondent was, at the time of the disciplinary hearing, practicing law in Branson, generally out of his home. **App. 110 (T. 176)**. In 1998, an admonition was issued to Respondent for violation of Rules 4-1.5(c) (failure to have signed contract in a contingency fee case), 4-1.4 (failure to keep client reasonably informed), and 4-8.1(b) (failure to respond to requests for information from disciplinary authorities). **App. 25**. In 2001, an admonition was issued to Respondent for violation of Rule 4-1.3 (failure to exercise diligence). **App. 26**.

Disciplinary Case

A five count information was served on Respondent on August 21, 2003. **App. 3-13**. The five counts were based on Respondent's representation of five different individuals. **App. 4-12**. After the expiration of the thirty day time period within which an answer was to be filed, Mr. Hambrick contacted OCDC Staff Counsel and requested an extension of time, to which Staff Counsel had no objection. **App. 69 (T. 11)**. Staff Counsel wrote Respondent asking to meet with him regarding the allegations in the information. Mr. Hambrick responded that he would be available January 21 through 25. A confirmation letter was sent for a meeting date of January 23. Mr. Hambrick failed to appear for the meeting. **App. 69 (T. 12)**.

Mr. Hambrick contacted Staff Counsel on January 28 and offered to meet with him on February 11. The meeting was confirmed by letter from Staff Counsel to Mr. Hambrick. Mr. Hambrick failed to appear for the scheduled February 11 meeting. **App. 69-70 (T. 12-13)** .

Hearing before a Disciplinary Hearing Panel was conducted on March 10, 2004. Count I was dismissed by Informant at the time of the disciplinary hearing due to the nonappearance of the complaining witness. **App. 70 (T. 16)**.

The Panel issued its decision on March 17, 2004. **App. 115-124**. The Panel made findings supporting its conclusion that Respondent violated the Rules of Professional Conduct as alleged in Counts II, III, and V of the information. **App. 117-120**. The Panel concluded that Informant did not "substantially support" the allegations of Count IV. **App. 119**.

The Panel recommended a ninety day suspension with "appropriate substance/alcohol abuse treatments as a precondition to his readmission." The Panel also "conditioned" suspension and readmission "upon no felony conviction of Respondent for the Felony DWI charge presently pending in Dallas County." **App. 122**. The Chief Disciplinary Counsel did not concur with the Panel's recommendation, so the record was filed with the Court pursuant to Rule 5.19.

Evidence Relating to Alcohol Use

In 1998, Respondent got a suspended imposition of sentence (SIS) on a driving while intoxicated (DWI) charge in Buchanan County. **App. 108 (T. 166)**. In 2001,

Respondent got an SIS on a DWI charge in Clay County. **App. 108 (T. 166)**. At the time of the disciplinary hearing, felony DWI charges were pending against Respondent in Dallas County.[1] **App. 108 (T. 166)**.

Respondent underwent inpatient treatment for alcohol abuse for one month in 1997 or 1998. **App. 108 (T. 165)**. Respondent began an outpatient program in August of 2003, in compliance with SATOC requirements. **App. 108 (T. 165-66)**.

The Supreme Court's Intervention Committee began trying to work with Mr. Hambrick in 1997. **App. 65**. The member of the Committee to whom Respondent was to report heard nothing from Respondent after June of 2002. As of April 4, 2003, the Committee declined to continue trying to assist Mr. Hambrick. **App. 65; 109 (T. 170)**.

Mary Daugherty asked Respondent to handle a bankruptcy case for her ex-husband, Ma'en Abu-Znaimeh. **App. 84 (T. 71-72)**. Ms. Daugherty translated for her ex-husband in communications between Mr. Abu-Znaimeh and Mr. Hambrick, because the ex-husband spoke very little English. **App. 84 (T. 70, 72)**. Respondent failed to return many phone calls to Ms. Daugherty about the bankruptcy case. **App. 87 (T. 83)**. Ms. Daugherty became aware, in February of 2003, that some paperwork had to be filed in the bankruptcy court by the next day. **App. 85 (T. 75)**. Respondent had mailed signature pages to Mr. Abu-Znaimeh, but not the underlying pleadings. **App. 85 (T. 75)**.

[1] Although not a part of the record, the Court may take judicial notice that, according to CASENET, State v. Hambrick, 03CR695954-01 (30th Judicial Circuit), is set for trial on March 1, 2005.

Ms. Daugherty, a bank vice-president, was not comfortable having Mr. Abu-Znaimeh execute the signature pages without reviewing the underlying pleadings. **App. 84 (T. 69), 85 (T. 75-76)**. Ms. Daugherty arranged to drive to St. Joseph to pick up the paperwork from Mr. Hambrick at his office/home. **App. 85 (T. 75-76)**.

Ms. Daugherty waited in Respondent's St. Joseph driveway for an hour and a half for Respondent to get home. Respondent's mother, who Ms. Daugherty reached by cell phone in an effort to contact Respondent, told Ms. Daugherty that Respondent had car problems. **App. 86 (T. 77)**. Respondent's assistant arrived at the home and handed Ms. Daugherty a big stack of papers, suggesting that Ms. Daugherty look through them to see if she could find what she wanted. **App. 86 (T. 77)**. When Respondent arrived, he stumbled up the stairs. **App. 86 (T. 78)**. Respondent smelled of alcohol, could not answer Ms. Daugherty's questions, and fell asleep while she was talking to him. **App. 86 (T. 78), 87 (T. 84)**. When Ms. Daugherty could not awaken Respondent after an hour of trying, she took what she thought were the correct papers and left. **App. 86 (T. 78), 87 (T. 84)**.

On the drive back to Kansas City, Ms. Daugherty phoned another lawyer, who told her where she needed to go the next morning to file the bankruptcy paperwork. **App. 86 (T. 79)**. The next morning, personnel in the clerk's office assisted Ms. Daugherty and Mr. Abu-Znaimeh with filing the correct paperwork. **App. 55; 86 (T. 79)**.

Mr. Hambrick failed, on February 25, 2003, without notice to his client, to attend the § 341 meeting of creditors. **App. 56, 62, 86 (T. 80)**. On May 15, 2003, the

bankruptcy judge ordered Respondent to disgorge the fee paid him to represent Mr. Abu-Znaimeh. **App. 63-64; 87 (T. 81)**.

Mr. Hambrick maintains he had had nothing to drink the evening Ms. Daugherty saw him in St. Joseph. **App. 108 (T. 165, 168)**. Respondent maintains he was suffering from pneumonia at the time. **App. 107 (T. 161)**.

Respondent believes that people discussing his drinking causes problems. **App. 109 (T. 171)**. Respondent believes he does have a drinking problem, and that it may be the cause of some of his difficulties with clients. **App. 109 (T. 171)**. Respondent does not know that drinking had any effect on the client complaints represented in the disciplinary information. **App. 109 (T. 171)**.

Evidence Relating to Rule Violations

Count III

In August of 1994, Robert Duganich underwent back surgery at University Hospital in Columbia to remove a protruding disc and fuse two vertebrae with a plate and screw. **App. 71 (T. 18)**. The surgery failed to relieve Mr. Duganich's symptoms, and in July of 1995, the internal fixation device was surgically removed. **App. 71 (T. 18), 133**. Mr. Duganich, a former radiologic technician, tried unsuccessfully thereafter to employ a lawyer to assert medical malpractice claims against the doctors involved in the initial surgery. **App. 71 (T. 19)**. On March 3, 1997, Mr. Duganich filed, pro se, a petition for damages against the doctors. **App. 71 (T. 20)**. Mr. Hambrick thereafter met Mr.

Duganich and on November 3, 1997, entered his appearance on Mr. Duganich's behalf. **App. 40, 72 (T. 21)**.

On August 24, 1998, Mr. Duganich's cause was dismissed for failure to prosecute. **App. 39, 41**. Respondent never provided Mr. Duganich with a copy of the order, but at some point he did advise Mr. Duganich by telephone that the dismissal had occurred. **App. 72 (T. 22-23)**.

On August 23, 1999, Respondent filed a petition for damages against two of the doctors previously sued by Mr. Duganich. **App. 42**. The next day, August 24, 1999, Respondent's legal assistant and only office help at the time, Judy Hanson, wrote Mr. Duganich requesting $2,788.50 for expert witness and filing fees. **App. 43**. Mr. Duganich sent a check for the amount requested, which Ms. Hanson deposited in Respondent's regular checking account. **App. 44, 91 (T. 97-98), 93 (T. 107)**. Ms. Hanson does not recall ever forwarding from Respondent's office a check to pay an expert for reviewing Mr. Duganich's records. **App. 93 (T. 106-107)**. The money for the expert witness fee was never refunded to Mr. Duganich. **App. 73 (T. 25)**. Mr. Duganich requested a copy of whatever report was generated by the fee, but none was ever provided to him. **App. 73 (T. 25), 74 (T. 30), 79 (T. 49)**. On September 25, 2000, the 1999 petition was dismissed for failure to prosecute. **App. 45, 46**.

Mr. Duganich called Respondent's office frequently attempting to check the status of his case. **App. 90 (T. 96)**. Ms. Hanson passed Mr. Duganich's messages on to Respondent, but he would not take or return the calls. **App. 91 (T. 97), 93 (T. 105)**. Mr.

Duganich felt lucky if he actually spoke to Mr. Hambrick once in every 30 to 40 calls. **App. 74 (T. 29)**.

After the petition was dismissed the second time, in 2000, Mr. Duganich called to check the status of his case. Mr. Hambrick took the call and told Mr. Duganich that the case had again been dismissed. Mr. Hambrick told Mr. Duganich that he needed to bring all his medical evidence and meet with Mr. Hambrick about the case. **App. 73 (T. 26)**. Mr. Duganich thereafter met with Mr. Hambrick and explained his theory of the malpractice case. **App. 73 (T. 27)**.

On February 26, 2001, Mr. Hambrick filed a third medical malpractice petition for Mr. Duganich. **App. 47, 73 (T. 27-28)**. The 2001 petition was dismissed with prejudice after motion by the defendants. **App. 52**. The motion asserted that the statute of limitations had run on the cause of action, in that a plaintiff may receive the benefit of the savings statute only once. **App. 49-51**. Respondent did not contact Mr. Duganich after the third dismissal. **App. 74 (T. 29)**. When Mr. Duganich finally made contact with Respondent by telephone, Respondent told Mr. Duganich that Respondent had screwed up his case, and that Mr. Duganich should get a lawyer and sue him. **App. 74 (T. 29)**. Mr. Hambrick did not know that the savings statute would not toll the running of the statute of limitations a second time. **App. 102 (T. 143-144), 113 (T. 186, 188)**. Mr. Hambrick testified that the delay in processing the Duganich case was owing to his inability to locate an expert witness to support Duganich's theory of malpractice and the pendency of a class action case against the manufacturers of the surgical plates and screws. **App. 95-98**.

On December 23, 2002, the Office of Chief Disciplinary Counsel wrote Respondent requesting information about a complaint filed by Mr. Duganich. **App. 53**. Mr. Hambrick did not respond to the letter. **App. 98 (T. 127-128)**.

It was alleged in Count III of the information, and the Panel concluded, that Respondent violated Rules 4-1.1 (competence), 4-1.3 (diligence), 4-1.4 (communication), and 4-8.1(b) (failure to respond to disciplinary authorities), in the course of his representation of Mr. Duganich and the disciplinary investigation that followed.

Count II

Eloise Davis was a client for whom Mr. Hambrick filed a medical malpractice petition in November of 2001. **App. 28, 92 (T. 102)**. Ms. Davis called Respondent's office frequently requesting information about the status of her case. **App. 91 (T. 98)**. The secretary passed Ms. Davis' messages to Respondent, but he would never call her back, **App. 91 (T. 98-99)**, nor would he take her calls if he was in the office. **App. 92 (T. 103)**. They had a telephone number where Ms. Davis could be reached after 3:00 or 3:30 p.m. **App. 91-92 (T. 99-101)**. Ms. Davis discharged Respondent in December of 2002 in frustration over her inability to communicate with him about her case. **App. 33, 35-37**.

It was alleged in Count II of the information, and the Panel concluded, that Respondent violated Rules 4-1.3 (diligence), 4-1.4 (communication), and 4-8.1(b).

Count IV

Jon Shell retained lawyer Brice Taylor's services on November 4, 2002, to represent Mr. Shell in a felony DWI case pending against Shell in Holt County. **App. 79**

(T. 51-52). Mr. Shell had been previously represented by Respondent in the same case. **App. 79 (T. 52)**. On November 4, Mr. Taylor faxed his entry of appearance on behalf of Mr. Shell to the judge and prosecutor involved in the case, as well as Mr. Hambrick. **App. 80 (T. 53)**.

On November 6, 2002, Mr. Taylor wrote Respondent requesting that he turn over Mr. Shell's file to Mr. Taylor. **App. 80 (T. 54)**. Respondent did not respond to the letter. **App. 80 (T. 54)**. On November 8, Mr. Taylor attempted to call Mr. Hambrick, but his voicemail was "full," so Mr. Taylor tried Mr. Hambrick's cell phone number, and got the message that it had been disconnected. **App. 80 (T. 55)**. On December 5, 2002, Mr. Taylor went to Mr. Hambrick's home/office in an attempt to get the file, but no one was there. **App. 80 (T. 55)**.

On December 7, Mr. Taylor tried the office telephone number again, and got a message that the number had changed. Mr. Taylor called the new number and left a message. **App. 80 (T. 55-56)**. Mr. Taylor ultimately had to have the prosecutor reproduce the previously disclosed evidence in the case, because he could not get Mr. Shell's file from Mr. Hambrick. **App. 80 (T. 56)**.

Count V

The evidence supporting the Count V allegations is recited under the subheading Evidence Relating to Alcohol Use. The information alleged, and the Panel concluded, that Respondent violated Rules 4-1.1 (competence) and 4-1.3 (diligence) in the course of his representation of Mr. Abu-Znaimeh.

POINT RELIED ON

I.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR TWELVE MONTHS BECAUSE ONLY A SUBSTANTIAL SUSPENSION, FOLLOWED BY A REINSTATEMENT INVESTIGATION, WILL ENSURE THAT THE PUBLIC AND THE PROFESSION ARE PROTECTED IN THAT RESPONDENT'S MISCONDUCT, COUPLED WITH HIS RECORD OF ALCOHOL ABUSE AND FAILURE TO COOPERATE WITH REHABILITATIVE EFFORTS AND DISCIPLINARY AUTHORITIES, REFUTE THE ADEQUACY OF THE NINETY DAY SUSPENSION RECOMMENDED BY THE PANEL.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

In re Houtchens, 555 S.W.2d 24 (Mo. banc 1977)

In re Lavin, 788 S.W.2d 282 (Mo. banc 1990)

In re Pendergast, 525 S.W.2d 341 (Mo. banc 1975)

POINT RELIED ON

II.

THE SUPREME COURT SHOULD CONSIDER THE COUNT IV EVIDENCE OF RESPONDENT'S VIOLATION OF RULE 4-1.16(d) BECAUSE THE PANEL'S CONCLUSION THAT INFORMANT DID NOT "SUBSTANTIALLY SUPPORT" THE ALLEGATIONS OF COUNT IV IS IN ERROR IN THAT THE CORRECT BURDEN OF PROOF IS A PREPONDERANCE OF EVIDENCE, AND INFORMANT DID ADDUCE A PREPONDERANCE OF EVIDENCE TO PROVE RESPONDENT VIOLATED RULE 4-1.16(d).

Rule 4-1.16(d)

In re Westfall, 808 S.W.2d 829 (Mo. banc 1991)

Rule 5.15(c)

ARGUMENT

I.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR TWELVE MONTHS BECAUSE ONLY A SUBSTANTIAL SUSPENSION, FOLLOWED BY A REINSTATEMENT INVESTIGATION, WILL ENSURE THAT THE PUBLIC AND THE PROFESSION ARE PROTECTED IN THAT RESPONDENT'S MISCONDUCT, COUPLED WITH HIS RECORD OF ALCOHOL ABUSE AND FAILURE TO COOPERATE WITH REHABILITATIVE EFFORTS AND DISCIPLINARY AUTHORITIES, REFUTE THE ADEQUACY OF THE NINETY DAY SUSPENSION RECOMMENDED BY THE PANEL.

Mr. Hambrick has a serious drinking problem. Two DWI convictions[2] and a pending felony DWI charge, all accumulated in a six-year period, is compelling evidence of that unfortunate conclusion. See *In re Carr*, 46 Cal. 3d 1070, 252 Cal. Rptr. 24, 761 P.2d 1011 (1988). While the Disciplinary Hearing Panel recognized that the "facts in this case convincingly demonstrate that Respondent engaged in misconduct, which violated

[2] A suspended imposition of sentence is considered a conviction for purposes of attorney discipline. *In re Shunk*, 847 S.W.2d 789, 790 (Mo. banc 1993).

his duties to his client, the public and the legal system," **App. 121**, the Panel nonetheless recommended a ninety day suspension with conditions on reinstatement, rather than the twelve month suspension recommended by Informant. The Panel recognized the following aggravating factors as present in this case: prior disciplinary history, pattern of misconduct, multiple offenses, bad faith obstruction of the disciplinary process, and refusal to acknowledge wrongful nature of the misconduct. See Rule 9.0 (Aggravation and Mitigation), ABA Standards for Imposing Lawyer Sanctions (1991 ed.). As mitigating factors, the Panel cited personal and/or emotional problems, character or reputation,[3] and physical or mental disability or impairment. **App. 121-122**. The Panel recommended that "Suspension and readmission is also conditioned upon no felony conviction . . . for the Felony DWI charge presently pending in Dallas County." **App. 122**. Informant could not concur in the Panel's sanction recommendation for practical, as well as theoretical, reasons.

As a practical matter, whether Respondent is exonerated on the pending felony DWI charge, which the Panel recommended as a condition for his reinstatement, is a fact that will not be knowable until March of 2005, when the matter is set for trial. Interestingly, had the Panel accepted Informant's recommendation of a twelve month suspension, Respondent would have been eligible to apply for reinstatement at about the same time, or shortly after, the pending DWI charge is resolved.

[3] Informant questions what "character and reputation" evidence the Panel relied on. Respondent offered no evidence other than his own narrative testimony.

As a theoretical matter, Informant heartily disagrees with the Panel's inclusion of "physical or mental disability or impairment" as a factor it considered in mitigation of sanction. The point of disagreement is not whether alcoholism is a physical or mental disability or impairment; but rather, whether it should be factored into sanction analysis as mitigating where, as here, the record is quite clear that Respondent has not successfully completed, nor shown any real commitment to even participating in, a rehabilitative program. Mr. Hambrick was ambivalent in his testimony to the Panel about his drinking and the role it plays in his law practice. Similarly, Respondent shows a continuing lack of regard for the disciplinary process and authorities by not responding to correspondence and not appearing for scheduled meetings, even though he was admonished in 1998 for like conduct.

In 1992, the ABA amended the Standard Rule on mitigating factors, Rule 9.3, to clarify the appropriate role that chemical dependency should play in sanction analysis. The amended subsection (i) was added to Standard 9.32 and reads as follows:

> (i) mental disability or chemical dependency including alcoholism or drug abuse when:
>
> > (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
> >
> > (2) the chemical dependency or mental disability caused the misconduct;

(3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

The burden, then, was on Mr. Hambrick to provide meaningful and reliable evidence of the above-listed factors, if chemical dependency was to be considered in mitigation of the appropriate sanction. Instead, Mr. Hambrick provided no evidence of any of the relevant information that the Standard states must be present before the Respondent may be given the advantage of factoring in his addiction in mitigation of sanction. The evidence relating to alcohol use was adduced by Informant and the Panel members' questioning of the various witnesses. Respondent did not himself initiate the inquiry or sponsor the evidence, yet more indication that Respondent has not truly acknowledged, much less demonstrated recovery from, his dependency. Respondent clearly has not come to terms with his alcohol problem and has not demonstrated a meaningful and sustained recovery from his addiction.

The Court spoke indirectly to the issue of alcoholism and sanction analysis in *In re Houtchens*, 555 S.W.2d 24 (Mo. banc 1977) (per curiam). The lawyer in *Houtchens* admitted egregious misconduct, including forging clients' signatures to settlement checks and misappropriating client funds, but offered what we would consider, in ABA Standards terminology, to be mitigating medical evidence that he suffered from "psychotemporal epilepsy reflected in periodic states of amnesia, confusion, and

disorientation," as well as "excessive use of alcohol," which aggravated and triggered his irrational conduct. 555 S.W.2d at 26. The Special Master recommended a one year suspension, based on evidence that Mr. Houtchens had stopped drinking and was undergoing long-term psychiatric care.

The Missouri Supreme Court instead suspended Mr. Houtchens with no leave to apply for reinstatement for three years. In rejecting the Special Master's shorter term recommendation, the Court stated that "until such time as he has recovered, protection of the public as well as the profession is paramount. . . . We select three years for suspension that false hopes will not be created nor recovery efforts be further frustrated." 555 S.W.2d at 27. The Court also noted that Mr. Houtchens would be required, as a prerequisite to reinstatement, to show "a full capacity to practice law." Id.

One factor favorable to the attorney in *In re Houtchens*, a factor that is glaringly absent from Mr. Hambrick's record, is that the former had "quit drinking" and committed to a long-term mental health treatment plan by the time of the disciplinary case. Conversely, Mr. Hambrick was turned out of the Court's Intervention Committee program in April of 2003 with the comment by his advisor that "I believe I and the committee have gone as far as possible with Mr. Hambrick and that any action concerning Mr. Hambrick should be handled by the Office of Chief Disciplinary Counsel." **App. 65**. The record shows that Mr. Hambrick accumulated the second of his two DWI convictions after undergoing month long inpatient treatment program for alcohol abuse (in 1997 or 1998). The pending DWI charges were filed in 2003. The later conviction, the pending DWI charges, and the action of the Intervention Committee offer

damning evidence that Mr. Hambrick has not come to grips with his impairing addiction. Unless and until he has done so, and can establish that fact with credible and persuasive evidence, giving credit to his alcoholism as a factor in mitigation of sanction is antithetical to the purpose of disciplinary proceedings – to protect the public and preserve the integrity of the legal profession.

It should be noted that even if Respondent had presented evidence of abstinence and an ongoing commitment to a treatment program, substance addiction does not ameliorate the need for a substantial sanction for underlying professional misconduct. The lawyer in *In re Lavin*, 788 S.W.2d 282 (Mo. banc 1990), was an admitted alcoholic whose addiction interfered with his law practice. This Court said that Mr. Lavin's submission to the Intervention Committee's rehabilitative program and his cooperation with the Disciplinary Committee did "not exonerate him of responsibility for his actions." 788 S.W.2d at 284. See also *In re Pendergast*, 525 S.W.2d 341 (Mo. banc 1975) (claim of recovery from alcoholism and lawyer's provision of legal services to underserved segment of the public does not eliminate need for disciplinary sanction). Indeed, for the proposition that alcoholism, manifested in drunken appearances in public and court, is grounds for disbarment, see *In re Lovell*, 257 Ga. 193, 357 S.E.2d 92 (1987) (per curiam). Although the evidence of Respondent's alcohol addiction in the case at bar was offered by Informant primarily as evidence in aggravation of the sanction to be imposed for the underlying Rule violations, alcohol-related driving offenses standing alone have been recognized as the appropriate basis for disciplinary attention. See *In re Kelley*, 52 Cal. 3d 487, 276 Cal. Rptr. 375, 801 P.2d 1126 (1990).

Indefinite suspension of Respondent's license with no leave to apply for reinstatement for twelve months will protect the public and the profession from the impairment that goes with alcohol addiction and afford Respondent yet another opportunity, free from the stress of practice, to overcome his addiction. By the time Respondent would be eligible to apply for reinstatement under Rule 5.28, appropriate inquiry can be made into Respondent's recovery efforts and into the outcome of the pending Dallas County criminal charges. Under the circumstances, an indefinite suspension with no leave to apply for reinstatement for twelve months is the appropriate sanction.

ARGUMENT

II.

THE SUPREME COURT SHOULD CONSIDER THE COUNT IV EVIDENCE OF RESPONDENT'S VIOLATION OF RULE 4-1.16(d) BECAUSE THE PANEL'S CONCLUSION THAT INFORMANT DID NOT "SUBSTANTIALLY SUPPORT" THE ALLEGATIONS OF COUNT IV IS IN ERROR IN THAT THE CORRECT BURDEN OF PROOF IS A PREPONDERANCE OF EVIDENCE, AND INFORMANT DID ADDUCE A PREPONDERANCE OF EVIDENCE TO PROVE RESPONDENT VIOLATED RULE 4-1.16(d).

Mr. Schaeperkoetter conceded in his closing argument to the Panel that he had been unable to produce evidence to support the allegations made in Count IV, paragraph 33, subsections A, B, and C. **App. 112 (T. 181-182)**. He was unable to support those allegations due to the nonappearance at the hearing of the former client, Mr. Shell. The Rule 4-1.16(d) Rule violation, however, was alleged in the information and evidence was adduced to support it. The Court should consider that evidence. Cf. *In re Westfall*, 808 S.W.2d 829, 832 (Mo. banc 1991). (Court will consider only charges contained in the information).

The Panel erroneously concluded that Informant proved no Rule violations under Count IV. The testimony of Mr. Shell's subsequently hired lawyer, Mr. Taylor, amply supplied the evidence Informant was required to adduce to show Respondent violated

Rule 4-1.16(d) in failing, despite repeated efforts by Mr. Taylor through various means, to turn Mr. Shell's file over to Mr. Taylor.

The burden of proof that Informant must satisfy is a preponderance of evidence, Rule 5.15(c), not the "substantially support" standard cited by the Panel in its decision. **App. 119**. That the evidence admittedly supports only one of the four separately enumerated allegations of misconduct in Count IV does not consign the remaining allegation to the ash heap. The Rule 4-1.16(d) charge was pled in the information, Informant adduced a preponderance of evidence to support it, and the Court should consider that evidence in assessing Respondent's fitness to practice law.

CONCLUSION

In recommending a short-term (90-day) suspension and explicitly citing Respondent's physical or mental disability or impairment as a mitigating factor, the Disciplinary Hearing Panel misapplied the ABA Standards and failed to heed this Court's directions as to the role substance addiction should play in sanction analysis. In view of the multiple underlying Rule violations (4-1.1, 4-1.3, 4-1.4, 4-1.16(d), and 4-8.1(b)), Respondent's prior history, and the evidence of Respondent's alcohol abuse and lack of commitment to treat it, an indefinite suspension with no leave to apply for reinstatement for twelve months is the appropriate sanction.

Respectfully submitted,

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

By: _____

Sharon K. Weedin #30526
Staff Counsel
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2004, two copies of Informant's Brief have been sent via First Class mail to:

J. C. Hambrick, Jr.
Attorney at Law
106 Oxford Drive, #10
Branson, MO 65615

_____
Sharon K. Weedin

CERTIFICATION: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;

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

3. Contains 4,817 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

_____
Sharon K. Weedin

APPENDIX