IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
BRIAN ZINK,	**)**	**Supreme Court #SC89623**
	)	
Respondent.	**)**	

INFORMANT'S BRIEF

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL

SHANNON L. BRIESACHER #53946
STAFF COUNSEL
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400
Shannon.Briesacher@courts.mo.gov

ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters exists in the Missouri Supreme Court and 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

On or about October 1, 1993, Respondent, Brian E. Zink ("Respondent") was licensed to practice law in the State of Missouri. Respondent's bar number is 44563. Respondent's license is currently in good standing and he has no disciplinary history before this Court.

Misconduct Underlying the Disciplinary Complaint

In or around May, 2006, a woman named Mary Hart ("Hart") was arrested and charged with three felony counts of forgery in St. Charles County Circuit Court. **App. 39**. Matthew Thornhill ("Thornhill") was the Assistant Prosecuting Attorney and Respondent, a criminal defense attorney with the firm of Dalton, Coyne, Cundiff & Hillemann, P.C., agreed to defend Hart in the action styled *State of Missouri v. Mary C. Hart,* Cause No. 0511-CR05314 in the Circuit Court of St. Charles County, Missouri. **App. 6 (T. 14); 39**. Prosecuting Attorney, Thornhill, initially indicated to Respondent that he was recommending that Hart serve six years in the Department of Corrections opposing probation, but if she were to obtain probation, then five years intensive supervised probation with 60 days shock treatment in the county jail, as well as restitution and court costs. **App. 6 (T. 15); 14 (T. 48)**. Respondent did not accept this recommendation and proceeded to negotiate with Thornhill for a lesser recommended sanction. **App. 6 (T. 15)**. During the course of the negotiations, Respondent informed Thornhill that Hart had previously indicated that her godfather was former football player, Terry Bradshaw. **App. 6 (T. 15); 24**. Thornhill expressed disbelief that Hart's

godfather was Terry Bradshaw, but nevertheless informed Respondent that if Respondent could produce a baseball with Terry Bradshaw's signature, Thornhill would reconsider his position regarding the voracity of Hart. **App. 6 (T. 17); 29; 36**. At the time of the negotiation, Respondent believed that in order to get Hart's felony charges reduced, Respondent would be required to produce a baseball signed by Terry Bradshaw. **App. 6 (T. 17)**. In a subsequent conversation and in furtherance of the negotiations to reduce Hart's charges, Respondent also discussed with Thornhill the cooperation of Hart with the undercover drug task force. **App. 6 (T. 16); 24**.

Respondent informed a partner at his firm, Mr. Dave Dalton ("Dalton") that Respondent could get the felony charges reduced if Hart produced a baseball signed by Terry Bradshaw. **App. 7 (T. 18)**. Respondent also communicated to Hart, in a conversation taped by the Federal Bureau of Investigations ("FBI"), that he could get the felonies "taken care of" if she produced a baseball signed by Terry Bradshaw. **App. 7 (T. 19)**. Hart subsequently gave Respondent a baseball, football and rookie card all purported to have been signed by Terry Bradshaw. **App. 7 (T. 19)**. Respondent never indicated to Hart that the ball or memorabilia would be returned to her possession and Respondent understood that Hart believed that the baseball would be given to Thornhill in a *quid pro quo* exchange for the reduction of her felony charges. **App. 7 (T. 20-21)**. Respondent, in turn, informed Thornhill that he had the baseball signed by Terry Bradshaw in Respondent's possession. **App. 7 (T. 21); 29**. Though Respondent never received a formal letter indicating that Thornhill had reduced the felony charges to

misdemeanor charges, Thornhill did inform Respondent that Hart would need to pay restitution up front if the charges were to be reduced. **App. 15 (T. 52-53)**.

In early July, 2006, the FBI received information and allegations that Respondent had advised Hart that the prosecuting attorney had agreed to accept sports memorabilia in exchange for reducing Hart's felony charges to misdemeanors. **App. 35-36**. The FBI initiated a federal criminal investigation and on August 31, 2006, conducted an interview with Respondent. **App. 8 (T. 22); 40**. At the beginning of the interview, Respondent believed that the FBI was questioning him about Hart because they wished to work with Hart in some capacity. **App. 8 (T. 24)**. The agents then began asking Respondent about the baseball produced by Hart and its roll in the negotiations with Thornhill. **App. 8 (T. 24)**. During the interview with the FBI, Respondent made numerous false statements and false representations to the FBI Special Agents. **App. 8 (T. 22-23); 40**. The false statements made by Respondent were material to the FBI's ongoing investigation and concerned Respondent's discussions with his client, Hart, as well as his discussions with Thornhill. **App. 40**. Respondent told FBI agents that the baseball in question was a joke between Respondent and Thornhill, even though Respondent believed that the baseball was part of a deal to have Hart's felony charges reduced. **App. 8 (T. 24)**.

Respondent participated in a separate interview with Assistant United States Attorney, Hal Goldsmith ("Goldsmith"), in which Respondent also made false and misleading statements concerning the role of the sports memorabilia in Respondent's negotiations with Thornhill. **App. 8 (T. 23); 9 (T. 26-27)**. Respondent knew it was against the law to make misstatements to a federal officer. **App. 9 (T. 28)**. After

learning of the FBI's taped conversations, Respondent admitted to having made false statements during his interviews with the FBI and the United States Attorney's Office. **App. 9 (T. 28-29)**.

Having made false statements of fact to a federal law enforcement officer, Respondent entered into an agreement for pretrial diversion with the United States in *United States of America v. Brian Zink,* USAO #2006R01051 in the United States District Court, Eastern District of Missouri, Eastern Division. The agreement provided that prosecution of the offense be deferred for a period of 12 months, provided Respondent abide by the conditions of the agreement. **App. 42-44**. Among other conditions, the pretrial agreement provided that Respondent report to a Pretrial Services Officer, make bi-monthly reports, and "abstain from the practice of law and from engaging in the law business, as those terms are defined pursuant to Missouri Revised Statutes 484.010, for the pretrial diversion period of twelve (12) months and shall cooperate fully with the Missouri Supreme Court and the Missouri State Bar Disciplinary Commission relative to that Office's investigation and the Court's proceedings." **App. 42-44**. Respondent ceased practicing law from June 25, 2007 to June 26, 2008 and has received verbal confirmation with his diversionary officer that Respondent has completed his diversion program. **App. 16-17 (T. 57-58)**. Respondent understood that the pretrial diversion agreement was not in consideration of any violation of the Missouri Rules of Professional Conduct and expected to receive separate sanction for the ethics violations. **App. 11 (T. 34); 17 (T. 60)**. Respondent further understood that his agreement to voluntarily abstain from the practice of law was not related to any disciplinary

proceeding that might be instituted by the Office of Chief Disciplinary Counsel. **App. 17 (T. 60-61)**.

Charges of Misconduct, Respondent's Admissions and the Findings of the Disciplinary Hearing Panel

On or about October 3, 2007, the Office of Chief Disciplinary Counsel filed an Information against Respondent. **App. 23-27**. On or about October 29, 2007, the Respondent filed his Answer, denying some allegations in the Information, but admitting several others. **App. 28-31**. A Disciplinary Hearing Panel was appointed on October 30, 2007 and the disciplinary hearing took place on June 26, 2008. **App. 2-22; 32-34**.

In its charging Information, Informant alleged that Respondent violated Rule 4-1.4 regarding communication with his client. **App. 26**. The Disciplinary Hearing Panel found that Respondent violated Rule 4-1.4 of the Rules of Professional Conduct in that Respondent "failed to consult with Hart about the limitation on Respondent's conduct as Respondent knew that Hart expected assistance not permitted by the rules of professional conduct or other law." **App. 49-50**. Informant also charged and the Disciplinary Hearing Panel found that Respondent engaged in misconduct involving dishonesty, fraud and deceit in violation of Rule 4-8.4(c) in that Respondent, by his own admission in his Answer, made false statements to the FBI and the United States Attorney's Office. **App. 26; 30; 50-51**.

The Informant charged and the Disciplinary Hearing Panel found that Respondent stated an ability to improperly influence a government official or to achieve results by means that violate the Rules of Professional Conduct, in violation of Rule 4-8.4(e) in that

Respondent led Hart to believe that an autographed baseball by Terry Bradshaw would be given to Thornhill in an exchange for a reduction in Hart's felony charges. **App. 26; 51**. However, the Disciplinary Hearing Panel did not find that Respondent engaged in conduct prejudicial to the administration of justice, in violation of Rule 4-8.4(d), as charged by the Informant. **App. 26; 51**.

In its charging Information, Informant alleged that Respondent was untruthful in his statement to others in violation of Rule 4-4.1 of the Missouri Rules of Professional Conduct. **App. 26**. In his Answer to the Information, Respondent admits that he is guilty of professional misconduct pursuant to Rule 4-4.1, in that Respondent made false statements to the FBI and United States Attorney's Office. **App. 30**. Nevertheless, the Disciplinary Hearing Panel found that Respondent did not violate Rule 4-4.1 in his untruthful statements to the FBI and United States Attorney's Office because the statements were not made "in the course of representing a client." **App. 50**. Finally, Informant charged that Respondent violated Rule 4-3.5 in seeking to influence an official by means prohibited by law in that Respondent attempted to obtain a reduction in Hart's felony charges by giving Thornhill a baseball purportedly autographed by Terry Bradshaw. **App. 26**. The Disciplinary Hearing Panel did not find that Informant proved by a preponderance of the evidence that Respondent violated Rule 4-3.5. **App. 50**.

The Disciplinary Hearing Panel stated in its Decision that "[t]he facts in this case convincingly demonstrate that the Respondent engaged in misconduct which violated the rules of professional conduct." **App. 52**. The Disciplinary Hearing Panel further stated that "Respondent's serious misconduct warrants a severe sanction." **App. 52**. The

Disciplinary Hearing Panel ultimately recommended that Respondent be suspended from the practice of law for a period of 12 months commencing on June 25, 2007 and ending on June 26, 2008.[1] **App. 53**. The Disciplinary Hearing Panel found that Respondent's illegal conduct served as an aggravating factor in the case, while Respondent's "full and free disclosure to the Disciplinary Hearing Panel," as well as Respondent's admissions in his Answer, served as mitigating factors in the case. **App. 52-53**. In addition to the Panel's recommendation for retroactive suspension, the Panel also recommended that Respondent complete six hours of ethics CLE and that Respondent comply with all conditions of Rule 5.28 if Respondent should apply for reinstatement. **App. 53**. On August 11, 2008, Respondent filed his acceptance of the Hearing Panel's Decision and on August 13, 2008, Informant filed its rejection of the Panel's Decision, which brings the matter before this Court. **App. 57; 58**.

[1] The hearing in this matter took place on June 26, 2008 and the Disciplinary Hearing Panel's recommendation of 12 month's suspension coincided with the time period that Respondent voluntarily abstained from the practice of law pursuant to his pretrial diversion agreement with the United States Attorney's Office.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULES OF PROFESSIONAL CONDUCT:

a. **4-4.1 (TRUTHFULNESS IN STATEMENTS TO OTHERS) IN THAT RESPONDENT MADE UNTRUTHFUL STATEMENTS OF MATERIAL FACT TO THE FBI AND UNITED STATES ATTORNEY'S OFFICE IN CONJUNCTION WITH A PENDING CRMINAL INVESTIGATION;**

b. **4-8.4(c) (CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION) IN THAT RESPONDENT MADE UNTRUTHFUL STATEMENTS OF MATERIAL FACT TO THE FBI AND UNITED STATES ATTORNEY'S OFFICE IN CONJUNCTION WITH A PENDING CRIMINAL INVESTIGATION;**

c. **4-8.4(e) (STATING ABILITY TO INFLUENCE OFFICIAL OR ACHIEVE RESULTS BY VIOLATIVE MEANS) IN THAT RESPONDENT INDICATED TO HIS CLIENT THAT HE COULD OBTAIN A REDUCTION IN FELONY**

CHARGES IN EXCHANGE FOR SPORTS MEMORABILIA;

d. 4-3.5 (SEEKING TO INFLUENCE OFFICIAL) IN THAT RESPONDENT ATTEMPTED TO OBTAIN A REDUCTION IN FELONY CHARGES IN EXCHANGE FOR SPORTS MEMORABILIA;

e. 4-1.4 (COMMUNICATION) IN THAT RESPONDENT FAILED TO INFORM HIS CLIENT OF THE LIMITATIONS ON HIS CONDUCT WHEN HE KNEW THAT THE CLIENT EXPECTED ASSISTANCE NOT PERMITTED BY THE RULES OF PROFESSIONAL CONDUCT; and

f. 4-8.4(d) (CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE) IN THAT RESPONDENT ATTEMPTED TO OBTAIN A REDUCTION IN FELONY CHARGES ON BEHALF OF A CLIENT IN EXCHANGE FOR SPORTS MEMORABILIA AND MADE UNTRUTHFUL STATEMENTS OF MATERIAL FACT TO A FEDERAL LAW ENFORCEMENT OFFICER IN CONJUNCTION WITH A PENDING CRIMINAL INVESTIGATION.

In the Matter of Rausch, 32 P.3d 1181 (Kan. 2001)

State ex rel. Oklahoma Bar Association v. Allford, 152 P.3d 190 (Ok. 2006)

In re Disney, 922 S.W.2d 12 (Mo. banc 1996)

In re Disciplinary Action Against Andrade, 736 N.W.2d 603 (Min. 2007)

Hazard Geoffrey C., Jr. & W. William Hodes, The Law of Lawyering, A Handbook on the Model Rules of Professional Conduct, Vol. 2 § 4.1:101 (2d ed. 1998)

Rule 4-1.4

Rule 4-3.5

Rule 4-4.1

Rule 4-8.4

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD DISREGARD THE DISCIPLINARY HEARING PANEL'S SANCTIONING RECOMMENDATION BECAUSE THE DISCIPLINARY HEARING PANEL'S RECOMMENDATION VIOLATES SUPREME COURT RULE 5.16, INVADES THE PROVINCE OF THIS COURT AND DOES NOT PROPERLY ADDRESS THE EGREGIOUSNESS OF THE RESPONDENT'S CONDUCT.

In re Mid-America Living Trust Associates, Inc., 927 S.W.2d 855 (Mo. banc 1996)

In re Crews, 159 S.W.3d 355 (Mo. banc 2005)

Rule 5.16

POINTS RELIED ON

III.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE BECAUSE SUSPENSION IS APPROPRIATE WHEN A LAWYER KNOWINGLY ENGAGES IN CONDUCT INVOLVING DISHONESTY, FRAUD, MISREPRESENTATION OR DECEIT.

In re Carey, 89 S.W.3d 477 (Mo. banc 2002)

In re Forge, 747 S.W.2d 141 (Mo. banc 1988)

State ex rel. Oklahoma Bar Association v. Allford, 152 P.3d 190 (Ok. 2006)

Standards for Imposing Lawyer Sanctions, American Bar Association, 1991

Rule 4-4.1

Rule 4-8.4

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULES OF PROFESSIONAL CONDUCT:

a. **4-4.1 (TRUTHFULNESS IN STATEMENTS TO OTHERS) IN THAT RESPONDENT MADE UNTRUTHFUL STATEMENTS OF MATERIAL FACT TO THE FBI AND UNITED STATES ATTORNEY'S OFFICE IN CONJUNCTION WITH A PENDING CRMINAL INVESTIGATION;**

b. **4-8.4(c) (CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION) IN THAT RESPONDENT MADE UNTRUTHFUL STATEMENTS OF MATERIAL FACT TO THE FBI AND UNITED STATES ATTORNEY'S OFFICE IN CONJUNCTION WITH A PENDING CRIMINAL INVESTIGATION;**

c. **4-8.4(e) (STATING ABILITY TO INFLUENCE OFFICIAL OR ACHIEVE RESULTS BY VIOLATIVE MEANS) IN THAT RESPONDENT INDICATED TO HIS CLIENT THAT HE COULD OBTAIN A REDUCTION IN FELONY**

CHARGES IN EXCHANGE FOR SPORTS MEMORABILIA;

d. 4-3.5 (SEEKING TO INFLUENCE OFFICIAL) IN THAT RESPONDENT ATTEMPTED TO OBTAIN A REDUCTION IN FELONY CHARGES IN EXCHANGE FOR SPORTS MEMORABILIA;

e. 4-1.4 (COMMUNICATION) IN THAT RESPONDENT FAILED TO INFORM HIS CLIENT OF THE LIMITATIONS ON HIS CONDUCT WHEN HE KNEW THAT THE CLIENT EXPECTED ASSISTANCE NOT PERMITTED BY THE RULES OF PROFESSIONAL CONDUCT; and

f. 4-8.4(d) (CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE) IN THAT RESPONDENT ATTEMPTED TO OBTAIN A REDUCTION IN FELONY CHARGES ON BEHALF OF A CLIENT IN EXCHANGE FOR SPORTS MEMORABILIA AND MADE UNTRUTHFUL STATEMENTS OF MATERIAL FACT TO A FEDERAL LAW ENFORCEMENT OFFICER IN CONJUNCTION WITH A PENDING CRIMINAL INVESTIGATION.

A disciplinary hearing panel's recommendation is advisory in nature. *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). This Court conducts a de novo review of the evidence and reaches its own conclusions of law. *Id.* Discipline will not be imposed unless professional misconduct is proven by a preponderance of the evidence. *Id*. Where misconduct is proven by a preponderance of the evidence, violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004).

In 1986, Missouri adopted the American Bar Association's Model Rules of Professional Conduct and though the Rules in Missouri now exist with variation, the Model Rules are used by a majority of other states, making other state disciplinary cases persuasive in Missouri disciplinary matters. *State ex rel. Horn v. Ray*, 138 S.W.3d 729 (Mo.App. E.D. 2002) and www.abanet.org/cpr/mrpc/model_rules.html (last visited October 24, 2008) (indicating that California, New York and Maine are the only states that have not adopted professional conduct rules that follow the format of the ABA Model Rules). See also *In re Cupples*, 952 S.W.2d 226 (Mo. banc 1997) and *In re Belz*, 258 S.W.3d 38 (Mo. banc 2008) (where this Court analyzed other state disciplinary law in reaching a conclusion in Missouri).

a. Rule 4-4.1 regarding Untruthful Statements to Others

It is undisputed between Informant and Respondent that Respondent violated Rule of Professional Conduct 4-4.1(a) which states that "[i]n the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person." Despite Respondent's admission in his Answer that he had violated Rule 4-

4.1(a), the Disciplinary Hearing Panel found that Respondent had not violated Rule 4-4.1(a) in making misstatements to the FBI and United States Attorney's Office because the statements were not "in the course of representing a client."

At the time of his interview with the FBI and the United States Attorney's Office an attorney-client relationship existed between Respondent and Hart. The FBI interviewed Respondent after learning that Hart had produced a baseball purportedly signed by Terry Bradshaw with the expectation that her felony forgery charges would be reduced by the prosecutor. When the interview with the FBI began, Respondent believed that the FBI wished to work with Hart and Respondent was most certainly speaking to the FBI in his capacity as Hart's attorney. When the interview turned to Hart's felony charges and the subsequent negotiations with Thornhill, Respondent conveyed to the FBI information regarding his client's actions in producing a baseball signed by Terry Bradshaw. Again, in speaking to Hart's actions, Respondent was speaking as Hart's attorney. In the Law of Lawyering, the authors state:

> [i]n its simplest applications, Rule 4.1 merely codifies a simple proposition: although lawyers are supposed to be zealous partisans of their clients, they must draw the line at lying. The law generally and all lawyer codes of conduct have always been clear that a lawyer may not make misrepresentations to a court, to a client, or to a third person. Rule 4.1(a) recodifies the traditional rule that a lawyer's word is his bond.

Hazard Geoffrey C., Jr. & W. William Hodes, The Law of Lawyering, A Handbook on the Model Rules of Professional Conduct, Vol. 2 § 4.1:101 (2d ed. 1998). The authors

also note that Rule 4.1(a) applies to statements made by a lawyer to a third person out-of-court, whereas statements made to a court or other tribunal are governed by the otherwise identical provision of 3.3(a). *Id*. at §4.1:201. In the present action, had the Court questioned Respondent about the exchange of a baseball for a reduced sentence and had Respondent made misrepresentations to the Court, the rules pertaining to an attorney's duty to exercise candor before the Court would most certainly apply and there would be no question that Respondent was answering in the course of representing a client. It can be no less true that when Respondent made misstatements of fact to federal authorities about his attempt to negotiate a reduced sentencing recommendation on behalf of his client, Respondent was acting in the course of representing his client and was obligated to tell the truth.

In Matter of Rausch, a Kansas attorney was suspended after having been found guilty of violating Rule 4.1. *In the Matter of Rausch*, 32 P.3d 1181 (Kan. 2001). The attorney incorporated an organization and served as a registered agent and a shareholder and was found to have violated Rule 4.1 by failing to disclose to third party investors the "sham" nature of the investments that were being filtered through his company. *Id*. at 1195. Though the attorney argued that Rule 4.1 did not apply because his actions did not involve client representation and though the Court found that no attorney-client relationship existed between the attorney and the investors, the Court nevertheless determined that the attorney had violated Rule 4.1 because Respondent had acted as <u>*an*</u> attorney in the transaction. *Id*. at 1196 (where the Court notes that the Respondent had acted as an attorney for the filtering company). In the present action, not only did

Respondent's actions involve client representation, but the relationship in question was more directly related to the misconduct than in the case of *Rausch*. Similarly, an attorney in Oklahoma was suspended after she refused to respond to the disciplinary authorities attempt to investigate a client complaint and when later subpoenaed by the disciplinary authority for deposition, persuaded sheriff's to falsify the date of service on the subpoena by telling them that the matter was soon going to be dropped. *State ex rel. Oklahoma Bar Association v. Allford*, 152 P.3d 190, 192-194 (Ok. 2006). Oklahoma's Rule 4.1 was identical to that of Missouri's in that a lawyer was prohibited from making a false statement of material fact to a third person *in the course of representing a client*. *Id*. Though the false statement was made by Allford when sheriffs attempted to serve the subpoena pursuant to the disciplinary investigation for a client complaint, the Kansas Supreme Court nevertheless found Allford guilty of violating 4-4.1, necessarily finding that she was acting in the course of representing a client. *Id*. Again, the connection between the attorney misconduct and the client representation was far more tenuous in *Allford* than in the present action. Respondent in the present case made misstatements of fact to the FBI concerning his client's perceived attempt to bribe a prosecuting attorney. Respondent was acting as Hart's attorney and as such, Rule 4-4.1 applies. Further, Respondent has admitted making false statements of material fact to the FBI and the United States Attorney's Office while being interviewed about the events in question. Respondent's conduct resulted in a breach of his duty to be truthful to third parties and as such, Respondent's license should be suspended.

b. Rule 4-8.4(c) regarding Misrepresentation, Dishonesty, Fraud or Deceit

Rule 4-8.4(c) provides that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The Disciplinary Hearing Panel in the present action found that Respondent, by his own admission, made knowingly false statements and false representations to the FBI Special Agents and therefore engaged in conduct involving fraud, deceit and misrepresentation. Questions of honesty go to the heart of fitness to practice law and misconduct involving untrustworthiness undermines the public confidence in not only the individual attorney, but also the bar. *In re Disney*, 922 S.W.2d 12, 15 (Mo. banc 1996). This Court has held that attorneys owe the public, the courts and their clients a duty of honesty and that failure to act honestly warrants severe discipline. *In re Carey and Danis*, 89 S.W.3d 477, 498 (Mo. banc 2002) (quoting *In re Caranchini*, 956 S.W.2d 910, 919-920 (Mo. banc 1997)). When Respondent knowingly made false statements to FBI Special Agents, who were investigating a federal crime, Respondent engaged in dishonesty, fraud, deceit and misrepresentation and subsequently called into question his fitness to practice law.

c. Rule 4-8.4(e) regarding Statement of Ability to Improperly Influence Official

Rule 4-8.4(e) provides that it is professional misconduct for a lawyer to "state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law." In the present case, the FBI tape recorded a conversation between Respondent and his client, Hart, in which Hart informed Respondent that she had obtained the baseball and Respondent replied that he should be able to "take care" of the felonies with the baseball.

The Disciplinary Hearing Panel found that the evidence adduced at hearing, as well as Respondent's own admissions that he understood that Hart expected the baseball would be given to Thornhill in a *quid pro quo* exchange for the reduction of the felony charges was sufficient to establish that Respondent violated Rule 4-8.4(e). In a case involving an attorney who implied to his client the ability to bribe a high-ranking police official in a drug case, the Supreme Court of Minnesota stated the following:

> We have rarely been faced with the task of disciplining attorneys charged with implying the ability to improperly influence a government agency or official, but when we have, we have disbarred the attorney. (citations omitted). We have done so because such misconduct calls into question the very integrity of the judicial system, a system the attorney has sworn to uphold. And in this case, Andrade's [Respondent's] actions effectively reinforced his client's cynical view of the legal system as corrupt and subject to influence. The harm of such conduct to the public and to the judicial system outweighs the mitigating circumstances found by the referee.

In re Disciplinary Action Against Andrade, 736 N.W.2d 603, 606 (Min. 2007). In the present action, Respondent admitted that he believed that Thornhill would reduce the felony charges in exchange for a baseball signed by Terry Bradshaw. Respondent further admitted that he communicated to his client the ability to "take care" of the felony charges in exchange for the baseball. Respondent was an active participant in the fraud that took place, but also led his client to believe that a bribe to Thornhill would result in the reduction of charges. Respondent's conduct is the antithesis of that which we would

expect from Missouri attorneys in that Respondent undermined the credibility of our judicial system, engaged in dishonest behavior and guided his client in doing the same. As such, Respondent should receive a severe sanction for his misconduct.

d. Rule 4-3.5 regarding Influence of an Official by Prohibited Means

Rule 4-3.5(a) states that a lawyer shall not seek to influence an official by means prohibited by law. In the present case, Respondent engaged in an initial conversation with Thornhill whereby Respondent believed that Thornhill would reduce Hart's felony charges in exchange for a baseball signed by Terry Bradshaw. Respondent communicated this belief to his client, Hart. Not only did Respondent believe that the felony charges would be reduced in exchange for the baseball, but Respondent understood that his client believed the same and Respondent did nothing to disavow Hart's belief. Once Hart produced the baseball, Respondent notified Thornhill that Respondent had the baseball in his possession. If Respondent was not seeking to influence Thornhill's recommendation, there would have been no need to inform Thornhill that Respondent had the baseball in his possession. Notifying Thornhill that the baseball had been produced was an advancement of the agreement that Respondent believed he had with Thornhill and amounted to an actual attempt to influence Thornhill's decision. Where an attorney conspired to obtain titles to vehicles known to be stolen and then paid co-conspirators or potential government witnesses to avoid being questioned or served with subpoenas, the Supreme Court of Indiana stated that the attorney failed to meet to meet any standard of professional behavior and brought severe discredit to the legal profession. *In the Matter of Anast*, 634 N.E.2d 493, 494 (In. 1994).

Similarly, in the present action, Respondent engaged in behavior that undermines the credibility of the legal profession and reflects on Respondent's character and fitness to practice law.

e. Rule 4-1.4 regarding Failure to Inform Client of Limitations

Rule 4-1.4(a)(3) provides that "[a] lawyer shall consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law." In the case of *In re Breslin*, an attorney was disciplined when a client provided the attorney with an envelope of money with the expectation that the attorney would deliver the money to a police commissioner and the attorney subsequently failed to inform the client that such behavior would be unethical. *In re Breslin* 793 A.2d 645 (N.J. 2002). In the present action, Respondent testified that he understood that Hart expected that the baseball would be given to Thornhill in a *quid pro quo* exchange for a reduction in her felony charges and Respondent further admitted that he did nothing to disavow Hart of this belief. Respondent's admissions are sufficient to establish that Respondent violated Rule 4-1.4 in that Respondent did not communicate the illegal and unethical nature of the bribery scheme to his client.

f. Rule 4-8.4(d) regarding Conduct Prejudicial to the Administration of Justice

Rule 4-8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. This Court has found attorneys guilty of violating Rule 4-8.4(d) in a variety of circumstances where the respondent attorney engaged in disreputable behavior. See *In re Caranchini*, 956 S.W.3d 910 (Mo.

banc 1997) (where attorney found guilty of violating Rule 4-8.4(d) after filing frivolous pleadings in court and failing to expedite litigation); *In re Carey & Danis*, 89 S.W.3d 477 (Mo. banc 2002) (attorneys found to have engaged in conduct prejudicial to the administration of justice for filing false discovery responses); and *In re Kazanas*, 96 S.W.3d 803 (Mo. banc 2003) (attorney guilty of violating 4-8.4(d) after being convicted for income tax fraud)). Other states have set forth a "test" for determining whether conduct is prejudicial to the administration of justice, requiring that there be improper action or conduct, that the conduct bear directly upon the judicial process and finally that the conduct cause harm or potential harm in more than a *de minimis* way. *In re Hopkins*, 677 A.2d 55 (D.C. 1996) and *In re Smith*, 848 P.2d 612 (Or. 1993).

In the present action, Respondent's conduct was prejudicial to the administration of justice under any analysis in that Respondent engaged in a negotiation with a prosecutor wherein Respondent believed that the prosecutor would accept an autographed baseball in exchange for the reduction in felony charges. Further, Respondent communicated this understanding to his client and then informed the prosecutor that a baseball had been obtained. Respondent attempted to influence the prosecutor's decision-making process, thereby influencing the outcome of the proceeding and corrupting the judicial process as a whole. As such, Respondent's license should be sanctioned for violation of Rule 4-8.4(d). Whether Respondent actually committed bribery is irrelevant to a finding that Respondent engaged in conduct prejudicial to the administration of justice: Respondent's actions interfered with the judicial process and negatively impacted the legal system. As such, Respondent's license should be suspended for a substantial period of time.

ARGUMENT

II.

THE SUPREME COURT SHOULD DISREGARD THE DISCIPLINARY HEARING PANEL'S SANCTIONING RECOMMENDATION BECAUSE THE DISCIPLINARY HEARING PANEL'S RECOMMENDATION VIOLATES SUPREME COURT RULE 5.16, INVADES THE PROVINCE OF THIS COURT AND DOES NOT PROPERLY ADDRESS THE EGREGIOUSNESS OF THE RESPONDENT'S CONDUCT.

Missouri Supreme Court Rule 5.16 governs the findings and recommendations of a disciplinary hearing panel and states, in relevant part:

> The recommended discipline may be a public reprimand, suspension or disbarment. A recommendation for suspension shall include the length of time that must elapse before the respondent is eligible to apply for reinstatement. A recommendation for suspension may provide that the suspension be stayed in whole or in part and that the respondent be placed on probation.

In this case, the Disciplinary Hearing Panel recommended that Respondent be suspended from the practice of law for a period of twelve months commencing June 25, 2007 to June 26, 2008, a period that had already elapsed by the time that the disciplinary hearing took place. In making its recommendation, the Disciplinary Hearing Panel exceeded its authority under Rule 5.16, which provides only that a recommendation for suspension shall include the length of time that must elapse before the respondent may apply for reinstatement and that a recommendation for suspension may provide that the

suspension be stayed in whole or in part. Rule 5.16 does not provide for "retroactive" suspension. Further, this Court has the inherent authority to regulate the practice of law. *In re Mid-America Living Trust Associates, Inc*., 927 S.W.2d 855, 856 (Mo. banc 1996) (citations omitted). As such, when attorney discipline is administered, it is administered by order of this Court. When the Disciplinary Hearing Panel recommended that Respondent be suspended for the year prior, the panel was effectively stating that Respondent had already been suspended, though without order by this Court. Such recommendation is improper. As provided *supra*, a disciplinary hearing panel's recommendation is advisory in nature. *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). The Disciplinary Hearing Panel is empowered to issue a dismissal, admonition or recommendation for discipline to this Court. See Rule 5.16. The Disciplinary Hearing Panel may not impose discipline, retroactive or otherwise, without order of this Court and this Court is free to disregard the recommendation of the hearing panel, altogether.

As a practical matter, the Disciplinary Hearing Panel's recommendation was akin to imposing no discipline, or giving credit for "time served," this despite the Panel's finding that Respondent's conduct was egregious and warranted a severe sanction. Respondent abstained from the practice of law not because this Court ordered suspension as part of a disciplinary sanction, but because Respondent voluntarily agreed to do so as part of a diversion agreement in a criminal matter. Had Respondent agreed to community service as the primary sanction in his plea agreement, it is unlikely that the Disciplinary Hearing Panel would have recommended the same as an appropriate disposition for his disciplinary action. This is true because the diversion agreement and the Respondent's

disciplinary action are unrelated. The United States Attorney's Office, with whom Respondent made the diversion agreement, is not charged with maintaining the integrity of Missouri's legal system or ensuring that Missouri practitioners adhere to the Rules of Professional Conduct. The agreement between the United States Attorney's Office and Respondent was for a criminal act and did not address the ethical implications of Respondent's conduct. Giving Respondent the benefit of "time served" for a voluntary act that was part of a criminal plea agreement is not proper and not sanctioned by the Rules. Further, giving Respondent the benefit of a retroactive suspension does not properly address the egregious nature of his dishonest conduct. As such, this Court should disregard the sanctioning recommendation of the Disciplinary Hearing Panel and order Respondent actually suspended.

ARGUMENT

III.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE BECAUSE SUSPENSION IS APPROPRIATE WHEN A LAWYER KNOWINGLY ENGAGES IN CONDUCT INVOLVING DISHONESTY, FRAUD, MISREPRESENTATION OR DECEIT.

When considering the level of discipline to impose for violation of the Rules of Professional Conduct, this Court has considered the propriety of the sanctions under the American Bar Association model rules for attorney discipline ("ABA Standards"). *In re Crews*, 159 S.W.3d 355, 360 (Mo. banc 2005). The ABA Standards divide rule violations into four categories: 1) violations of duties owed to the clients, 2) violations of duties owed to the public, 3) violations of duties owed to the legal system and 4) violations of duties owed to the profession. *See* Standards for Imposing Lawyer Sanctions, American Bar Association, 1991. In the present action, Respondent's conduct has run afoul of his duties to his client, the legal system and the profession. The notes to the ABA Standards also 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.

In Respondent's case, Respondent has admitted to, and the disciplinary hearing panel has found Respondent guilty of, violating Rules of Professional Conduct 4-8.4(c) by engaging in conduct involving dishonesty, fraud, misrepresentation or deceit.

Respondent has also admitted to having violated Rule 4-4.1 by making untruthful statements to a third party. Both Rule violations pertain to Respondent's honesty and trustworthiness as a practitioner and are addressed by ABA Standards 5.1 and 6.1, respectively. ABA Standard 5.1 provides, in pertinent part:

> 5.11 Disbarment is generally appropriate when:
>
> (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft[;] or
>
> (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.
>
> 5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

In the present action, not only did Respondent actively participate in an attempt to bribe a prosecutor for the reduction of his client's felony charges, Respondent also lied to the FBI and United State's Attorneys Office when questioned as part of their criminal investigation. Respondent's conduct was both illegal and involved intentional interference with justice, as well as misrepresentation, dishonesty and deceit, which makes disbarment an appropriate remedy in Respondent's case. The justification for

disbarment in cases involving dishonesty, misrepresentation and deceit was articulated by the Supreme Court of Oklahoma in *Allford* where the Court stated:

> [T]here are some matters so serious that mitigating factors will seldom override the requirement of substantial discipline…[O]ffenses against common honesty should be clear, even to the youngest lawyers; and to distinguished practitioners, their grievousness should be even clearer. Honesty and integrity are the cornerstones of the legal profession. Nothing reflects more negatively upon the profession than deceit.

State ex rel. Oklahoma Bar Association v. Allford, 152 P.3d 190, 194-195 (Ok. 2006). Disbarment has been a common sanction in other states where respondent attorneys have engaged in conduct similar to that of Respondent. See *In re Tucker*, 766 A.2d 510 (D.C. 2000) (attorney disbarred for bribing an employee of the District of Columbia Bureau of Traffic Adjudication to 'fix' parking tickets); *In re Dickson*, 968 So.2d 136 (La. 2007) (attorney disbarred for telling his client he could bribe a judge or district attorney, with the Court stating that attorney's conduct "goes to the very heart of the legitimacy of our legal system"); and *Office of Disciplinary Counsel v. Diangelus*, 907 A.2d 452 (Penn. 2006) (attorney suspended for five years for telling prosecutor that police officer agreed to a plea when no such agreement existed). Even should this Court determine that Respondent's conduct does not fall within the guidelines for disbarment, it is clear that Respondent's conduct is worthy of a substantial suspension under the ABA Standards. Respondent knowingly perpetuated an agreement that he believed would result in the reduction of his client's felony charges in exchange for sports memorabilia. Further,

Respondent lied to federal authorities when questioned as part of their criminal investigation. Such conduct clearly reflects adversely on Respondent's fitness to practice law. Respondent compromised the integrity of our judicial process and engaged in conduct that disrespects and injures the legal system, which warrants a substantial sanction.

ABA Standard 6.1 pertains to conduct that is dishonest and prejudices the administration of justice, most commonly against the court, and provides that disbarment is appropriate when a lawyer knowingly advances a false statement with the intent to deceive, whereas suspension is appropriate when a lawyer knows of a misrepresentation and takes no remedial action. Again, Respondent's conduct appears to indicate that disbarment is appropriate, as Respondent was responsible for actively making false statements of fact to the FBI and United States Attorney's Office.

Though Respondent's conduct may fall within the ABA Standard's guidelines for disbarment, this Court has previously considered the ABA Standards in conjunction with the nature of Respondent's actions and aggravating and mitigating circumstances, which may operate to reduce or increase the level of the sanction under the guidelines. Standards for Imposing Lawyer Sanctions, American Bar Association, 1991 at 361. In the present action, Respondent has been cooperative and compliant at all stages of litigation. The Disciplinary Hearing Panel found that Respondent made "full and free disclosure" in the form of Respondent's Answer and admissions and that Respondent maintained a cooperative attitude during the proceedings. Respondent has ostensibly and successfully completed his diversion agreement in his criminal case and Respondent has

no disciplinary history before this Court. Conversely, the Disciplinary Hearing Panel found that the illegal nature of Respondent's conduct could be considered an aggravating factor in Respondent's case. Given that the illegal nature of Respondent's conduct has been addressed by his criminal case and subsequent diversion agreement, this aggravating factor is not substantial and is far outweighed by the mitigating circumstances.

This Court has stated that disbarment is to be reserved for those cases where it is clear that the attorney is not fit to continue in the profession. *In re Forge*, 747 S.W.2d 141, 145 (Mo. banc 1988). While Respondent's conduct casts doubt on whether he is fit to continue in the practice of law, Respondent has no previous disciplinary history and has been cooperative at all stages of litigation. This Court has further stated that:

> [S]uspension is "an appropriate intermediate sanction where reprimand is insufficient to protect the public and maintain the integrity of the profession, and where this Court does not believe that the acts of a respondent are such that he should not be at Bar. Suspension serves the dual purposes of discipline; it protects the public and maintains the integrity of the profession by deterring other members of the bar from engaging in similar conduct. Suspension also recognizes that while the focus of discipline is to achieve the purposes previously described, those purposes are inevitably achieved through punishment.

In re Carey, 89 S.W.3d 477, 503 (Mo. banc 2002) (citing *In re Ruffalo*, 390 U.S. 544, 550, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968)). In this case, substantial and actual suspension appears to be the appropriate remedy. As discussed, *supra*, Respondent should not receive credit for the time that he voluntarily abstained from the practice of

law as part of his criminal diversion agreement as the egregious nature of his conduct warrants no such leniency. At the same time, Respondent's cooperation and lack of previous disciplinary history should be taken into consideration in concluding an appropriate remedy. As such, Informant respectfully requests that Respondent be actually suspended for a substantial time period to be determined by this Court with no retroactive credit granted.

CONCLUSION

For the reasons set forth above, the Chief Disciplinary Counsel respectfully requests this Court:

(a) find that Respondent violated Rules 4-1.4, 4-3.5 and 4-8.4(c), (d) and (e);

(b) suspend Respondent's license to practice law; and

(c) tax all costs in this matter to Respondent, including the $1000.00 fee for suspension, pursuant to Rule 5.19(h).

Respectfully submitted,

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL

By: _____
Shannon L. Briesacher #53946
Staff Counsel
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400 – Phone
(573) 635-2240 – Fax
Shannon.Briesacher@courts.mo.gov

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2008, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

Paul J. D'Agrosa
8019 Forsyth
Clayton, MO 63105

Attorney for Respondent

_____
Shannon L. Briesacher

CERTIFICATION: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;

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

3. Contains 7,727 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.

_____
Shannon L. Briesacher

TABLE OF CONTENTS – APPENDIX