IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
HAHN, JAMES W. II,	**)**	**Supreme Court #86940**
	)	
Respondent.	**)**	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

NANCY L. RIPPERGER #40627
STAFF COUNSEL
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400
Nancy.Ripperger@courts.mo.gov

ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

STATEMENT OF JURISDICTION

This action is one in which Informant, the Chief Disciplinary Counsel, is seeking to discipline an attorney licensed by the Missouri Bar for violations of the Missouri Rules of Professional Conduct. 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

Background and Disciplinary History

Respondent James W. Hahn, II, has been licensed as a Missouri attorney since 1981. Ex. 1 ¶ 2, Ex. 2.[1] He practices law in Cape Girardeau, Missouri. Tr. 12.[2] He is a solo practitioner and his practice consists of primarily family and criminal laws matters with Respondent handling some business law, personal injury and workers' compensation matters. Tr. 30.

From 1994 until approximately 1999, Respondent practiced law with what is now his former wife, Marcia Mulcahy. Tr. 12-15. The couple separated in 1999 and they divorced in 2002. Tr. 14, 16. In June of 2001, Respondent had a heart attack and suffered from depression for a few months after the heart attack. Tr. 15. Until January of 2003, Respondent and his ex-wife continued to work out of the same building and to share office staff. Tr. 17. Since the beginning of 2003, Respondent and Ms. Mulcahy have not shared office space or office staff. Tr. 17.

---

[1] Copies of Exhibits 1 and 2 can be found in the Appendix.

[2] Informant is citing to Respondent's opening statement. Tr. 285. Respondent gave a lengthy opening statement which was in effect testimony upon his part. The Panel did not require Respondent to repeat the testimony during his defense. Rather, the Panel merely required Respondent to swear to the truthfulness of his opening statement. Tr. 285-86.

A copy of the transcript can be found in the Appendix.

Respondent has received and accepted six admonitions. Ex. 1 ¶ 5; Ex. 2. He received his first admonition in 1996, his second admonition in 2000, and most recently received four admonitions in 2002. Ex. 1 ¶ 5; Ex. 2. The admonitions were issued for: (1) lack of diligence in handling client matters (Rule 4-1.3); (2) lack of adequate client communications (Rule 4-1.4); (3) failing to respond to lawful demands for information from Informant (Rule 4-8.1(b)); and for (4) providing financial assistance to a client in connection with contemplated litigation (Rule 4-1.8(e)). Ex. 1 ¶ 5; Ex. 2.

On September 30, 2004, Informant filed a six count Information against Respondent. Ex. 1; Ex. 2. The Information alleged conduct in violation of Rules 4-1.3, 4-1.4(a), 4-1.16(d), 4-3.3(a), 4-5.5(c), 4-8.1, and 4-8.4(d). Ex. 1. On October 28, 2004, Respondent answered the Information.[3] Ex. 2. In his Answer, Respondent admitted to almost all of the factual allegations and to many of the alleged violations of the Rules of Professional Conduct. Ex. 2.

A Disciplinary Hearing Panel held a hearing on February 4, 2005. Tr. 1-328. Respondent had admitted to all allegations set forth in Counts I, II, IV and V. Ex. 1; Ex. 2. Therefore, for Counts I, II, IV and V, Informant merely introduced into evidence her Information and Respondent's Answer along with other exhibits which supported Informant's claims. T. 34-36. For Counts III and VI, Informant put on live testimony from five witnesses along with introducing various exhibits into evidence. Tr. 39-284.

[3] Respondent's Answer is incorrectly titled as an Information. Ex. 2.

Respondent testified upon his own behalf and he introduced into evidence one exhibit. Tr. 11-32, 286-323.

On May 6, 2005, the Panel issued its decision finding that Respondent had violated all of the Rules alleged in the Information. The Panel further held that the facts of the case would support disbarment under ABA standards and Missouri Supreme Court law in that Respondent intentionally misled both Informant and this Court and Respondent had shown a pattern of neglect to his clients. However, due to mitigating circumstances related to the break up of Respondent's marriage and law partnership, the Panel recommended the suspension of Respondent's license instead. More specifically, the Panel recommended: (1) Respondent be suspended from the practice of law for at least six months; (2) Respondent meet all of the requirements of a prior Diversion Agreement before reapplying for reinstatement; and (3) monitoring of Respondent's activities by Informant for two years after reinstatement.

Informant did not concur in the discipline recommended by the Panel. Therefore, Informant filed the record with this Court.

Facts Underlying Disciplinary Hearing

Sandra Carey Complaint
Count I of Information

In November 1998, Sandra Carey hired Respondent to handle her worker's compensation case. Ex. 1 ¶ 7; Ex. 2. Ms. Carey had been injured while at work in January 1998. Ex. 1 ¶ 7; Ex. 2. Respondent did not have a doctor examine Ms. Carey until August 2000; twenty-one months after Ms. Carey had hired Respondent and after

the statute of limitations had run on her cause of action. Ex. 1 ¶ 8; Ex. 2. Respondent prepared a worker's compensation claim for Ms. Carey but Respondent never filed the claim. Ex. 1 ¶ 9; Ex. 2.

While Respondent was representing Ms. Carey, Ms. Carey tried to contact Respondent on numerous occasions. Ex. 1 ¶ 10; Ex. 2. Respondent's office staff would inform Ms. Carey that she should call back at a specific date and time. Ex. 1 ¶ 10; Ex. 2. However, Respondent was seldom available when Ms. Carrey called at the designated date and time. Ex. 1 ¶ 10; Ex. 2.

Respondent did not inform Ms. Carey that he had failed to file her worker's compensation claim. Ex. 1 ¶ 11; Ex. 2. Rather, Ms. Carey learned of the information when she contacted the Division of Worker's Compensation in September 2002, almost four years after she hired Respondent, to check on the status of her claim. Ex. 1 ¶ 11; Ex. 2.

Respondent admitted that in connection with his representation of Ms. Carey he violated:

1. Rule 4-1.3 (diligence) by waiting until after the statute of limitations had run on Ms. Carey's case and twenty-one months after Ms. Carey hired him before sending Ms. Carey to a doctor to determine her injuries; and

2. Rule 4-1.4(a) (communication) when he failed to inform Ms. Carey that he had not filed her worker's compensation claim in a timely manner even though Ms. Carey repeatedly called Respondent's office and asked to speak with him.

Ex. 1 ¶¶ 12-17; Ex. 2.

Tidwell/Limbaugh Complaint
Count II of the Information

On December 21, 2002, Donna Tidwell hired Respondent to represent her in a divorce action filed by her husband. Ex. 1 ¶ 19; Ex. 2. Ms. Tidwell's sister, Sherry Limbaugh, paid Respondent's retainer fee of $1,250. Ex. 1 ¶ 20; Ex. 2. Ms. Tidwell's Answer was due on January 30, 2003; however, Respondent never filed the Answer or Ms. Tidwell's Cross –Petition. Ex. 1 ¶¶ 21-22; Ex. 2.

On February 11, 2003, Ms. Tidwell called Respondent and left a message inquiring whether Respondent had filed her Answer and Cross-Petition and expressed her concern that she was in default. Ex. 1 ¶¶ 23; Ex. 2. Respondent ignored Ms. Tidwell's call. Ex. 1 ¶ 23; Ex. 2. Again, on February 20, 2003, and February 27, 2003, Ms. Tidwell called Respondent and left messages for Respondent asking about her Answer. Ex. 1 ¶ 24; Ex. 2. Respondent continued to ignore Ms. Tidwell's messages. Ex. 1 ¶ 24; Ex. 2.

On February 28, 2003, Ms. Tidwell's husband filed a Motion For Default Judgment. Ex. 1 ¶ 25; Ex. 2. Respondent received a copy of the motion and the notice that the Court would hear the Motion on March 25, 2003. Ex. 1 ¶ 25; Ex. 2.

Ms. Tidwell learned of her husband's Motion for Default Judgment from a family member and called Respondent to inquire about the matter on March 3, 2003. Ex. 1 ¶ 26; Ex. 2. Upon learning that Respondent had not filed her Answer or Cross-Petition and she was in default, Ms. Tidwell fired Respondent and hired a new attorney. Ex. 1 ¶ 27; Ex. 2.

Ms. Tidwell then asked Respondent for a refund of the $1,250 retainer. Ex. 1 ¶ 28; Ex. 2. Respondent informed Ms. Tidwell that he would refund the retainer. Respondent did not make the refund until May 2004 even though he had entered into a Diversion Agreement in August of 2003 which required such and Informant's staff called him and encouraged him to return the retainer on numerous occasions. Ex. 1 ¶ 28; Ex. 2; Ex. 4, p. 45.

On or about May 19, 2003, Ms. Limbaugh made a complaint to Informant and Informant's staff requested that Respondent provide a written response to the complaint. Ex. 1 ¶ 30; Ex. 2; Ex. 4, pp. 27-28. Respondent did not respond to Informant's staff's request so Informant's staff wrote to Respondent again and asked that he provide a written response. Ex. 1, ¶ 31; Ex. 2. Respondent continued to ignore Informant's request. Ex. 1 ¶ 31; Ex. 2; Ex. 4, p. 29. Consequently, Informant's staff had to subpoena Respondent to appear at Informant's office on July 17, 2003. Ex. 1 ¶ 31; Ex. 2; Ex. 4, p. 31. After being served with the subpoena, Respondent did appear at Informant's office and answered the questions posed to him by Informant's staff. Ex. 1 ¶ 32; Ex. 2.

In connection with his representation of Ms. Tidwell, Respondent admitted that he violated:

1. Rule 4-1.3 (diligence) when he failed to file an Answer on behalf of Ms. Tidwell;

2. Rule 4-1.4(a) (communication) when he failed to return Ms. Tidwell's telephone calls;

3. Rule 4-1.16(d) (duty to protect client's interest upon termination of representation) when he failed to return the retainer Ms. Limbaugh had paid to him in a timely manner; and

4. Rule 4-8.1(b) (failing to respond to a lawful demand for information from Informant) when he failed to respond to the requests for information from Informant regarding the Tidwell/Limbaugh complaint. Ex. 1 ¶¶ 33-42; Ex. 2.

Continuing Legal Education Requirements
Count IV of Information

Rule 15 addresses an attorney's continuing legal education requirements. Ex. 1 ¶ 56; Ex. 2. More specifically, Rule 15.05 provides that after July 1, 1988, each lawyer shall complete during each reporting year at least fifteen credit hours of programs and activities accredited by the Missouri Bar. Ex. 1 ¶ 57; Ex. 2. Rule 15.06 further provides that on or before July 31st of each year after 1988, each lawyer shall report to the Missouri Bar the number of credit hours of accredited programs or activities in which he or she participated in the preceding reporting year and that the Missouri Bar shall annually report to Informant the name of each lawyer not meeting the requirements of Rule 15. Ex. 1 ¶ 58; Ex. 2.

The Missouri Bar informed Informant's staff on March 1, 2004, that Respondent had failed to make his required report for the July 1, 2002, to June 30, 2003, reporting year. Ex. 1 ¶ 59; Ex. 2. On March 17, 2004, Informant's staff notified Respondent that he had failed to file the required report with the Missouri Bar. Ex. 1 ¶ 59; Ex. 2. Respondent had been actively engaged in the practice of law at all relevant times from

July 1, 2002, to June 30, 2003. Ex. 1 ¶ 61; Ex. 2. On or about April 2, 2004, Respondent filed the required report with the Missouri Bar. Ex. 1 ¶ 62; Ex. 2.

Respondent admitted he violated Rule 4-.5.5(c) (unauthorized practice of law if not CLE compliant).[4] Ex. 1 ¶ 65; Ex. 2.

Breach of Diversion Agreement
Count V of Information

When Informant subpoenaed Respondent to her office on July 17, 2003, to discuss the Sherry Limbaugh/Donna Tidwell complaint, Respondent attributed his failure to diligently represent and communicate with clients to his health problems in 2001, his ongoing marital problems beginning in 1999 and the fact that he and his ex-wife continued to share office space and support staff after their divorce until early 2003. Tr. 266-68. He also stated he was having severe financial problems because he had not been able to bill clients since November 2002 due to problems with his computer system. Tr. 267-68. Upon further questioning by Informant's staff, Respondent indicated that he had opened approximately 130 new cases in the prior six months and was unsure of how many matters he was currently handling. Tr. 267-68. Informant and her staff were very concerned about the state of Respondent's law practice and about how to best assist him to correct the problems so that the public was adequately protected. Tr. 267-68.

[4] Rule 15.06(f) was amended effective July 1, 2005, to provide that attorneys who fail to meet their CLE requirements are automatically suspended from the practice of law. Rule 15.06(f) was not in effect when Respondent was prosecuted.

After the July 2003, meeting Informant's staff offered Respondent the opportunity to participate in a Diversion Program as set forth in Rule 5.105. Ex. 1 ¶ 68; Ex. 2. Respondent entered into a Diversion Agreement with Informant on August 24, 2003. Ex. 1 ¶ 69; Ex. 2. The Diversion Agreement had a term of two years and required Respondent to:

a. Find a qualified consultant to assess and monitor Respondent's law practice, for Respondent to meet with the consultant monthly and for Respondent to implement the changes recommended by the consultant;

b. Attend the Solo and Small Firm Continuing Legal Education course each year;

c. Comply with the Rules of Professional Conduct;

d. Obtain an evaluation by a mental health professional and follow any recommendations for therapy or treatment;

e. Obtain malpractice insurance;

f. Not accept any case that he did not have the requisite expertise and resources to handle competently and in a timely manner;

g. Implement and use a calendaring system;

h. Set up procedures to ensure there was adequate client communications;

i. Return the retainer paid by Ms. Limbaugh for Ms. Tidwell's divorce; and

j. Make periodic reports to Informant's staff regarding his compliance with the Diversion Agreement.

Ex. 4, pp. 39-47.[5]

Respondent did not take any action to comply with the terms of the Diversion Agreement. Ex. 1 ¶ 71; Ex. 2. On December 17, 2003, Informant's staff contacted Respondent and informed him that he had not made the reports required by the Diversion Agreement. Ex. 1 ¶ 72; Ex. 2; Ex. 4, pp. 52-54. Informant's staff gave Respondent ten (10) days in which to respond and informed Respondent that if he did not respond Informant would terminate the Diversion Agreement. Ex. 1 ¶ 72; Ex. 2; Ex. 4, pp. 52-54. Respondent did not respond to Informant's December 17, 2003, letter. Ex. 1 ¶ 73; Ex. 2; Ex. 4, p.57. On January 20, 2004, Informant's staff notified Respondent that Informant was terminating the Diversion Agreement because of Respondent's non-compliance with the Agreement. Ex. 1 ¶ 74; Ex. 2; Ex. 4, p.57.

Respondent admits he violated:

1. Rule 4-8.4(d) (engaged in conduct prejudicial to administration of justice) when he failed to comply with the terms of the Diversion Agreement; and
2. Rule 4-8.1(b) (failure to respond to lawful demand for information from Informant) when he failed to respond to Informant's staff's letter of December 17, 2003.

Ex. 1 ¶¶ 75-79; Ex. 2.

[5] A copy of the Diversion Agreement can be found in the Appendix.

John Gaither Complaint
Count III of Information

In June 1999, Mr. John Gaither hired Respondent to handle a personal injury action on Mr. Gaither's behalf. Tr. 191; Ex. 1 ¶ 44; Ex. 2. Mr. Gaither had been injured in an auto accident on May 16, 1999. Tr. 191; Ex. 1 ¶ 44; Ex. 2. Respondent informed Mr. Gaither that his initial plan of action was to make a demand for settlement on the insurance company for the driver of the car causing the accident. Tr. 191-92; Ex. 1 ¶ 45; Ex. 2.

Because Mr. Gaither was still undergoing medical treatment at the time he hired Respondent, Respondent informed Mr. Gaither that it would be best for Mr. Gaither to conclude his medical treatment before Respondent made a demand on the driver's insurance company. Ex. 1 ¶ 46; Ex. 2. In August 2000, Mr. Gaither's physicians informed Respondent that Mr. Gaither had reached maximum medical improvement. Tr. 192-93; Ex. 1 ¶ 47 ; Ex. 2. Accordingly, Respondent informed Mr. Gaither that he would make demand upon the driver's insurance company for payment of $25,000 for the injuries sustained by Mr. Gaither. Tr. 193; Ex. 1 ¶ 48; Ex. 2. From August 2000, until January 2004, Mr. Gaither made numerous phone calls to check on the status of his case. Tr. 193-95; Ex. 1 ¶ 48; Ex. 2. Respondent's file reflected 29 phone messages from Mr. Gaither from November 20, 2000, until January 1, 2004. Ex. 11. When Respondent spoke with Mr. Gaither, Respondent was very vague about what action he had taken on the matter and for an extended period of time Mr. Gaither was under the impression that Respondent had already made a demand upon the insurance company. Tr. 194-95.

However, Respondent had never made any demand upon the insurance company. Tr. 194-95; Ex. 1 ¶ 49; Ex. 2.

On January 13, 2004, a few days before Informant terminated the Diversion Agreement, Mr. Gaither made a complaint to Informant. Ex. 4, p. 55. On February 18, 2004, Respondent was subpoenaed to Informant's office to discuss, among other things, Mr. Gaither's complaint. Ex. 4, p. 58-59. Respondent appeared and discussed the Gaither complaint. Tr. 271.

When the five year statute of limitations was very close to running, Mr. Gaither insisted Respondent take some action on the matter. Tr. 195. On May 14, 2004, two days before the statute of limitations was to run and forty-five months after Mr. Gaither reached maximum medical improvement, Respondent filed suit against the driver of the car that caused the accident. Tr. 198; Ex. 20. In his petition Respondent listed the address for the defendant as a post office box. Tr. 199-200; Ex. 20. On June 23, 2004, the sheriff returned the summons for the lawsuit non est and as of February 5, 2005, seven months later, Respondent had not successfully served the defendant. Tr. 199-201; Ex. 20.

Since May 2004, Mr. Gaither has tried to contact Respondent numerous times. Tr. 196-97. Usually Respondent would not speak with Mr. Gaither and Respondent would require Mr. Gaither to schedule a phone conference two to four weeks later. Tr. 196-97. Even after Mr. Gaither had scheduled a phone conference Respondent would not always take Mr. Gaither's phone calls. Tr. 196-97.

On the few times that Respondent took Mr. Gaither's calls, Respondent informed Mr. Gaither that he had been unable to ascertain a physical address for the driver of the car so that the sheriff could serve the defendant. Tr. 200-01. Mr. Gaither then asked Respondent to provide him with a copy of the accident report so that Mr. Gaither could try to obtain a physical address for the driver of the car. Tr. 201. Respondent did not provide Mr. Gaither with the accident report for several months. Tr. 201-02.

On January 8, 2005, Respondent advised Mr. Gaither that he had mailed the accident report to Mr. Gaither on January 7, 2005. Tr. 201-02. On or about January 12, 2005, Mr. Gaither received a copy of the accident report from Respondent. Ex. 21. The envelope from Respondent was postmarked January 10, 2005, three days after the date Respondent had stated he had mailed the letter. Ex. 21.

After searching on the internet for only a few minutes Mr. Gaither was able to locate a possible physical address for the driver of the car. Tr. 204-06; Ex. 21.

Making False Statements to Court and Informant
Count VI of Information

After Informant terminated the Diversion Agreement, Informant subpoenaed Respondent to come to Informant's office on February 18, 2004, to explain why he had failed to comply with the Diversion Agreement and to discuss Respondent's outstanding complaints (Carey, Limbaugh/Tidwell, and Gaither complaints). Ex. 1 ¶ 81; Ex. 2; Ex. 4, p. 58.

Respondent appeared on February 18, 2004, and spoke with Informant's staff. Tr. 271, Ex. 1 ¶ 82; Ex. 2. At the beginning of the meeting, Informant's staff informed

Respondent that because Respondent had not complied with the Diversion Program, Informant would have to prosecute the outstanding complaints against him. Tr. 271-72. Informant's staff further stated that given the seriousness of the complaints Informant would either request that the Supreme Court suspend or disbar Respondent. Tr. 271-72. Respondent became very emotional and began pleading with Informant's staff to not seek the suspension or disbarment but rather to let him continue with the Diversion Program. Tr. 272. Respondent then reported that he had not complied with the Diversion Agreement because his former in-laws had begun foreclosure proceedings on his law office building shortly after he entered into the Diversion Agreement, he had devoted his efforts and money to stopping the foreclosure, and he had recently refinanced the building and stopped the foreclosure. Tr. 273.

Informant's staff then questioned Respondent about various problems Respondent had previously advised existed with his practice. Tr. 272-76. Respondent reported that he had made various improvements to his practice. More specifically, he stated:

1. he had rectified his computer problems a few months earlier,
2. he had started sending monthly bills to clients on a regular basis,
3. his revenues had begun increasing and he now had funds to make other improvements to his practice,
4. he had contacted a medical professional about seeking treatment for his depression, and
5. he had reduced his case load to approximately 100 cases and was phasing out his personal injury and worker's compensation practice.

Tr. 272-77.

On February 18, 2004, Respondent had not billed any clients for work done after November 2002 and he had not made improvements to his law office practices and procedures. Tr. 39, 42-81; Ex. 1 ¶ 83; Ex. 2. Respondent knew that the information he had provided to Informant's staff about billing clients was false. Ex. 13, pp. 14, 33-35. He also knew that as an attorney he had an ethical duty provide accurate information to Informant. Ex. 13, p. 28. Respondent provided Informant's staff with false information with the intent to persuade Informant's staff to forgo suspension or disbarment proceedings. Tr. 272.

Based upon the false representations Respondent made to Informant's staff at the February 18, 2004, meeting Informant agreed to enter into a joint stipulation with Respondent whereby Informant recommended that this Court impose a public reprimand against Respondent's license. Tr. 276-77. Informant's staff drafted a Joint Stipulation of Facts, Joint Proposed Conclusions of Law and Joint Recommended Discipline ("Joint Stipulation") and a Joint Motion for Leave to File Stipulation Directly with the Supreme Court And to Submit Without Further Process ("Joint Motion"). Ex. 13, p. 27; Ex. 14B, C. Informant's staff provided Respondent with the opportunity to review the documents and to request changes to the documents prior to Respondent's signature and submission to the Court. Ex. 13, p 28; Ex. 1, ¶ 85; Ex. 2. Respondent did not request any changes to the documents or notify Informant's staff that certain statements in the Joint Stipulation were false. Ex. 13, p. 36; Ex. 1 ¶ 85; Ex. 2.

On or about May 28, 2004, Respondent entered into a Joint Stipulation and Joint Motion. The Joint Stipulation provided, in pertinent part:

> "10. In November of 2002, the computer system Respondent used for billing `crashed.' Respondent was not able to repair the system and from November 2002, until September 2003, Respondent did not bill clients.
>
> 11. Due to his inability to bill clients, Respondent has had many financial difficulties.
>
> * * *
>
> 14. Respondent has recently implemented a computer system which allows him to bill clients and Respondent is sending out bills to clients on a monthly basis now. Respondent is beginning to receive revenue again.
>
> * * *
>
> **JOINT RECOMMENDED DISCIPLINE**
>
> ***
>
> Informant further states that she is recommending a public reprimand rather than suspension or disbarment only because of the health and personal problems Respondent has suffered in recent years. . . . . Respondent is also billing clients on a regular basis now and is beginning to receive payments from clients. Respondent

reports that with income now coming into his practice, he should be able to implement procedures which will improve his practice."

Ex. 14C.[6]

On June 2, 2004, Informant submitted the Joint Motion and the Joint Stipulation to this Court for its approval. Ex. 14A.

In July 2004, while the Joint Stipulation was under consideration by this Court, Shannon Blagg, a former employee of Respondent, contacted Informant's staff and informed Informant's staff that Respondent had not been truthful in providing information to Informant about his law office practices. Tr. 87-88. After Informant's staff spoke with Ms. Blagg, Informant began an investigation into the matter. During the investigation, Informant's staff learned that Respondent had provided false information about his billing and Respondent had not provided accurate information regarding other aspects of his practice.

Prior to the February 18, 2004, meeting with Informant's staff, Respondent had not produced any billings to clients. Tr. 39, 42-81; Ex. 1 ¶ 83; Ex. 2. From March 1, 2004, until June 21, 2004, Respondent employed Ms. Chris Leonard, a secretary with eight years of prior legal experience who had used Respondent's billing program at a previous job. Tr. 210-11. Except for two occasions when he asked Ms. Leonard to prepare a bill after receiving a request for a refund from a client, Respondent never

[6] A copy of the Joint Stipulation can be found in the Appendix.

requested that Ms. Leonard enter time records into the computer or prepare bills[7]. Tr. 215-16. Consequently, Respondent did not have funds coming into the practice from his billings. Ex. 13, p. 28. From March 1, 2004, forward there were no problems with Respondent's computer system which would have prevented Respondent from billing. Tr. 218.

In addition to providing Informant with false information about billing, Respondent's practices and procedures were not improving as he had reported at the February 18, 2004, meeting. Ex. 5. Respondent's office was in complete disarray both before and after February 2004. Tr. 39-186, 209-248, 249-255, Ex. 17. Respondent's files were not organized in any usable manner. Tr. 42-45, 211-212, 252-253, Ex. 17. Files were scattered throughout the office and many of the relevant documents were not filed into the client's files. Tr. 42-45, 211-212, 252-253, Ex. 17. Documents had not been filed in client files consistently since 2001. Tr. 124, 131. Staff members would have to search for hours to find files. Tr. 42-45, 211-212, 252-253, Ex. 17. Respondent did not open mail on a timely basis and would not allow staff to open the mail on his behalf. Tr. 48-50. Often Respondent would wait weeks before opening mail including mail from the courts, clients, opposing counsel and Informant. Tr. 48-50, 213.

[7] One of the two bills produced was included in a response Respondent was making to Informant regarding a new complaint Informant had received on Respondent. Tr. 217; Ex. 12.

Respondent focused his efforts almost exclusively upon bringing in new clients and receiving retainers from the new clients. Tr. 60, 63, 68-71, 73, 111, 113, 162, 185-186, 219-220. He received approximately ten to fifteen new client calls per week. Tr. 69. Respondent always took phone calls from prospective clients. T. 63. They were his "bread and butter", "treated as emergencies" and staff was instructed to "get him right away for the phone call." Tr. 185-86, 220, 253-54.

Once clients had paid Respondent their initial retainer in full[8], Respondent stopped working on the clients' matters even though he had not completed the work that the client had requested. Tr. 71-73, 221-222. During the hearing Ms. Blagg, Respondent's former secretary and the person who alerted Informant's staff to Respondent's false statements, testified as to how Respondent handled her divorce as an example of his lack of diligence after a client paid his or her retainer. Ms. Blagg hired Respondent to represent her in a divorce in October 2003 before she went to work as his secretary. Tr. 66. She paid Respondent a $750 retainer and the filing fee in full. Tr. 66. She then assumed that Respondent went ahead and filed a petition on her behalf as he promised to do at the start of the representation. Tr. 66. When she came to work for him in February 2004 she discovered that he had not prepared or filed a petition. Tr. 66. Ms. Blagg advised Respondent that the matter was urgent as her husband was making false child abuse calls to DFS and refusing to return her son to her. Tr. 66. In April of 2004, six months after she hired Respondent, Ms. Blagg drafted her own petition with the help of Chris Leonard, Respondent's other employee, and asked Respondent to review and sign the petition so

she could file it. Tr. 126, 222. After she filed the petition, Ms. Blagg had Respondent withdraw from her case and hired another attorney to represent her. Tr. 67.

Respondent also avoided communicating with clients who had paid their retainer. Tr. 58-62, 71. Current clients had to wait weeks before Respondent would return their calls and in some instances Respondent never returned their calls. Tr. 59-60. On a daily basis Respondent's staff received phone calls from clients dissatisfied with Respondent. Tr. 73, 255. A secretary who worked for Respondent after Ms. Blagg estimated that 90 percent of the phone calls she handled were clients calling because they were unhappy with Respondent. Tr. 255.

On September 15, 2005, after Informant's staff completed their investigation of Respondent's alleged fraudulent statements, Informant moved to set aside the Joint Stipulation on the basis that Respondent made false representations to Informant and this Court. Exs. 14A and H. On September 20, 2004, this Court rejected the Joint Stipulation and remanded the matter to Informant for her to take appropriate action. Ex. 14A. Informant then filed her Information with the Advisory Committee.

Condition of Respondent's Practice on the Hearing Date

Since the beginning of 2003 Respondent has hired at least fifteen different support staff. Tr. 18-20, 250, 253, 297, 306, 310; Ex. 11, p. 1, 8. Thirteen of the fifteen staff people have either quit or been fired by Respondent. Tr. 18-20, 250, 253, 297, 306, 310. Respondent attributes his recent the problems with his practice to the fact that he has been unable to find and keep good staff. Tr. 18-30, 300.

---

[8] Respondent allowed clients to make payments on their initial retainer. Tr. 70.

On of the date of the hearing, Respondent testified that he presently had good office support staff and was turning his practice around yet he admitted that he had not billed any clients for work done after November 2002 except for the two bills produced by Ms. Leonard. Tr. 297, 306, 322.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE IN ADDITION TO VIOLATING RULES 4-1.3, 4-1.4(a), 4-1.16(d), 4-8.1(b), 4-5.5(c), AND 4-8.4(d), WHICH RESPONDENT ADMITTED, HE ALSO VIOLATED:

a. **RULE 4-1.3 IN CONNECTION WITH THE REPRESENTATION OF JOHN GAITHER IN THAT RESPONDENT DID NOT ACT WITH DILIGENCE WHEN HE FAILED TO TAKE ANY ACTION ON THE MATTER FOR ALMOST FIVE YEARS;**

b. **RULE 4-8.1 IN CONNECTION WITH RESPONDENT ENTERING INTO THE JOINT STIPULATION IN THAT RESPONDENT, WITH THE INTENT TO DECEIVE, FALSELY STATED TO INFORMANT'S STAFF ON FEBRUARY 18, 2004, THAT HE WAS BILLING CLIENTS AND RECEIVING FUNDS FROM THE BILLINGS; AND**

c. **RULE 4-3.3(a) WHEN RESPONDENT ENTERED INTO THE JOINT STIPULATION WHEN HE KNEW THE JOINT STIPULATION CONTAINED FALSE INFORMATION REGARDING HIS BILLING OF CLIENTS.**

Cases:

In re Shelhorse, 147 S.W.3d 79, 80 (Mo. banc 2004)

In re Wiles, 107 S.W.3d 228, 229 (Mo. banc 2003)

Committee on Professional Ethics and Conduct v. Pracht, 505 N.W.2d 196, 198 (Iowa 1993)

In re Huffman, 13 P.3d 994, 999 (Or. 2000)

Rules:

Rule 4-1.3

Rule 4-1.4(a)

Rule 4-1.16(d)

Rule 3.3(a)

Rule 5.5(c)

Rule 8.1(b)

Rule 8.4(d)

Other Sources:

ABA/BNA Lawyers Manual on Professional Conduct

II.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE DISBARMENT IS AN APPROPRIATE DISCIPLINE:

a. WHEN A LAWYER ENGAGES IN UNETHICAL CONDUCT INVOLVING DISHONESTY IN THAT RESPONDENT INTENTIONALLY MADE A MATERIAL FALSE STATEMENT TO THIS COURT IN THE JOINT STIPULATION, THIS COURT AND INFORMANT SPENT VALUABLE TIME AND EFFORT ADDRESSING THE MATTER AND APPROPRIATE DISCIPLINARY PROCEEDINGS WERE DELAYED AS A RESULT OF THE DECEPTION; AND

b. WHEN A LAWYER ENGAGES IN A PATTERN OF NEGLECT WITH RESPECT TO CLIENT MATTERS IN THAT RESPONDENT HAS CONTINUED TO TAKE ON NEW CLIENTS WHEN HE KNOWS THAT HE CANNOT DILIGENTLY REPRESENT THEM.

Cases:

In re Storment, 873 S.W.2d 227 (Mo. banc 1994)

In re Caranchini, 956 S.W.2d 910, 919 (Mo. banc 1997)

In re Donaho, 98 S.W.3d 871, 874 (Mo. banc 2003)

Cincinnati Bar Assoc. v. Weaver, 809 N.E.2d 1113, 1116 (Ohio 2004)

Other Sources:

ABA Standards for Imposing Lawyer Sanctions (1991)

III.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE THE MITIGATING FACTORS IN THIS CASE DO NOT DEMONSTRATE RESPONDENT'S FITNESS TO PRACTICE LAW IN THAT RESPONDENT HAS WIDESPREAD PROBLEMS WITH HIS PRACTICE, RESPONDENT HAS SHOWN AN UNWILLINGNESS TO WORK WITH INFORMANT TO CORRECT THE PROBLEMS AND RESPONDENT HAS DEMONSTRATED AN INABILITY TO CORRECT THE PROBLEMS ON HIS OWN.

Cases:

In re Donaho, 98 S.W.3d 871, 874 (Mo. banc 2003)

Other Sources:

ABA Standards for Imposing Lawyer Sanctions (1991)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE IN ADDITION TO VIOLATING RULES 4-1.3, 4-1.4(a), 4-1.16(d), 4-8.1(b), 4-5.5(c), AND 4-8.4(d), WHICH RESPONDENT ADMITTED HE ALSO VIOLATED:

In matters of attorney discipline, the Disciplinary Hearing Panel's decision is only advisory. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004). This Court reviews the evidence de novo and reaches its own conclusions of law.[9] *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). Professional misconduct is established by a preponderance of the evidence. *Id.*

As a condition of retaining his or her license an attorney must comply with the Rules of Professional Conduct as set forth in Supreme Court Rule 4. *In re Shelhorse*, 147 S.W.3d at 80. Violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *Id.*

As set forth above, Respondent admitted in his Answer that he:

1. failed to act with reasonable diligence and promptness in violation of Rule 4-1.3 when representing Ms. Carey and Ms. Tidwell;

---

[9] The standard of review is the same for all of the Points Relied On in this Brief. Consequently, Informant has only set forth the standard for review under Point I of this Brief and incorporates the standard of review into the other Points.

2. failed to keep his clients, Ms. Carey and Ms. Tidwell, reasonably informed about the status of their cases in violation of Rule 4-1.4(a);

3. failed to refund unearned advanced fees in a timely manner upon the termination of representation by Ms. Tidwell in violation of Rule 4-1.16(d);

4. knowingly failed to respond to a lawful demand for information from Informant on three different occasions in violation of Rule 4-8.1(b);

5. engaged in the unauthorized practice of law because of his failure to comply with the continuing legal education requirements in violation of Rule 4-5.5(c); and

6. engaged in conduct prejudicial to the administration of justice in violation of Rule 4-8.4(d) when he failed to comply with the Diversion Agreement.

In addition, the evidence at trial shows Respondent also violated Rule 4-1.3 when representing John Gaither and Rules 4-8.1 and 4-3.3(a) concerning the Joint Stipulation previously submitted to this Court.

a. RULE 4-1.3 IN CONNECTION WITH THE REPRESENTATION OF JOHN GAITHER IN THAT RESPONDENT DID NOT ACT WITH DILIGENCE WHEN HE FAILED TO TAKE ANY ACTION ON THE MATTER FOR ALMOST FIVE YEARS;

Rule 4-1.3 provides that a lawyer shall act with reasonable diligence and promptness in representing a client. At the core of the duty of diligence is a lawyer's obligation to perform in a timely manner the work for which he or she was hired.

ABA/BNA Lawyers Manual on Professional Conduct, *Lawyer-Client Relationship* § 31:403 (2005).

In the instant matter, Respondent did not take any action on Mr. Gaither's personal injury matter until the statute of limitations was about to run even though Mr. Gaither had hired Respondent almost five years earlier and Mr. Gaither had reached maximum medical improvement over three and one half years earlier. Tr. 191-93, 198; Ex. 1 ¶ 44; Ex. 2. When Respondent finally filed suit, he filed suit without having an address at which to serve the defendant and he then did nothing to obtain a physical address for the defendant for over eight months after filing suit. Tr. 200-06; Ex. 20.

No professional shortcoming is more widely resented than procrastination. Comment to Rule 4-1.3. Respondent has shown extreme procrastination in the representation of Mr. Gaither and has caused Mr. Gaither needless anxiety about his legal matter. Respondent's lack of action on Mr. Gaither's matter is particularly troubling in that this was not a case in which Mr. Gaither acquiesced in Respondent's lack of action and the matter was merely forgotten by Respondent. Respondent's file reflected 29 phone messages from Mr. Gaither from November 20, 2000, until January 1, 2004. Ex. 11. Respondent clearly chose to ignore Mr. Gaither and Mr. Gaither's legal matters.

Even more troubling was that Respondent continued to neglect Mr. Gaither even after Informant began investigating Mr. Gaither's complaint. Ex. 4, p. 58-59.[10]

At the hearing, Respondent attempted to excuse his lack of diligence by asserting that he had marital, health and law office management problems since 1999. Tr. 11-38, 286-308. Respondent's excuses are without merit. As the Iowa Supreme Court stated in *Committee on Professional Ethics and Conduct v. Pracht,* 505 N.W.2d 196, 198 (Iowa 1993), personal and professional problems do not excuse attorneys from completing legal matters in a timely manner. "When attorneys find themselves unable to complete pending legal matters in a timely fashion, they have the following options: (1) decline additional work; (2) seek assistance; or, (3) withdraw and allow another attorney to complete the work." *Id.* Respondent did none of these things. Accordingly, this Court should find that he violated Rule 4-1.3 in regards to his representation of Mr. Gaither.

d. RULE 4-8.1 IN CONNECTION WITH RESPONDENT ENTERING INTO THE JOINT STIPULATION IN THAT RESPONDENT, WITH THE INTENT TO DECEIVE, FALSELY STATED TO INFORMANT'S STAFF ON FEBRUARY 18, 2004, THAT HE WAS BILLING CLIENTS AND RECEIVING FUNDS FROM THE BILLINGS; AND

[10] Even after Informant's staff met with Respondent concerning the Gaither suit, Respondent continued to delay in filing suit and then after filing suit took no action to get the defendant served.

Rule 4-8.1 provides that in connection with a disciplinary matter a lawyer shall not knowingly make a false statement of material fact or fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter. The evidence presented at trial shows that Respondent appeared on February 18, 2004, pursuant to a subpoena issued by Informant and informed Informant's staff that he had rectified his computer problems a few months earlier, he had started sending monthly bills to clients on a regular basis and with the increase in his funds due to the billing he had begun making other improvements to his practice. Tr. 272-74. On February 18, 2004, Respondent had not billed any clients for work done after November 2002 and he had not made improvements to his law office practices as he had asserted. Tr. 39, 42-81, Ex. 1 ¶ 83; Ex. 2. Therefore, Respondent's statements to Informant's staff were false.

In the disciplinary context, a material fact is a fact that had it been known by the decision-maker would or could have influenced the decision-making process significantly. See *In re Huffman*, 13 P.3d 994, 999 (Or. 2000). Respondent's statements were obviously material to Informant's decision regarding what type of discipline she should seek. The Joint Stipulations specifically stated Informant was recommending that this Court impose a public reprimand instead of suspension or disbarment because, in part, Respondent was "billing clients on a regular basis and is beginning to receive payments from clients." Ex. 14C.

Rule 4-9.1 provides that Respondent's knowledge of the falsity of his statements may be inferred from the circumstances. The support staff Respondent had hired after July 2003 did not have any training in using Respondent's billing program and both staff

members quit by January 2003. Tr. 19-20. On February 14, 2004, Respondent hired Ms. Chris Leonard to do his billing but she did not start until March 1, 2004. Tr. 20-21. Consequently, Respondent obviously knew that the statements he made to Informant's staff on February 18, 2004, about billing were false.

At the hearing Respondent asserted that he did not intend to mislead but was merely too optimistic when discussing the matter with Informant's staff. Tr. 304. Respondent further stated what he intended to convey to Informant's staff was that he had started entering expenses into the computer and that when Chris Leonard started in March he expected to be able to bill shortly thereafter. Tr. 304-05, 321.

Respondent's argument does not hold up for two reasons. First, one of Informant's staff members, Dori DeCook, took notes of Respondent's statements at the February 18, 2004, meeting. Ex. 5. Ms. DeCook's handwritten notes specifically state Respondent is "currently billing clients," and "finally getting payment from clients." Ex. 5. These notes do not reflect that Respondent stated he had started the billing process and hoped to actually send out bills in the near future. Furthermore, Ms. DeCook specifically recalls Respondent making the false statements. Tr. 273-74.

Moreover, assuming *arguendo* that Respondent had stated at the February 18, 2004, meeting that he hoped to be billing in the near future, Rule 4-8.1 required Respondent to correct any misapprehension Informant may have had about the matter before he entered into the Joint Stipulation. On May 28, 2004, Respondent entered into the Joint Stipulation. Ex. 13, p. 27; Ex. 14C. The Joint Stipulation specifically stated that Respondent was sending out bills to clients on a monthly basis and had begun

receiving revenues again as a result of the billings. Ex. 14C. Respondent reviewed the Joint Stipulations carefully before he signed it and did not request any changes to the document or notify Informant's staff that certain statements in the Joint Stipulation were false. Ex. 13, p. 27, 36.

Thus, the evidence shows Respondent knowingly made a false statement of material fact about his billings and revenues to Informant's staff in connection with a disciplinary matter and is in violation of Rule 4-8.1. Furthermore, even if Respondent had not made a false statement of material fact at the February 18, 2004, meeting, his failure to point out the misapprehension to Informant's staff before entering into the Joint Stipulation was a violation of Rule 4-8.1.

c. RULE 4-3.3(a) WHEN RESPONDENT ENTERED INTO THE JOINT STIPULATION WHEN HE KNEW THE JOINT STIPULATION CONTAINED FALSE INFORMATION REGARDING HIS BILLING OF CLIENTS.

Rule 4-3.3(a) provides that a lawyer shall not knowingly make a false statement of material fact to a tribunal. The evidence presented at trial proves that Respondent violated Rule 4-3.3(a). As discussed above, the Joint Stipulation Respondent entered into expressly stated that Respondent had resumed billing on a regular basis and was currently receiving revenues from the billings. Ex. 14C. When Respondent signed the Joint Stipulation on May 28, 2004, he still was not billing clients on a regular basis and he did not have any funds coming in from his billings. Tr. 319-21. Respondent knew that the information set forth in the Joint Stipulation was false concerning his billings and

revenues. From March 1, 2004, until June 21, 2004, Respondent never requested that Ms. Leonard enter time records into the computer or prepare bills except on two occasions when the clients requested refunds and/or made complaints to Informant. Tr. 215-16.

Respondent also knew that the Joint Stipulation had to be submitted to this Court for approval. The Joint Motion along with the Joint Stipulation specifically provides that the Supreme Court must approve the Joint Stipulation. Ex. 14B, C. Because the false information was extensively discussed in the Joint Stipulation and relied upon heavily by Informant in the Joint Stipulation, the false statement could have influenced the Court in its decision about whether to accept the discipline recommended by the Joint Stipulation. Accordingly, Respondent's false statements were material. Thus, at trial Informant proved a violation of Rule 4-3.3(a).

II.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE DISBARMENT IS AN APPROPRIATE DISCIPLINE:

a. WHEN A LAWYER ENGAGES IN UNETHICAL CONDUCT INVOLVING DISHONESTY, IN THAT RESPONDENT INTENTIONALLY MADE A MATERIAL FALSE STATEMENT TO THIS COURT IN THE JOINT STIPULATION, THIS COURT AND INFORMANT SPENT VALUABLE TIME AND EFFORT ADDRESSING THE MATTER AND APPROPRIATE DISCIPLINARY PROCEEDINGS WERE DELAYED AS A RESULT OF THE DECEPTION; AND

When determining an appropriate penalty for the violation of the Rules of Professional Conduct, this Court considers the gravity of the misconduct, as well as mitigating or aggravating factors that tend to shed light on respondents' moral and intellectual fitness as an attorney. *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003).

Since its decision in *In re Storment*, 873 S.W.2d 227 (Mo. banc 1994), this Court has consistently turned to the ABA Standards for Imposing Lawyers Sanctions (1991) ("ABA Standards") for guidance in deciding what discipline to impose. The notes to the ABA Standards provide that when an attorney violates multiple Rules of Professional Conduct the ultimate sanction imposed should be at least consistent with the sanction for

the most serious instance of misconduct and often should be greater than the sanctions for the most serious misconduct. See Section II-Theoretical Framework.

Respondent's false statements to this Court and Informant are the most serious violations. "Honesty is, perhaps, the most essential quality for a lawyer." *In re Cupples,* 952 S.W.2d 226, 238 (Mo. banc) (Covington, J. dissenting). As this Court stated in *In re Caranchini*, 956 S.W.2d 910, 919 (Mo. banc 1997), attorneys who intentionally make false statements to or intentionally withhold material information from a court are "an affront to the fundamental and indispensable principle that a lawyer must proceed with absolute candor towards the tribunal." "Attorneys who make misrepresentations to a court create 'an erosion of confidence on the part of the judiciary and the public in a lawyer's honesty'. . . '[t]here is no more serious impact on the integrity of our judicial system.'" *Florida Bar v. Lathe*¸ 774 So.2d 675, 679 (Fla. 2000).

Similarly, this Court has held that dishonesty before a disciplinary committee is especially egregious. In *In re Donaho*, 98 S.W.3d 871, 874 (Mo. banc 2003), this Court stated, "We expect members of the bar to cooperate promptly and candidly with bar committees. Those who knowingly seek to mislead those committees, and in so doing interfere with their work, do so at their peril." (citing *In Re Forge,* 747 S.W.2d 141, 145 (Mo. banc 1988). As the Arizona Supreme Court stated in *In re Varbel,* 897 P.2d 1337, 1340 (Ariz. 1995), lying during disciplinary proceedings "is one of the most serious ethical violations an attorney can commit and, absent mitigating circumstances warrants disbarment."

In *In re Storment*, 873 S.W.2d at 231, this Court adopted ABA Standard 6.1 which sets forth the appropriate discipline in cases of false statements or misrepresentations. In *Storment*, the attorney had engaged in an intentional act of making a false statement to the court, i.e. the attorney had advised his client to lie while on the witness stand. This Court applied ABA Standard 6.11 which provides disbarment is appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, causing serious or potentially serious injury to a party, or a significant or potentially significant adverse effect on the legal proceedings. Accordingly, this Court disbarred Mr. Storment. This Court further stated *In re Caranchini*, 956 S.W. at 919, that a lesser sanction of suspension or reprimand concerning false statements is only appropriate when the attorney merely knows of the misrepresentation or is merely negligent in allowing the misrepresentation to occur. *See also* ABA Standards 6.12 and 6.13.

In the instant case, the facts show that Respondent intentionally lied to both Informant and the Supreme Court in order to prevent Informant from pursuing a suspension or disbarment of his license. It is also clear that Respondent's actions had potentially adverse effects on the legal system. Informant's staff spent valuable time drafting the Joint Stipulation and the Motion to Set Aside the Joint Stipulation. This Court used its valuable resources reviewing the Joint Stipulation and the Motion to Set Aside the Joint Stipulation. Moreover, if Respondent had not made the false statements to Informant, Informant would have moved forward with legal proceedings to suspend or disbar him immediately after the February 18, 2004, meeting. Respondent's deceit

delayed disciplinary proceedings from February 18, 2004, until September 30, 2004, and the public has been put at risk for a longer period of time.

The delay is particularly troubling given the testimony concerning the state of Respondent's practice after February 18, 2004. In July 2003, he advised Informant's staff that he had opened 130 new matters during the prior six months. Tr. 267-68. While we do not know the exact number of clients Respondent took on after February 18, 2004, Respondent's staff testified that Respondent focused his efforts almost entirely upon bringing in new clients and that on average he was receiving ten to fifteen new client calls per week. Tr. 69. His staff further testified that he required the new clients to pay a retainer up front and then after the new clients paid their retainer he stopped working on the clients' matters and returning their calls. Tr. 71-73, 221-22. Obviously, the delay in the disciplinary proceedings were detrimental to the public in that additional clients have been harmed by Respondent.

b. WHEN A LAWYER ENGAGES IN A PATTERN OF NEGLECT WITH RESPECT TO CLIENT MATTERS IN THAT RESPONDENT HAS CONTINUED TO TAKE ON NEW CLIENTS WHEN HE KNOWS THAT HE CANNOT DILIGENTLY REPRESENT THEM.

In addition, even if Respondent had not lied to this Court and to Informant's staff, the other facts of this case support disbarment. ABA Standard 4.11 provides that disbarment is appropriate when a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client. The evidence

shows that Respondent has engaged in a pattern of neglect of his clients and his clients have suffered. Respondent did not pursue Ms. Carey's claim in a timely manner and the statute of limitations ran so Ms. Carey's claim was barred. Ex. 1 ¶ 8; Ex. 2. Respondent did not file an Answer on behalf of Ms. Tidwell even after he received notice that Ms. Tidwell's husband had filed a Motion for Default. He also kept the retainer for over one year after he was discharged. For over three years Respondent did not make a demand upon the insurance company on behalf of Mr. Gaither even though Mr. Gaither desperately needed the money. Tr. 190-209; Ex. 1, ¶¶ 22-26; Ex. 20. Then, after he filed suit on Mr. Gaither's behalf, he failed to take any action to get the defendant served. Tr. 199-205. Respondent did not prepare a divorce petition for his own secretary even though his secretary paid him for his services and it was critical that he act in a timely manner. Tr. 66, 126, 222. The Complainants in this action have clearly suffered.

Moreover, Respondent's former employees testified that: (1) he was constantly seeking new clients, (2) he required his new clients to pay an initial retainer, (3) except for new clients paying their retainers, Respondent did not have any funds coming into his practice; (4) and after a client paid the initial retainer Respondent ceased working on the client's legal matters and taking phone calls from the clients. Tr. 39-186, 209-48, 249-63. As the Supreme Court of Ohio declared in *Cincinnati Bar Assoc. v. Weaver*, 809 N.E.2d 1113, 1116 (Ohio 2004), "taking retainers and failing to carry out the contracts of employment is tantamount to theft of the fee from the client" and disbarment is the only appropriate discipline.

III.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE THE MITIGATING FACTORS IN THIS CASE DO NOT DEMONSTRATE RESPONDENT'S FITNESS TO PRACTICE LAW IN THAT RESPONDENT HAS WIDESPREAD PROBLEMS WITH HIS PRACTICE, RESPONDENT HAS SHOWN AN UNWILLINGNESS TO WORK WITH INFORMANT TO CORRECT THE PROBLEMS AND RESPONDENT HAS DEMONSTRATED AN INABILITY TO CORRECT THE PROBLEMS ON HIS OWN.

The Disciplinary Hearing Panel recommended this Court suspend Respondent's license rather than disbar him because it found the mitigating circumstances related to the break up of Respondent's marriage and law partnership warranted such.

Informant disagrees. This Court's decision in *In re Donaho,* 98 S.W.3d 871 (Mo. banc 2003), is instructive regarding what type of mitigating factors should be considered when there is intentional deception upon the part of an attorney. In *In re Donaho*, the attorney had paid $750 to handle a post-dissolution proceeding for a client. Respondent failed to file the motion upon behalf of the client, failed to communicate with the client and failed to return the $750 fee to the client. The client filed a complaint against the attorney. While the disciplinary committee was investigating the complaint, the attorney falsely advised the committee that he had returned the $750 to the client. Based upon the false statement the committee issued an admonition to the attorney and closed the

complaint. After the committee closed the complaint, the committee discovered the attorney's lie. During oral arguments before this Court the attorney failed to acknowledge that he acted dishonestly. Even though the case involved intentional deceit this Court imposed suspension against the attorney because of mitigating factors, i.e. the attorney had no prior discipline, he expressed some remorse at the hearing and was a recovering alcoholic. However, this Court specifically stated that a lesser discipline than disbarment should be given only when the mitigating factors demonstrate the attorney's continued fitness to practice law. *Id.* at 876.

In the instant case the mitigating factors do not demonstrate Respondent's continued fitness to practice law and the aggravating factors outweigh any mitigating factors. Unlike the attorney in *Donaho* who had neglected only one client, Respondent has neglected many clients. As discussed above, Respondent has engaged in a pattern of neglect to his clients. What is more disturbing is that he continues to take on new clients knowing that there are serious problems with his law office practice and that other clients are complaining because he has not diligently represented them

Informant does not dispute that Respondent suffered a heart attack in 2001, divorced his wife/law partner in 2002, and was involved in litigation with his ex-wife over their office building in 2003. See ABA Standard 9.3(c). While Respondent has suffered from personal and health problems[11] in recent years, Respondent has failed to take advantage of the opportunities offered to him by Informant to correct the problems with his practice. In August 2003, Informant entered into a Diversion Agreement with

Respondent. Ex. 4, pp. 39-51. The purpose of the diversion was to provide education and support to Respondent so that Respondent could more effectively manage his practice. Ex. 4, p. 31. The Diversion Agreement required Respondent to engage a law office consultation to evaluate his practice and to make recommendations about how to correct the numerous problems was experiencing with his practice. Ex. 4, pp. 40-41. It also required Respondent to undergo a mental health evaluation and undergo any treatment recommended by the mental health professional. Ex. 4, pp. 42-43. Respondent never took any action to comply with the Diversion Agreement or made the effort to advise Informant's staff that personal or professional problems were preventing him from complying with the Diversion Program. Furthermore, he never contacted Informant's staff after Informant's staff asked him to respond why he was not complying with the Agreement. Ex. 1, ¶ 73; Ex. 2. By allowing Respondent to enter into the Diversion Agreement, Informant gave Respondent the chance to rectify the problems with his practice and he chose not to take advantage of the opportunities offered him. He should not be given a second chance as the risk to the public is too great.

Furthermore, this Court should not reduce the discipline imposed against Respondent because his lack of action could be interpreted as depression or other mental illness. The ultimate purpose of attorney discipline is protection of the public. Mental health issues should not serve as a mitigating factor unless an attorney is willing to take action to correct the problem. This is evidenced by the fact that ABA Standard 9.3(a), as amended, requires that before physical or mental health issues can be considered as a

---

11

mitigating factor an attorney must offer medical evidence of the mental disability, show that the mental disability was causing the misconduct, the attorney must demonstrate a successful period of rehabilitation and demonstrate that recovery has stopped the misconduct. Respondent did not put on evidence that he is receiving treatment, that he is rehabilitated from any mental illness, or that his recovery has stopped the misconduct.

Respondent has shown that he does not have the ability to correct the problems with his practice on his own. Respondent suffered his heart attack in 2001 and was back to work in a few months. Respondent's ex-wife moved from his building in January 2003 and he obtained refinancing on the office building at the end of 2003 ending any connection his ex-wife had to his practice. Tr. 17, 272. Yet the evidence shows that Respondent has been unable to make changes to improve his practice since 2003 when the "mitigating factors" ceased. On February 4, 2005, the date of the hearing, Respondent was still not billing clients on a regular basis. Since 2003, he has had at least fifteen different support staff working for him. The problems Respondent is currently experiencing with his practice are not directly attributable to his personal or health problems. They are attributable to the fact that he lacks the skills to effectively manage a law office and that he is willing to take on more clients than he can serve to ensure he has funds to live.

There are also many other aggravating factors in this case. Respondent is not new to the practice of law. He received his license in 1981. Ex. 1, ¶ 2; Ex. 2. He is a veteran practitioner who should know what is expected of him as an attorney. See ABA Standard 9.2(i). Respondent has numerous prior admonitions and as a result of the prior

admonitions should have been on notice that he needed to improve his office practices and procedures especially when his prior admonitions were for lack of communication, lack of diligence and failure to respond to requests for information from Informant. See ABA Standard 9.2(a). As discussed above, unlike the attorney in *Donaho*, Respondent has shown a pattern of misconduct with several clients. See ABA Standard 9.2(c). Also this Court should consider that the suspension with monitoring after reinstatement as recommended by the panel is not an appropriate discipline because Respondent will not cooperate with Informant. He repeatedly ignores requests for information from Informant whenever he receives a new complaint and lies to Informant when it is beneficial to him. Tr. 324-25.

In addition, Respondent has refused to acknowledge his wrongful conduct. Throughout the hearing he placed the blame for problems in his practice after 2003 upon the fact that he cannot find good and retain competent staff. Tr. 18-32, 294-306. See ABA Standard 9.2(g). Respondent has refused to acknowledge that he should not have continued to take in new clients when he was not providing competent and diligent representation to his current clients. By his actions, Respondent has shown that he is a dishonest person who cannot acknowledge his own wrongdoing and lacks the ability to efficiently manage a law office. As such he cannot be rehabilitated and will always be a threat to the public. Accordingly, the only appropriate discipline is disbarment.

CONCLUSION

For the reasons set forth above, this Court should find that Respondent violated Rules 4-1.3, 4-1.4(a), 4-1.16(d), 4-3.3(a), 4-8.1, 4-5.5(c), and 4-8.4(d), disbar Respondent, and tax costs in this matter against Respondent.

Respectfully submitted,

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

By: _____

Nancy L. Ripperger #40627
Staff Counsel
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2005, two copies of Informant's Brief and a copy of the diskette containing the brief have been sent via First Class mail to:

James W. Hahn, II
2858 Professional Court
P. O. Box 862
Cape Girardeau, MO 63702-0862

_____
Nancy L. Ripperger

CERTIFICATION: SPECIAL RULE NO. 1(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 Special Rule No. 1(b);

3. Contains 10,622 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.

_____
Nancy L. Ripperger

APPENDIX – VOLUME I

TABLE OF CONTENTS

APPENDIX VOLUME II

TABLE OF CONTENTS