

IN THE SUPREME COURT

STATE OF MISSOURI

IN RE:)
)
ERIC A. FARRIS) **Case No. SC877064**
)
Respondent.)

RESPONDENT'S BRIEF

Eric A. Farris, Attorney At Law
Missouri Bar Number 42649
Farris Law Group, L.L.C.
P.O. Box 490
Branson, Missouri 65615
Telephone: 417-334-7278

RESPONDENT

TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES.....	4-5
STATEMENT OF JURISDICTION.....	6
STATEMENT OF FACTS	7-22
POINTS RELIED ON	23-25
 ARGUMENT	
<p>I. THIS COURT SHOULD AFFIRM THE DISCIPLINARY HEARING PANEL’S CONCLUSION THAT INFORMANT DID NOT PROVE BY A PREPONDERANCE OF EVIDENCE THE ALLEGATIONS CONTAINED IN THE FIRST POINTS RELIED ON OF THE INFORMANT’S BRIEF IN THAT THE EVIDENCE DOES NOT ESTABLISH THAT RESPONDENT FAILED TO COMMUNICATE TO CLIENTS CHANGES IN THE CLIENTS’ LIKELIHOOD OF PREVAILING DUE TO THE FILING OF A MOTION FOR SUMMARY JUDGMENT AND IN THAT THE EVIDENCE DOES NOT ESTABLISH THAT RESPONDENT FAILED TO TIMELY PROVIDE A COPY OF THE DISPOSITIVE ORDER TO CLIENT AFTER THE CLIENT’S REQUESTS BECAUSE THE FACTS AND EVIDENCE DO NOT SUPPORT A CONCLUSION THAT RESPONDENT KNOWINGLY OR WILLINGLY VIOLATED RULE 4-1.4.....</p>	
	26-49
I. CONCLUSION	49

II. THIS COURT SHOULD AFFIRM THE DISCIPLINARY HEARING PANEL’S CONCLUSION THAT INFORMANT DID NOT PROVE BY A PREPONDERANCE OF EVIDENCE THE ALLEGATIONS CONTAINED IN THE SECOND POINTS RELIED ON OF THE INFORMANT’S BRIEF IN THAT THE EVIDENCE DOES NOT ESTABLISH THAT RESPONDENT FAILED TO COMMUNICATE TO CLIENTS MATERIAL FACTS RELATED TO THE STRENGTH OF THE OPPOSING PARTY’S MOTION FOR SUMMARY JUDGMENT BECAUSE THE FACTS AND EVIDENCE DO NOT SUPPORT A CONCLUSION THAT RESPONDENT KNOWINGLY OR WILLINGLY VIOLATED RULE 4-1.4..... 50-55

II. CONCLUSION 55

PROOF OF SERVICE 56

CERTIFICATION: RULE 84.06(c)..... 56

TABLE OF AUTHORITIES

	Page(s)
CASES	
Young v. Ernst , 113 S.W.3d 695 (Mo. App. 2003).....	18
In re Littlton , 719 S.W.2d 772, 775 (Mo. banc 1986).....	26
In re Oberhellmann , 873 S.W.2d 851, 852 (Mo. banc 1994).....	26
In Re Mirabile , 975 S.W.2d 936, 941 (Mo. banc 1998).....	27
In Re Griffey , 873 S.W.2d 600, 601 (Mo. banc 1994).....	27
Davis v. Research Medical Center , 903 S.W.2d 557, 568 (Mo. App. 1955).	27
Creamer v. Bivert , 113 S.W. 1118, 1120 (1908).....	27
In re Severo , 41 Cal.3d 493, 500, 714 P.2d 1244 (1986).....	28
In re Kreamer , 14 Cal.3d 524, 532, fn. 5, 535 P.2d 728 (1975).....	28
Murphy v. Carron , 536 S.W.2d 30, 32 (Mo. banc 1976).....	28
In re McIntire , 33 S.W.3d 565, 568 (Mo. App. 2000).....	28
In re Marriage of Eikermann , 48 S.W.3d 605, 608 (Mo. App. 2001).....	28
K.J.B. v. C.A.B. , 883 S.W.2d 117, 121-22 (Mo. App. 1994).....	28
Bernstein v. State Bar of California , 50 Cal.3d 221, 786 P.2d 352 (1990)..	34-39
In re Voorhees , 739 S.W.2d 178, 180 (Mo. banc 1987).....	46
In re Westfall , 808 S.W.2d 829 (Mo. banc 1991).....	46
In re Caranchini , 956 S.W.2d 910, 918-919 (Mo. banc 1997).....	46

In re Cupples , 979 S.W.2d 932, 938 (Mo. banc 1998).....	46-48
In re McBride , 938 S.W.2d 905 (Mo. banc 1997).....	48
In Re Coe , 903 S.W.2d 916, 920 (Mo. banc 1995).....	48
In Re Staab , 719 S.W.2d 780, 784-85 (Mo. banc 1986).....	49
In re Miller , 568 S.W.2d 246 (Mo. banc 1978).....	49
In re Shelhorse , 147 S.W.3d 79 (Mo. banc 2004).....	49
In re Hardge-Harris , 845 S.W.2d 557 (Mo. banc 1993).....	49
In re Sullivan , 494 S.W.2d 329 (Mo. banc 1973).....	49
OTHER AUTHORITIES	
ABA <u>Standards for Imposing Lawyer Sanctions</u> (1991 ed.) Rule 6.11.....	46

STATEMENT OF JURISDICTION

Respondent joins and adopts the jurisdictional statement of the Informant.

STATEMENT OF FACTS

Respondent supplements the Informant's Statement of Facts to clarify certain incorrect impressions that might flow from the Informant's selection for recitation and to more fully describe the hearing evidence.

Hearing Panel Decision

Informant's Statement of Facts informs the Court that the Hearing Panel found that the Informant failed to prove by a preponderance of the evidence that Respondent had committed an ethical violation without providing many of the important underlying found by the Hearing Panel upon which it based its decision. The Informant omits to inform the Court that the Hearing Panel found that Respondent communicated very well with the Clients while the Respondent was primarily handling the Clients' file and that the Respondent communicated with the Clients at later dates when specifically requested by Clients. (Inf. App. 28). The Informant omits to inform the Court that the Hearing Panel found that after Reidar Hammond joined the Respondent's firm, the responsibility for the Clients' file was transferred to Mr. Hammond (Inf. App. 26). The Informant also failed to inform the Court that the Hearing Panel found that, based on the evidence, the Clients did not oppose the transfer of responsibility for the Clients' file from the Respondent to Mr. Hammond (Inf. App. 26). The Informant omits to inform the Court that the Hearing Panel found that the attorneys' evaluation of the merits of the Clients' case changed over time, but that the Clients were made aware of this and understood those aspects (Inf. App. 29). The Informant also failed to inform the Court that, following entry of the July 11,

2002 docket entry sustaining the Motion for Summary Judgment, Mr. Hammond did advise the Clients of the adverse ruling (Inf. App. 27). The Informant omits to inform the Court that the Hearing Panel found that the Respondent made reasonable efforts to see to it that the July 11, 2002 docket entry was sent to Clients after it was first brought to Respondent's attention that Clients claimed not to have received it (Inf. App. A29). The Informant omits to inform the Court that the Hearing Panel found that the Respondent did not intentionally, dishonestly or deceitfully attempt to conceal the July 11, 2002 docket entry from Clients (Inf. App. 29). The Informant omits to inform the Court that the Hearing Panel found that the Information should be dismissed (Inf. App. 30).

Gerard J. Meier's testimony

Mr. Meier testified that he and the Respondent communicated a lot and that the form of communication was primarily by either phone or e-mail (Inf. App. 46; Tr. 51:19-22). Mr. Meier testified that the Respondent was prompt in returning his e-mails and that the Respondent had kept him informed by responding, if not the very same day then usually within a matter of days, with answers to his questions or advising him on the status of his case (Inf. App. 46; Tr. 51:23-25; Inf. App. 53; Tr. 79:24-24 and Tr. 80:1-5). Mr. Meier testified that, at various times, he had lots of questions as to what things meant in his case and Respondent explained the matters to him and answered his questions (Inf. App. 46; Tr. 52:1-9). The Respondent's firm sent monthly detailed billing statements to Mr. Meier (Inf. App. 48; Tr. 61:4-9). Mr. Meier testified that from the monthly billing statements, he was able to follow and track what was going on in his case by looking at

the details of the billing entries (Inf. App. 49; T. 64:2-25 and 65:1-4). Mr. Meier testified that he received copies of the documents filed, received or sent from Respondent's firm during the time before the transfer of his case to Mr. Hammond (Inf. App. 49; Tr. 65:14-24 and Inf. App. 50; Tr. 67:4-16). The only time that Mr. Meier could recall not receiving any document in his case was after the transfer of his case to Mr. Hammond in May, 2002 (Inf. App. 50; Tr. 66:5-16, Tr. 66:21-25 and 67:1-3). Mr. Meier testified that prior to the transfer of his case to Mr. Hammond in May, 2002, he was reasonably informed as to his case (Inf. App. 50; Tr. 67:24-25 and Tr. 68:1-3).

Mr. Meier testified that Mr. Hammond contacted him in May, 2002, introduced himself and explained that he would be taking over his case (Inf. App. 46; Tr. 52:14-17 and 53:5-11). Although the Informant asserts that Mr. Meier did not understand that Respondent "had no further responsibility", the Informant omits to inform the Court that Mr. Meier did testify that he understood that Respondent had transferred responsibility of Client's case to Mr. Hammond in that he "understood that you were transferring, you know, my file or my case to his control" (Inf. App. 46; Tr. 53:5-11). Mr. Meier testified that he did not ever once complain or express any concerns to Respondent as to the transfer of responsibility of the case to Mr. Hammond (Inf. App. 47; Tr. 54:4-14 and Inf. App. 64; Tr. 123:9-13). Further, Mr. Meier testified that he never expressed any concerns to Mr. Hammond that the Respondent had transferred responsibility to Mr. Hammond (Inf. App. 65; Tr. 123:14-23). Mr. Meier testified that he did not want the Respondent to attend the June 6, 2002 depositions or meetings prior to and after the taking of the

depositions of he and his wife because he felt Mr. Hammond was “giving me legal counsel” (Inf. App. 68; Tr. 141:2-13). Mr. Meier testified that after the transfer of his case to Mr. Hammond, he communicated exclusively with Mr. Hammond until he sent an e-mail to Respondent on July 8, 2002 and that he then communicated exclusively with Mr. Hammond from July 10, 2002 until he sent an e-mail to Respondent on October 19, 2002 (Inf. App. 60; Tr. 107:18-23; Inf. App. 64; Tr. 125:7-25; and Inf. App. 65; Tr. 126:1-4).

As to the transmittal of the docket entry to clients, Mr. Meier testified that the first time he notified the Respondent that he had not received the copy of the docket entry was by an e-mail on October 19, 2002 (Inf. App. 61; Tr. 113:9-16 and Inf. App. 62; Tr. 115:1-7). Mr. Meier also testified that, other than any communication with the Respondent or Mr. Hammond, he could not recall making a request to any legal assistants or secretaries with Respondent’s firm for a copy of the docket entry (Inf. App. 62; Tr. 117:20-25 and Inf. App. 63; Tr. 118:1-7).

The Informant omits to inform the Court that although Mr. Meier testified that he did not discuss settlement of the case with Mr. Hammond prior to June 20, 2002, which is the date of the oral argument of the Motion for Summary Judgment, the firm’s Invoice dated July 8, 2002 which covered legal work performed during the month of June, 2002 shows an entry dated June 10, 2002 for “phone conference with Gerry Meier regarding

negotiations” (Inf. App. 460). Mr. Meier testified that he received, read and reviewed the billing invoices “meticulously” (Inf. App. 58; Tr. 101:12-21). Mr. Meier admitted that after the receipt of the July 8, 2002 Invoice he did not contact the firm to question or complain about the June 10, 2002 billing entry which billed him for time spent discussing “negotiations” (Inf. App. 59 Tr. 102:5-19).

The Informant omits to inform the Court that, although Mr. Meier denied settling his case in an e-mail sent to Respondent, Mr. Meier did admit before the Hearing Panel that he did agree to a settlement of the case and further ended up admitting that he had filed court pleadings in which he told the trial court that there was a settlement (Inf. App. 60; Tr. 108:9-25 and Tr. 109:1-25).

Reidar Hammond’s testimony

When Mr. Hammond applied in 2002 for an associate attorney position at Respondent’s firm, he had 12 years of experience practicing law from being licensed in Colorado since 1990 and in Missouri and Oklahoma since 2000. (Inf. App. 76; Tr. 172:12-25 and Inf. App. 79; Tr. 185:14-18). Since Mr. Hammond was licensed to practice law in 1990 while the Respondent was licensed in 1994, Mr. Hammond felt that it was “safe to assume” that he had more experience practicing law than the Respondent (Inf. App. 80; Tr. 186:18-21). Mr. Hammond’s March 9, 2002 cover letter and resume stated that he had “broad experience” in the practice of law and “extensive litigation experience” including experienced trying over 35 jury trials (Resp. App. 1-3). Prior to his employment by Respondent, Mr. Hammond had been promoted to the level of Managing

Attorney of the Springfield, Missouri office of the multi-state Law Office of Gary Green (Inf. App. 79; Tr. 185:19-22; and Resp. App. 1-3). As Managing Attorney of the Springfield, Missouri office of the Law Office of Gary Green, Mr. Hammond had managed the staff and paralegals (Inf. App. 79; Tr. 185:23-25). As Managing Attorney of the Springfield, Missouri office of the Law Office of Gary Green, Mr. Hammond's duties had included ensuring that the ethical rules were being followed and that professional conduct was being maintained. (Inf. App. 80; Tr. 186:1-4). Mr. Hammond testified that, during the interview process with Respondent, he never expressed anything in his interview or application for employment that would have given the Respondent any reason to have any reservations about his ability to handle civil litigation or the case load he assumed at Respondent's firm. (Inf. App. 80; Tr. 187:1-6).

Upon being hired by Respondent, Mr. Hammond began working for Respondent's firm in April, 2002 and was assigned the Clients' file with the assignment to "take over the case". (Inf. App. 73; Tr. 158:23-25 and Tr. 159:1-4). Mr. Hammond testified that he called Mr. Meier sometime prior to the June 6, 2002 depositions and informed him that "I'm going to be the attorney handling the case". (Inf. App. 80; Tr. 188:4-14). Mr. Hammond testified that he could not recall Mr. Meier expressing any concern about his assuming representation. (Inf. App. 80; Tr. 188:15-17).

Mr. Hammond testified about the extensive training program he completed upon joining the Respondent's firm before he had any legal work to do, which among other things, including training on the office's mail procedures (Inf. App. 80; Tr. 189:14-24). Mr. Hammond testified that the policy, procedures and rules in Respondent's firm were not at all loose or easy going (Inf. App. 81; Tr. 190:5-12).

When Mr. Hammond joined the Respondent's firm, he received a memo about the firm's mailing procedures which included the firm policy that clients are to receive a courtesy copy of all documents either received or sent by the firm (Inf. App. 81; Tr. 190:21-25; Tr. 191:1-19; and Resp. App. 4-6). Mr. Hammond also received a memo and was trained on office procedures by a secretary of the firm including training on sending outgoing mail to clients (Inf. App 81; Tr. 192:3-20; and Resp. App. 7). Mr. Hammond also received a memo reminding him to "pay special attention to the details of the legal work" and to "perform each of our tasks perfectly" because if not, a mistake could result in "extra work for us, extra costs to the office, our embarrassment, disappointment to clients in our job performance, the loss of clients, or even worse, legal malpractice" (Inf. App. 81; Tr. 193:4-16 and Resp. App. 8).

After Mr. Hammond joined the Respondent's firm, he participated in a firm staff meeting on April 22, 2002 during which the expectation to send courtesy copies of documents to clients to keep them informed was discussed (Inf. App. 82; Tr. 194:12-25; Tr. 195:1-5; and Resp. App. 9). Mr. Hammond thereafter attended firm staff meetings on May 24, 2002, September 27, 2002 and November 22, 2002 in which client service was

discussed, particularly the need to “keep clients informed of the status of their matters” (Inf. App. 82; Tr. 195:15-25; Tr. 196:1-25; Tr. 197:1-16; and Resp. App. 10-15).

The Informant omits to inform the Court that Mr. Hammond testified that he visited with Mr. Meier on the phone on June 10, 2005 about settling the case after he had thought about how the June 6, 2005 deposition had not gone well in that Mr. Meier had “pretty much admitted all of the facts that – that his counsel had wanted him to admit” and that Mr. Hammond came to the conclusion after the June 6, 2005 deposition that “we just couldn’t prevail” so “we talked on June 10th about trying to get the case settled” (Inf. App. 74; Tr. 165:19-25 and Inf. App. 75; Tr. 166:1-10). The Informant omits to inform the Court that Mr. Hammond testified that, during that June 10, 2005 telephone call, Mr. Meier authorized him to make some settlement overtures, which he did (Inf. App. 75; Tr. 166:11-12).

Mr. Hammond testified that there was no discussion or agreement to conceal the July 11, 2002 docket entry from clients. (Inf. App. 84; Tr. 202:14-22; Tr. 203:23-25; and Tr. 204:1-7). Mr. Hammond testified that Respondent approached him in November, 2005 related to Mr. Meier’s request for a copy of the docket entry and that the Respondent told him “I don’t know how he’s not getting it or whether he’s not getting it, but this has got to get sent to him, one way or the other” (Inf. App. 84; Tr. 204:8-16).

As part of the policies and procedures of the Respondent’s firm, Mr. Hammond was required to prepare weekly or periodic case status memos so as to inform Respondent

of the status of each case handled by Mr. Hammond (Inf. App. 85; Tr. 206:14-25 and Tr. 207:1). After the above-mentioned conversation with Mr. Hammond in which the Respondent emphatically insisted that he docket entry be sent to Mr. Meier, Mr. Hammond's November 8, 2002 case status memo as submitted to Respondent informed the Respondent that a copy of the docket entry had been sent to clients (Inf. App. 86; Tr. 213:10-22).

Respondent's testimony

Respondent graduated in May, 1994 from the University of Missouri-Columbia School of Law and was sworn into the Missouri Bar in October, 1994 (Inf. App. 88; Tr. 221:7-11). Upon being licensed to practice law, Respondent worked for a 2 lawyer firm in Branson West, Missouri (Inf. App. 88; Tr. 221:22-25 and Inf. App. 89; Tr. 222:1-23). Respondent opened his own law office and later added a couple of attorneys as associates beginning in 1995 (Inf. App. 89; Tr. 223:2-20). Respondent conducts a general law practice (Inf. App. 89; Tr. 223:21-25 and Tr. 224:1-10). Respondent testified that, other than his family consisting of his wife and four (4) children, law is his life (Inf. App. 89; Tr. 224:14-20).

Respondent testified that he had instituted numerous policies and procedures within his firm so as to properly train and supervise his employees, including but not limited to, extensive training, minimum work hours for attorneys and establishing clear expectations as to how client matters are to be handled including that the Respondent wanted "special attention to the details of their work and to do their tasks perfectly and

explain to them the slightest mistake would result in embarrassment, loss of clients and legal malpractice” (Inf. App. 91; Tr. 233:6-25; Inf. App. 92; Tr. 234:1-5; Tr. 235:16-25; and Tr. 2356:1-7). At the May 13, 2005 hearing before the Panel, the Respondent attempted to present evidence to show how, as a supervising attorney, he discharged his duties to properly train and supervise his employees, but the Informant objected and clearly informed the Panel that the Informant was not alleging a violation of Rule 4-5.1 by Respondent relating to the responsibilities of a partner or supervisory lawyer (Inf. App. 63; Tr. 119:5-9). Informant further clearly informed the Panel that Informant was not taking a position that anything that Mr. Hammond may or may not have done or violated is attributable to Respondent by virtue of being a supervisory lawyer (Inf. App. 63; Tr. 119:12-21).

Respondent testified that, in conducting interviews to hire an associate attorney in 2002, he was impressed by Mr. Hammond’s experience in litigation and jury trials as well as his experience as the Managing Attorney of the Springfield, Missouri office of the Law Office of Gary Green (Inf. App. 89; Tr. 224:24-25 and Tr. 225:1-17). Respondent had good reason to assume that Mr. Hammond would be able to assume a busy caseload given that Mr. Hammond’s March 9, 2002 cover letter and resume stated that he had “broad experience” in the practice of law and “extensive litigation experience” including experienced trying over 35 jury trials (Resp. App. 1-3). Being confident in Mr. Hammond’s abilities, Respondent testified that he assigned certain cases to him as the responsible attorney at the outset of his employment with Respondent’s firm and

instructed him to contact each client to explain his involvement and responsibility for that client's case (Inf. App. 90; Tr. 226:2-10).

The Informant omits to inform the Court that the Respondent testified that the assignment of certain case files to Mr. Hammond was done in accordance with the Respondent's policy that if a client was not comfortable with the attorney who assumed the client's matter that a change of attorneys would not be made (Inf. App. 90; Tr. 226:11-19). The Informant omits to inform the Court that, in light of this policy, the Respondent did not receive any feedback from Mr. Hammond after he contacted Mr. Meier that Mr. Meier was uncomfortable or had any misgivings about Mr. Hammond assuming responsibility of handling Mr. Meier's case, but if Respondent had heard of Mr. Meier expressing concern, then he would have probably "taken the file back and had not done the assignment" (Inf. App. 90; Tr. 227:11-22).

Respondent testified that, because of his confidence in Mr. Hammond, he was confident that he could handle Clients' case (Inf. App. 91; Tr. 232:16-20). Respondent testified that as far as he knew, the Clients' case was being handled well and competently by Mr. Hammond (Inf. App. 91; Tr. 233:5-6). As to the Motion for Summary Judgment, the Respondent believed that Mr. Hammond was capable of handling the defense of the Motion and upon being requested by Mr. Hammond for his advice, Respondent "walked him through what I thought would be what he needs to do" and pointed Mr. Hammond to raise an equitable defense such as had been previously used by Respondent in **Young v.**

Ernst, 113 S.W.3d 695 (Mo. App. 2003) to defeat a Motion for Summary Judgment solely on equitable grounds. (Inf. App. 93; Tr. 238:13-25 and Tr. 239:1-21).

As to the transmittal of the July 11, 2002 docket entry to Clients, Respondent testified that he assumed that the docket entry was sent either by support staff or Mr. Hammond to the Clients as part of the firm's normal mail procedure (Inf. App. 93; Tr. 241:18-24). Respondent testified that upon receiving Mr. Meier's October 19, 2005 e-mail, he printed off the e-mail and placed it on Mr. Hammond's desk with a note pointing to the reference in the e-mail that Mr. Meier had not received the docket entry that said "never got it" and "follow-up" meaning to mail the docket entry to Mr. Meier (Inf. App. 94; Tr. 242:3-14). The Respondent testified that following placing the October 19, 2002 e-mail on Mr. Hammond's desk, he received Mr. Hammond's November 8, 2002 case status memo which informed the Respondent that a copy of the docket entry had been sent to clients (Inf. App. 94; Tr. 242:15-20).

Respondent testified that he never attempted, by action or omission, to prevent the Clients from receiving the July 11, 2002 docket entry (Inf. App. 94; Tr. 244:12-25 and Tr. 245:1-11). Respondent testified that, at the time of Mr. Meier's October 19, 2002 e-mail and his review of Mr. Hammond's November 8, 2002 case status memo, he was not aware of the contents of the docket entry other than the ruling that the motion was sustained (Inf. App. 94; Tr. 242:23-24). Then, when the Respondent heard in December, 2002 that Mr. Meier was claiming that he still had not received the docket entry, the Respondent was mad and he went to Mr. Hammond and instructed him to mail the docket

entry again to Mr. Meier and to let the Respondent see the letter when it was sent (Inf. App. 94; Tr. 243:2-25 and Tr. 244:1-2). The Respondent testified that he stated to Mr. Hammond during this conversation that “this has got to be sent out. I don’t care if it’s the secretary’s fault, I don’t care if it’s attorney’s fault, I don’t care if we’ve got to use a pack mule to get it to him, but this has got to be sent out” (Inf. App. 94; Tr. 243:9-16). Respondent testified that when he reviewed the letter that went out with the copy of the docket entry was the first time he was aware of the entire content of the ruling (Inf. App. 94 T. 243:22-25 and Tr. 244:3-5).

The Informant omits to inform the Court that the Respondent was not made aware until December, 2002 that Mr. Hammond had never handled the defense of a Motion for Summary Judgment (Inf. App. 95; Tr. 246:7-9). If Respondent had known, the Respondent would have personally prepared the response and had Mr. Hammond “look over his shoulder and hopefully learn from it” (Inf. App. 95; Tr. 246:9-11).

The Informant omits to inform the Court that the Respondent testified he was disappointed that Mr. Meier was disappointed in the Respondent and the Respondent’s firm and that he wanted to apologize to him because he was let down. (Inf. App. 95; Tr. 246:19-25 and Tr. 247:1). Respondent has been ashamed and embarrassed by the allegations in this case because the Respondent likes “to take care of people and I like to do things for them and I like to help them in their cases and it’s great to get a great result for a client. It’s – I mean, it’s the best feeling you probably ever have in the world. I mean, I’ve had a lot of great cases over time, and this – this – one way or another, I mean

pales (corrected spelling from “pails” in transcript) in comparison to the great triumphs that I’ve had” (Inf. App. 95; Tr. 247:3-25 and Tr. 248:1-5).

In discussing the admonishment issued to Respondent in February, 1998, the Informant omits to inform the Court as to an explanation of the underlying facts of said admonishment. As testified to by Respondent, a couple of years after he had been in practice, he took on a contingency fee case with the agreement that the client would be responsible and pay all of the expenses after which when the client refused to pay the deposition costs of a “thousand or couple of thousand dollars” and told Respondent that he was not going to pay and that the Respondent would have to pay them (Inf. App. 97 Tr. 255:12-25 and Tr. 256:1-2). The Respondent testified that, as a young attorney he “didn’t know probably how to properly handle that situation” because he had a client who had refused to pay the expenses and he assumed that “clients who refuse to pay, their lawyers are entitled to withdraw from representing them”. (Inf. App. 97 Tr. 256:3-7). The Respondent testified that what he did was he sought to withdraw close to the trial although he also sought and obtain a continuance so the client could hire other counsel and that, in his preparation of a motion to withdraw, he copied and pasted in the regular language of a motion to withdraw which stated incorrectly that the client had refused to pay fees and costs due to the Respondent when actually the client had only refused to pay the costs. (Inf. App. 97 Tr. 256:8-25). The Respondent testified that when the OCDC investigator pointed out that the motion to withdraw had incorrectly stated that the client had refused to pay the Respondent’s fee rather than just the costs, the Respondent

accepted a private letter of admonition. (Inf. App. 97 Tr. 256:16-25 and Tr. 257:1-24). The Respondent further testified that, from the admonition, the Respondent had learned “a lot more about the process of withdrawing and when and how on what grounds and what you should or should not say” (Inf. App. 97 Tr. 257:3-8).

Informant’s Argument at Hearing

A hearing was conducted on May 13, 2005. The Informant omits to inform the Court that the Informant essentially conceded that the Informant had failed to prove by a preponderance of the evidence the Informant’s claim that the Respondent had violated Rule 4-8.4(c) by the Informant’s statements before the Hearing Panel. At the close of evidence and after hearing all of the evidence, the counsel for Informant stated that finding a violation of Rule 4-8.4(c) was a “stretch” (Inf. App. 98 Tr. 260:20-25 and Tr. 261:1-2).

POINTS RELIED ON

I. THIS COURT SHOULD AFFIRM THE DISCIPLINARY HEARING PANEL'S CONCLUSION THAT INFORMANT DID NOT PROVE BY A PREPONDERANCE OF EVIDENCE THE ALLEGATIONS CONTAINED IN THE FIRST POINTS RELIED ON OF THE INFORMANT'S BRIEF IN THAT THE EVIDENCE DOES NOT ESTABLISH THAT RESPONDENT FAILED TO COMMUNICATE TO CLIENTS CHANGES IN THE CLIENTS' LIKELIHOOD OF PREVAILING DUE TO THE FILING OF A MOTION FOR SUMMARY JUDGMENT AND IN THAT THE EVIDENCE DOES NOT ESTABLISH THAT RESPONDENT FAILED TO TIMELY PROVIDE A COPY OF THE DISPOSITIVE ORDER TO CLIENT AFTER THE CLIENT'S REQUESTS BECAUSE THE FACTS AND EVIDENCE DO NOT SUPPORT A CONCLUSION THAT RESPONDENT KNOWINGLY OR WILLINGLY VIOLATED RULE 4-1.4.

In re Littlton, 719 S.W.2d 772, 775 (Mo. banc 1986)

In re Oberhellmann, 873 S.W.2d 851, 852 (Mo. banc 1994)

In Re Mirabile, 975 S.W.2d 936, 941 (Mo. banc 1998)

In Re Griffey, 873 S.W.2d 600, 601 (Mo. banc 1994)

Davis v. Research Medical Center, 903 S.W.2d 557, 568 (Mo. App. 1955).

Creamer v. Bivert, 113 S.W. 1118, 1120 (1908)

In re Severo, 41 Cal.3d 493, 500, 714 P.2d 1244 (1986)

In re Kreamer, 14 Cal.3d 524, 532, fn. 5, 535 P.2d 728 (1975).

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976)

In re McIntire, 33 S.W.3d 565, 568 (Mo. App. 2000)

In re Marriage of Eikermann, 48 S.W.3d 605, 608 (Mo. App. 2001).

K.J.B. v. C.A.B., 883 S.W.2d 117, 121-22 (Mo. App. 1994).

Bernstein v. State Bar of California, 50 Cal.3d 221, 786 P.2d 352 (1990)

In re Voorhees, 739 S.W.2d 178, 180 (Mo. banc 1987).

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

In re Caranchini, 956 S.W.2d 910, 918-919 (Mo. banc 1997).

In re Cupples, 979 S.W.2d 932, 938 (Mo. banc 1998)

In re McBride, 938 S.W.2d 905 (Mo. banc 1997)

In Re Coe, 903 S.W.2d 916, 920 (Mo. banc 1995)

In Re Staab, 719 S.W.2d 780, 784-85 (Mo. banc 1986)

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

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

In re Hardge-Harris, 845 S.W.2d 557 (Mo. banc 1993)

In re Sullivan, 494 S.W.2d 329 (Mo. banc 1973)

POINTS RELIED ON

II. THIS COURT SHOULD AFFIRM THE DISCIPLINARY HEARING PANEL'S CONCLUSION THAT INFORMANT DID NOT PROVE BY A PREPONDERANCE OF EVIDENCE THE ALLEGATIONS CONTAINED IN THE SECOND POINTS RELIED ON OF THE INFORMANT'S BRIEF IN THAT THE EVIDENCE DOES NOT ESTABLISH THAT RESPONDENT FAILED TO COMMUNICATE TO CLIENTS MATERIAL FACTS RELATED TO THE STRENGTH OF THE OPPOSING PARTY'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE FACTS AND EVIDENCE DO NOT SUPPORT A CONCLUSION THAT RESPONDENT KNOWINGLY OR WILLINGLY VIOLATED RULE 4-1.4.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DISCIPLINARY HEARING PANEL’S CONCLUSION THAT INFORMANT DID NOT PROVE BY A PREPONDERANCE OF EVIDENCE THE ALLEGATIONS CONTAINED IN THE FIRST POINTS RELIED ON OF THE INFORMANT’S BRIEF IN THAT THE EVIDENCE DOES NOT ESTABLISH THAT RESPONDENT FAILED TO COMMUNICATE TO CLIENTS CHANGES IN THE CLIENTS’ LIKELIHOOD OF PREVAILING DUE TO THE FILING OF A MOTION FOR SUMMARY JUDGMENT AND IN THAT THE EVIDENCE DOES NOT ESTABLISH THAT RESPONDENT FAILED TO TIMELY PROVIDE A COPY OF THE DISPOSITIVE ORDER TO CLIENT AFTER THE CLIENT’S REQUESTS BECAUSE THE FACTS AND EVIDENCE DO NOT SUPPORT A CONCLUSION THAT RESPONDENT KNOWINGLY OR WILLINGLY VIOLATED RULE 4-1.4.

A. Standard of Review

A violation must be shown by a preponderance of the evidence. **In re Littlton**, 719 S.W.2d 772, 775 (Mo. banc 1986). The Hearing Panel’s “recommendations are advisory in nature. This Court reviews the evidence *do novo*, determines independently the credibility, weight and value of the testimony of the witnesses and draws its own conclusions of law.” **In re Oberhellmann**, 873 S.W.2d 851, 852 (Mo. banc 1994).

Although the above line of cases clearly state that the evidence is reviewed *de novo* by this Court, Respondent would suggest that this Court also consider the long line of cases related to appellate review of trial court decisions in its review of the testimony and evidence submitted to the Hearing Panel and the Hearing Panel's subsequent decision, findings and conclusions. This recommendation comports with the comments made by Justice John Holstein in his opinion in **In Re Mirabile**, 975 S.W.2d 936, 941 (Mo. banc 1998) in recognizing that a Master's findings are helpful to the Court. **In Re Griffey**, 873 S.W.2d 600, 601 (Mo. banc 1994). The is because typically the one before whom a witness testifies is in a far better position to determine the credibility of the witness and the weight to be given to the testimony than a tribunal reviewing only the cold record. **Davis v. Research Medical Center**, 903 S.W.2d 557, 568 (Mo. App. 1995). In urging this Court to recognize the helpfulness of the findings of a Master (or in this case a Hearing Panel), Justice Holstein further urged the Court to follow Judge Lamm's opinion in the holding of **Creamer v. Bivert**, 113 S.W. 1118, 1120 (1908) that:

“Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it . . .”

This approach is taken by other state supreme courts in attorney discipline cases. In California, for instance, great weight is given to the underlying panel's disciplinary recommendation (**In re Severo**, 41 Cal.3d 493, 500, 714 P.2d 1244 (1986) and the panel's factual findings (**In re Kreamer**, 14 Cal.3d 524, 532, fn. 5, 535 P.2d 728 (1975)). With that suggestion in mind, the Respondent offers the following additional holdings for the Court to consider when applying the standard of review in the instant case.

This Court held in the much-heralded and quoted **Murphy v. Carron** decision that an appellate court must affirm the trial court's judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. **Murphy v. Carron**, 536 S.W.2d 30, 32 (Mo. banc 1976). In assessing the sufficiency of the evidence, the appellate court is to examine the evidence and the reasonable inferences derived therefrom in the light most favorable to the judgment. **In re McIntire**, 33 S.W.3d 565, 568 (Mo. App. 2000). When there is conflicting evidence, it is within the trial court's discretion to determine the credibility of the witnesses, and accept or reject all, part, or none of the testimony it hears. **In re Marriage of Eikermann**, 48 S.W.3d 605, 608 (Mo. App. 2001). The appellate court is to defer to the trial court's assessment of witnesses' credibility and accept the trial court's resolution of conflicting evidence. **K.J.B. v. C.A.B.**, 883 S.W.2d 117, 121-22 (Mo. App. 1994).

B. There is No Evidence Supporting a Rule 4-1.4 Violation

The Informant contends that Respondent violated Rule 4-1.4 regarding communication with a client. The Hearing Panel concluded that Respondent did not violate Rule 4-1.4 because Panel found that Respondent “communicated very well with the Clients while the Respondent Farris was primarily handling the file” and that the Respondent communicated with the Clients at later dates when specifically requested by Clients. (Inf. App. 28). The Panel also found that after Mr. Hammond joined the Respondent’s firm, the responsibility for the Clients’ file was transferred to Mr. Hammond (Inf. App. 26). The Panel also found that the Clients did not oppose the transfer of responsibility for the Clients’ file from the Respondent to Mr. Hammond (Inf. App. 26). The Panel also found that the attorneys’ evaluation of the merits of the Clients’ case changed over time, but that the Clients were made aware of this and understood those aspects (Inf. App. 29). The Hearing Panel also found that the Respondent made reasonable efforts to see that the July 11, 2002 docket entry was sent to Clients after it was first brought to Respondent’s attention that Clients claimed not to have received it (Inf. App. 29). The Panel also found that the Respondent did not intentionally, dishonestly or deceitfully attempt to conceal the July 11, 2002 docket entry from Clients (Inf. App. 29).

- 1. The Hearing Panel’s finding that Respondent “communicated very well with the clients while the Respondent Farris was primarily handling the file” and that the Respondent communicated with the clients at**

later dates when specifically requested by clients was supported by ample facts and evidence.

In its refusal to concur in the Panel's decision, the Informant has attacked nearly every finding of the Panel as to the Respondent. To the contrary of the Informant's position, the finding of the Panel of the Respondent's compliance with Rule 4-1.4(a)(b) is supported by ample facts and evidence as submitted at the hearing.

Mr. Meier testified that he and the Respondent communicated a lot (Inf. App. 46; Tr. 51:19-22). Mr. Meier testified that the Respondent was prompt in returning his e-mails and that the Respondent had kept him informed by responding, if not the very same day then usually within a matter of days, with answers to his questions or advising him on the status of his case (Inf. App. 46; Tr. 51:23-25; Inf. App. 53; Tr. 79:24-24 and Tr. 80:1-5). Mr. Meier testified that, at various times, he had lots of questions as to what things meant in this case and Respondent explained them to him and answered his questions (Inf. App. 46; Tr. 52:1-9). The Respondent's firm sent monthly detailed billing statements to Mr. Meier (Inf. App. 48; Tr. 61:4-9). Mr. Meier testified that from the monthly billing statements, he was able to follow and track what was going on in his case by looking at the details of the billing entries (Inf. App. 49; T. 64:2-25 and 65:1-4). Mr. Meier testified that he received copies of the documents filed, received or sent from Respondent's firm during the time before the transfer of his case to Mr. Hammond (Inf. App. 49; Tr. 65:14-24 and Inf. App. 50; Tr. 67:4-16). The only time that Mr. Meier could recall not receiving any document in his case was after the transfer of his case to Mr.

Hammond in May, 2002 (Inf. App. 50; Tr. 66:5-16, Tr. 66:21-25 and 67:1-3). Mr. Meier testified that prior to the transfer of his case to Mr. Hammond in May, 2002, he was reasonably informed as to his case (Inf. App. 50; Tr. 67:24-25 and Tr. 68:1-3). Mr. Meier testified that after the transfer of his case to Mr. Hammond, the Respondent responded to his e-mail of July 8, 2002 and his e-mail of October 19, 2002 (Inf. App. 60; Tr. 107:18-23; Inf. App. 64; Tr. 125:7-25; and Inf. App. 65; Tr. 126:1-4).

Any proposed inference by the Informant that the Respondent failed to properly communicate with the Clients is very easily disproved by the above statements by Mr. Meier that he communicated well with the Respondent and that he was reasonably informed by the Respondent during all times when the Respondent was primarily responsible for the Clients' file.

- 2. The Hearing Panel's finding that after Mr. Hammond joined the Respondent's firm, the responsibility for the client file was transferred to Mr. Hammond and that the clients did not oppose the transfer of responsibility for the clients' file from the Respondent to Mr. Hammond was supported by ample facts and evidence.**

In its refusal to concur in the Panel's decision, the Informant has attacked nearly every finding of the Panel as to the Respondent. To the contrary of the Informant's position, the finding of the Panel that after Mr. Hammond joined the Respondent's firm, the responsibility for the client file was transferred to Mr. Hammond and that the clients

did not oppose the transfer of responsibility for the clients' file from the Respondent to Mr. Hammond was supported by ample facts and evidence as submitted at the hearing.

Mr. Meier testified that Mr. Hammond contacted him in May, 2002, introduced himself and explained that he would be taking over his case (Inf. App. 46; Tr. 52:14-17 and 53:5-11). In turn, Mr. Hammond testified that he called Mr. Meier sometime prior to the June 6, 2002 depositions and informed him that "I'm going to be the attorney handling the case". (Inf. App. 80; Tr. 188:4-14). Mr. Meier testified that he understood that Respondent had transferred responsibility of Client's case to Mr. Hammond in that he "understood that you were transferring, you know, my file or my case to his control" (Inf. App. 46; Tr. 53:5-11). Mr. Meier testified that he did not ever once complain or express any concerns to Respondent as to the transfer of responsibility of the case to Mr. Hammond (Inf. App. 47; Tr. 54:4-14 and Inf. App. 64; Tr. 123:9-13). Further, Mr. Meier testified that he never expressed any concerns to Mr. Hammond that the Respondent had transferred responsibility to Mr. Hammond (Inf. App. 65; Tr. 123:14-23). In turn, Mr. Hammond testified that he could not recall Mr. Meier expressing any concern about his assuming representation. (Inf. App. 80; Tr. 188:15-17). Mr. Meier testified that he did not want the Respondent to attend the June 6, 2002 depositions or meetings prior to and after the taking of the depositions of he and his wife because he felt Mr. Hammond was "giving me legal counsel" (Inf. App. 68; Tr. 141:2-13). Mr. Meier testified that after the transfer of his case to Mr. Hammond, he communicated exclusively with Mr. Hammond until he sent an e-mail to Respondent on July 8, 2002 and that he then communicated

exclusively with Mr. Hammond from July 10, 2002 until he sent an e-mail to Respondent on October 19, 2002 (Inf. App. 60; Tr. 107:18-23; Inf. App. 64; Tr. 125:7-25; and Inf. App. 65; Tr. 126:1-4).

The Informant's argument that the Clients were looking for day-to-day representation directly from the Respondent is easily disproved by the above testimony by Mr. Meier that clearly shows that he assumed that his case was under the "control" of Mr. Hammond as his "legal counsel" and from Mr. Hammond's testimony that he instructed Mr. Meier that "I'm going to be the attorney handling the case". After all, if Mr. Meier had looked to Respondent for day-to-day representation, then why did he not complain or express any concerns about the representation by Mr. Hammond or even why did he not want the Respondent at the June 8, 2002 deposition or the meeting which occurred before and after the taking of the deposition? Quite simply, because it is clear that the Clients looked to Mr. Hammond as the attorney with responsibility for representation.

In support of its position that Respondent had primary responsibility notwithstanding the transfer of the client file to Mr. Hammond and the acceptance by clients of Mr. Hammond as the attorney with primary responsibility, the Informant solely relies upon the California case of **Bernstein v. State Bar of California**, 50 Cal.3d 221, 786 P.2d 352 (1990) for the simple and uncontested proposition that an attorney can be disciplined for his associate's failure to get assigned work done. However, such reliance is misplaced since the underlying facts in Bernstein are night and day different than those in the instant case. In **Bernstein**, the attorney had practiced law for 26 years at the time

of the ethical violation and had previously been disciplined for misappropriating client funds. Id at 225. The attorney had been charged with willfully failing to perform the services for which he was retained and refusing to return client files and documents and refund unearned portions of fees involving 3 separate client matters. Id. One of the complaining clients testified that he had paid the attorney to file an appeal and that in response to his inquiries regarding his case status, the attorney and his secretary had been rude and insulting to him. Id at 226. Only after a state bar investigator intervened did the attorney return the client's documents and file. Id. The client testified that the attorney did not file his appeal as hired to do so, that the attorney did not return his retainer and that, as a result, he was not able to retain other counsel to file his appeal. Id. The other complaining client testified that she paid the attorney to represent her in litigation involving a auto lease which he did not do which resulted in a default judgment being entered. Id. The second complaining client testified that they repeatedly attempted to contact the attorney, but their telephone calls and letters went unanswered and that the attorney had failed to refund the retainer to them. Id at 227. The third complaining client testified that he hired the attorney to handle an immigration matter, paid \$2,500.00 as a retainer, but yet he received no acknowledgment of his payments nor any report on the status of the case or any contact from the attorney at all. Id. When the third client finally contacted the attorney by phone, he told him to return his papers for which the attorney failed to do. Id.

Of the three (3) complaining clients, the first client testified that the attorney told him that he personally would file the opening appellate brief and the client had no contact with the attorney's associate, the second client dealt exclusively with the attorney and had no contact with the attorney's associate and the third client directed exclusively all of his telephone calls and letters to the attorney. Id at 230. From a careful review of the Bernstein case, the attorney's only argument to try to cast responsibility upon the associate was by the testimony of his secretary that commonly the associate would draft the pleadings and motions and the attorney would perform the trial work. Id at 231. Further, the attorney's defense that the associate was responsible for the clients' files failed since the panel found that the attorney was well aware that the associate was in ill health, had difficulty organizing and completing his work, was actively involved in non-legal activities to the detriment of his duties as an attorney and was not properly supervising his files. Id at 231.

In **Bernstein**, the hearing panel found that the attorney's testimony was not credible, that he did not cooperate with the State Bar and that he had filed motions to continue and dismiss that were frivolous and were made solely to delay the hearing. Id at 228. The panel also found that the attorney had failed to properly supervise his associate and that he had refused to return client papers and to refund unearned fees. Id at 229. The panel recommended "in the strongest possible terms" that the attorney be suspended for three years". Id at 228.

On so many different levels, the **Bernstein** case as offered by the Informant is distinguishable to such an extent that the facts of that case do not even slightly resemble the facts in the instant case. First, the Respondent has never been accused of misappropriating client funds like Mr. Bernstein. Second, the instant case does not involve any allegation that the Respondent failed to perform the services for which he was retained or refuse to return client files and documents like Mr. Bernstein. Third, the instant case does not involve any allegation that Respondent was “rude and insulting” to the complaining clients like Mr. Bernstein. Fourth, the instant case does not involve any accusation from the complaining clients that they failed to receive any report on the status of the case or any contact from the Respondent like Mr. Bernstein. Further, and most importantly, the evidence in the instant case is that Mr. Meier was reasonably informed of his case status by the Respondent during the time before the transfer of his case to Mr. Hammond, that Mr. Hammond contacted him in May, 2002 and explained that he would be taking over the work on his case after which Mr. Meier understood that Respondent had transferred responsibility of Client’s case to Mr. Hammond in that he “understood that you were transferring, you know, my file or my case to his control”. Further, not once did Mr. Meier ever complain or express any concerns to either Respondent or to Mr. Hammond as to the transfer of responsibility of the case to Mr. Hammond. In fact, Mr. Meier openly testified that he did not want the Respondent to attend the June 6, 2002 depositions or meetings prior to and after the taking of the depositions of he and his wife because he felt Mr. Hammond was “giving me legal counsel”, that after the transfer of his

case to Mr. Hammond, Mr. Meier communicated exclusively with Mr. Hammond until he sent an e-mail to Respondent on July 8, 2002 and that he then communicated exclusively with Mr. Hammond from July 10, 2002 until he sent an e-mail to Respondent on October 19, 2002.

Further, while in **Bernstein** the attorney was well aware that the associate was in ill health, had difficulty organizing and completing his work, was actively involved in non-legal activities to the detriment of his duties as an attorney and was not properly supervising his files, there never were any such concerns of the Respondent as to Mr. Hammond's ability to handle taking over responsibility for the clients' file. To the contrary in the instant case, the Respondent had every reason to reasonably conclude that Mr. Hammond would properly provide primary representation and responsibility over clients' file. The reasonable grounds for the Respondent's belief that the case would be properly handled flowed from Mr. Hammond's longer tenure practicing law than Respondent, the statements in Mr. Hammond's March 9, 2002 cover letter and resume stating that he had "broad experience" in the practice of law and "extensive litigation experience" including experience trying over 35 jury trials, Mr. Hammond's previous employment as the Managing Attorney of the Springfield, Missouri office of the multi-state Law Office of Gary Green where he had managed the staff and paralegals and ensured that the ethical rules were being followed and that professional conduct was being maintained. Further, vastly different from the widespread problems of Mr. Bernstein's associate attorney, Mr. Hammond had not expressed anything in his interview

or application for employment that would have given the Respondent any reason to have any reservations about his ability to handle primary responsibility for the clients' file.

Further, while in the instant case the Panel found no violations of any ethical rules and recommended dismissing the Information against the Respondent, in **Bernstein**, the hearing panel found that the attorney's testimony was not credible, that he did not cooperate with the State Bar and that he had filed motions to continue and dismiss that were frivolous and were made solely to delay the hearing and that the attorney had refused to return client papers and to refund unearned fees. Also, while in the instant case the Informant did not allege that the Respondent had failed to properly supervise Mr. Hammond, in the **Bernstein** case the panel specifically found that the attorney had failed to properly supervise his associate.

Respondent has no argument with the proposition in **Bernstein** that an attorney can be disciplined for his associate's failure to get assigned work done. If the facts in the instant case were that only a small part of the Clients' case was assigned by Respondent to Mr. Hammond to complete and that Mr. Hammond had failed to perform that assigned task, then **Bernstein** could possibly have some resemblance to this case. However, since the facts in this case are clear that Mr. Hammond was not to complete a mere assigned task, but instead had assumed the day-to-day representation of taking over the case to "get it ready for trial" and clearly communicated that he was assuming responsibility for the case to Mr. Meier and since Mr. Meier looked to Mr. Hammond as his "legal counsel" as

the attorney who had responsibility for his representation, then the **Bernstein** holding does not apply.

The Informant's position that Respondent had primary responsibility notwithstanding the transfer of the client file to Mr. Hammond and the acceptance by clients of Mr. Hammond as the attorney with primary responsibility flies in the face of everyday firm practice. Many firms properly assign primary responsibility of client matters to other attorneys within the firm without the formality of having the originating attorney who remains with the firm actually file a motion to withdraw. When a client retains the Law Office of Jane Doe and partner Jane Doe begins representation by filing an answer to a petition, if Ms. Doe assigns primary responsibility of the file to her associate son named John Doe and the client does not object or express concern about John Doe's new representation and if Jane Doe properly supervises said junior lawyer, then it would seem that Jane Doe has properly discharged her ethical duties. Several times the Informant has argued that the Respondent should have filed a Motion to Withdraw upon assigning the file to Respondent. Surely that is not necessary and such a requirement would be sure to cause great confusion to the Client who is still represented by the firm of which the withdrawing lawyer is still a lawyer. Even if the supervising attorney withdrew, surely that would not eliminate the obligation of the attorney to supervise the work of the junior lawyer. Practically, it appears that so long as the junior attorney is being properly supervised by the originating attorney and the client has no objection to representation by the junior attorney, then the originating attorney is not

primarily responsible for the day-to-day representation of the client other than those which may arise in her supervisory capacity over the junior lawyer. As such, under this analysis, it appears that the conduct of the Respondent was properly handled in that the client file was assigned to Mr. Hammond, no objection to such transfer of primary responsibility was made by Clients, who consented to said change, since the Informant is not making a claim that the Respondent failed to properly supervise Mr. Hammond.

3. The Hearing Panel's finding that the attorneys' evaluation of the merits of the Clients' case changed over time, but that the Clients were made aware of this and understood those aspects was supported by ample facts and evidence.

In its refusal to concur in the Panel's decision, the Informant has attacked nearly every finding of the Panel as to the Respondent. To the contrary of the Informant's position, the finding of the Panel of compliance with 4-1.4(b) by the Clients being made aware that the attorneys' evaluation of the merits of the Clients' case had changed is supported by ample facts and evidence as submitted at the hearing.

Mr. Hammond testified that he visited with Mr. Meier on the phone on June 10, 2005 about settling the case after he had thought about how the June 6, 2005 deposition had not gone well in that Mr. Meier had "pretty much admitted all of the facts that – that

his counsel had wanted him to admit” and that Mr. Hammond came to the conclusion after the June 6, 2005 deposition that “we just couldn’t prevail” so “we talked on June 10th about trying to get the case settled” (Inf. App. 74; Tr. 165:19-25 and Inf. App. 75; Tr. 166:1-10). Mr. Hammond testified that, during that June 10, 2005 telephone call, Mr. Meier authorized him to make some settlement overtures, which he did (Inf. App. 75; Tr. 166:11-12).

Although Mr. Meier testified that he did not discuss settlement of the case with Mr. Hammond prior to June 20, 2002, which is the date of the oral argument of the Motion for Summary Judgment, the firm’s Invoice dated July 8, 2002 which covered legal work performed during the month of June, 2002 shows an entry dated June 10, 2002 for “phone conference with Gerry Meier regarding negotiations” (Inf. App. 460). Mr. Meier testified that he received, read and reviewed the billing invoices “meticulously” (Inf. App. 58; Tr. 101:12-21). Mr. Meier admitted that after the receipt of the July 8, 2002 Invoice he did not contact the firm to question or complain about the June 10, 2002 billing entry which billed him for time spent discussing “negotiations” (Inf. App. 59 Tr. 102:5-19).

- 4. The Hearing Panel’s finding that the Respondent made reasonable efforts to see that the July 11, 2002 docket entry was sent to clients after it was first brought to Respondent’s attention that clients claimed not to have received it was supported by ample facts and evidence.**

In its refusal to concur in the Panel's decision, the Informant has attacked nearly every finding of the Panel as to the Respondent. To the contrary of the Informant's position, the finding of the Panel that the Respondent complied with Rule 4-1.4(a)(b) in that the Respondent made reasonable efforts to see that the July 11, 2002 docket entry was sent to client after it was brought to Respondent's attention that clients claimed not to have received it was supported by ample facts and evidence.

Respondent testified that he assumed that the docket entry was sent contemporaneously upon receipt either by support staff or Mr. Hammond to the Clients as part of the firm's normal mail procedure (Inf. App. 93; Tr. 241:18-24). Thus, the Respondent had a good faith basis to believe that such docket entry would have been received by Clients before being informed by e-mail on October 19, 2002 that the docket entry had not been received since Mr. Meier testified that the first time he notified the Respondent that he had not received the copy of the docket entry was by an e-mail on October 19, 2002 (Inf. App. 61; Tr. 113:9-16 and Inf. App. 62; Tr. 115:1-7). Mr. Meier also testified that, other than any communication with the Respondent or Mr. Hammond, he could not recall making a request to any legal assistants or secretaries with Respondent's firm for a copy of the docket entry (Inf. App. 62; Tr. 117:20-25 and Inf. App. 63; Tr. 118:1-7).

Respondent testified that upon receiving Mr. Meier's October 19, 2005 e-mail, he printed off the e-mail and placed it on Mr. Hammond's desk with a note pointing to the reference in the e-mail that Mr. Meier had not received the docket entry that said "never

got it” and “follow-up” meaning to mail the docket entry to Mr. Meier (Inf. App. 94; Tr. 242:3-14). Mr. Hammond testified that Respondent approached him in November, 2005 related to Mr. Meier’s request for a copy of the docket entry and that the Respondent told him “I don’t know how he’s not getting it or whether he’s not getting it, but this has got to get sent to him, one way or the other” (Inf. App. 84; Tr. 204:8-16). After this conversation with Mr. Hammond in which the Respondent emphatically insisted that the docket entry be sent to Mr. Meier, Mr. Hammond’s November 8, 2002 case status memo as submitted to Respondent informed the Respondent that a copy of the docket entry had been sent to clients (Inf. App. 86; Tr. 213:10-22). From seeing this November 8, 2002 case status memo, the Respondent had a good faith basis to believe that the subject docket entry had been made sent to clients.

Respondent testified that he never attempted, by action or omission, to prevent the Clients from receiving the July 11, 2002 docket entry (Inf. App. 94; Tr. 244:12-25 and Tr. 245:1-11). Respondent testified that, at the time of Mr. Meier’s October 19, 2002 e-mail and his review of Mr. Hammond’s November 8, 2002 case status memo, he was not aware of the contents of the docket entry other than the ruling that the motion was sustained (Inf. App. 94; Tr. 242:23-24). Then, when the Respondent heard in December, 2002 that Mr. Meier was claiming that he still had not received the docket entry, the Respondent was mad and he went to Mr. Hammond and instructed him to mail the docket entry again to Mr. Meier and to let the Respondent see the letter when it was sent (Inf. App. 94; Tr. 243:2-25 and Tr. 244:1-2). The Respondent testified that he stated to Mr.

Hammond during this conversation that “this has got to be sent out. I don’t care if it’s the secretary’s fault, I don’t care if it’s attorney’s fault, I don’t care if we’ve got to use a pack mule to get it to him, but this has got to be sent out” (Inf. App. 94; Tr. 243:9-16).

Respondent testified that when he reviewed the letter that went out with the copy of the docket entry was the first time he was aware of the entire content of the ruling (Inf. App. 94 T. 243:22-25 and Tr. 244:3-5).

Further, lest the Informant attempt to infer that the Respondent in some way attempted by action or omission to conceal the docket entry and that was the reason for the late receipt of the docket entry by Clients hearing, this Court is alerted to review that, at the close of evidence and after hearing all of the evidence, the counsel for Informant stated to the Panel that finding a violation of 4-8.4(c) (which involves deception or fraud) was a “stretch” (Inf. App. 98 Tr. 260:20-25 and Tr. 261:1-2).

C. Conclusion as to Whether Respondent violated 4.1.4

Respondent respectfully offers that there is not a preponderance of evidence to show that Respondent violated Rule 4-1.4 and that this Court should affirm the Hearing Panel’s finding that the Respondent did not violate 4-1.4. No factual basis exists to find as a matter of law that Respondent is subject to discipline for violation of 4-1.4.

C. Discipline if this Court Determines that Respondent violated 4.1.4

Assuming arguendo that this Court disagrees with the findings of the Hearing Panel, finds that there is a preponderance of evidence to show that Respondent violated Rule 4-1.4 and reverses the Disciplinary Hearing Panel’s decision to dismiss the

Information, the facts do not support the level of discipline recommended by the Informant and the recommendation of the Informant does not comport with prior Missouri cases or substantial justice in this matter.

A public reprimand is a substantial sanction, which must be administered only in accordance in due process of law. **In re Voorhees**, 739 S.W.2d 178, 180 (Mo. banc 1987). A reprimand is a scar on the lawyer's record. **In re Westfall**, 808 S.W.2d 829 (Mo. banc 1991). The purpose of attorney discipline is to protect the public, not to impose punitive measures on the attorney. **In re Caranchini**, 956 S.W.2d 910, 918-919 (Mo. banc 1997). The impact of this sanction on Respondent's legal career should not be lightly weighed.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.) Rule 6.11 provides that: "In determining the proper sanction, this Court must also consider aggravating and mitigating circumstances." **In re Cupples**, 979 S.W.2d 932, 938 (Mo. banc 1998).

As testified to at the hearing by the Respondent, other than his family consisting of his wife and four (4) children, the practice of law is his life (Inf. App. 89; Tr. 224:14-20). Imposing a reprimand upon the Respondent would be a "scar" on his record and cause public embarrassment to the Respondent that would only serve punitive purposes in the circumstance. Another mitigating factor is the absence of deceit or dishonesty on the part of the Respondent, who reasonably believed that Mr. Hammond had properly taken over primary responsibility for the client file. This Court should also consider that if this Court finds a violation of Rule 4-1.4 by either Respondent or Mr. Hammond in his separate

companion case, this Court should consider the appropriate discipline in proportion with the actions or omissions between the said attorneys in light of the Hearing Panel's recommendation that of a dismissal of the Information against the Respondent and the recommendation that Mr. Hammond be given an admonishment.

Further, it is clear that the Respondent is remorseful. The Respondent testified that he wanted to apologize to Mr. Meier because "the firm that bears my name one way or another let him down" (Inf. App. 95; Tr. 246:19-23). The Respondent also testified he was disappointed that Mr. Meier was disappointed in the Respondent and the Respondent's firm (Inf. App. 95; Tr. 246:23-25 and Tr. 247:1). Respondent has been ashamed and embarrassed by the allegations in this case because the Respondent likes "to take care of people and I like to do things for them and I like to help them in their cases and it's great to get a great result for a client. It's – I mean, it's the best feeling you probably ever have in the world. I mean, I've had a lot of great cases over time, and this – this – one way or another, I mean pales (corrected spelling from "pails" in transcript) in comparison to the great triumphs that I've had" (Inf. App. 95; Tr. 247:3-25 and Tr. 248:1-5).

Yet even if this Court does find cause to discipline Respondent, the level of sanction should be consistent with sanctions imposed previously by this Court. **In re Cupples**, 952 S.W.2d 225 (Mo. banc 1997) is an excellent case comparison. In **Cupples** the attorney violated his duties to both his former law firm and that firm's clients by secreting away with client files as he prepared to withdraw from the firm. He removed

files from the firm without the client's consent and he failed to inform the client of the change of in the nature of his representation. This Court held he violated the disciplinary rule that prohibits engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and ordered a public reprimand for his misconduct.

In **Cupples**, clients were harmed and the lawyer breached his duties to his former law partners. The misconduct and deceit were plain and palpable, both factors that are absent in this case. There is no evidence of any deceit of the clients in the instant case.

The fact is that attorneys who have committed much more serious ethical (and even criminal) breaches of the rules of professional conduct than those alleged in the instant case have been punished as severely as recommended by the Informant. In **In re McBride**, 938 S.W.2d 905 (Mo. banc 1997), the attorney took a gun and accosted three men outside a tavern. A fight ensued and one of the men was shot and critically wounded. McBride was convicted of felony assault. This Court imposed discipline and imposed a reprimand for a violation of Rule 5.21(a) finding as an aggravating factor that McBride was "engaging in conduct which under the circumstances, might incite or invite reckless conduct by the three men, posing a danger to the public in the area or to himself". Unlike McBride, the Respondent did not engage in criminal or reckless behavior.

Many other disciplinary cases in which reprimand was imposed involve facts not even close in severity as those alleged in the instant case. In **In Re Coe**, 903 S.W.2d 916, 920 (Mo. banc 1995), a reprimand was imposed after attorney Carol Coe engaged in

intentional conduct so as to disrupt a criminal trial and was incarcerated by the trial court. In **In Re Staab**, 719 S.W.2d 780, 784-85 (Mo. banc 1986), a reprimand was imposed after the attorney neglected cases to the detriment of clients and refused to cooperate with bar authorities investigating the issue. In **In re Miller**, 568 S.W.2d 246 (Mo. banc 1978), a reprimand was imposed after the attorney breached fiduciary duties to a client by engaging in self-dealing transactions. In **In re Shelhorse**, 147 S.W.3d 79 (Mo. banc 2004), a reprimand was imposed after the attorney failed to respond to disciplinary authorities and failed to maintain CLE requirement. In **In re Hardge-Harris**, 845 S.W.2d 557 (Mo. banc 1993), a reprimand was imposed after the attorney failed to cooperate and produce documents to bar committee. In **In re Sullivan**, 494 S.W.2d 329 (Mo. banc 1973), a reprimand was imposed after the attorney kept a \$1,000.00 retainer without providing legal services.

CONCLUSION

For the reasons stated, the Respondent respectfully requests this Court to affirm the Disciplinary Hearing Panel's decision dismissing the Information or, in the alternative, assuming arguendo that this Court finds that the Respondent knowingly and willfully violated Rule 4-1.4, suggests that the proper discipline in this case is no greater than an admonition.

ARGUMENT

II. THIS COURT SHOULD AFFIRM THE DISCIPLINARY HEARING PANEL'S CONCLUSION THAT INFORMANT DID NOT PROVE BY A PREPONDERANCE OF EVIDENCE THE ALLEGATIONS CONTAINED IN THE SECOND POINTS RELIED ON OF THE INFORMANT'S BRIEF IN THAT THE EVIDENCE DOES NOT ESTABLISH THAT RESPONDENT FAILED TO COMMUNICATE TO CLIENTS MATERIAL FACTS RELATED TO THE STRENGTH OF THE OPPOSING PARTY'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE FACTS AND EVIDENCE DO NOT SUPPORT A CONCLUSION THAT RESPONDENT KNOWINGLY OR WILLINGLY VIOLATED RULE 4-1.4.

A. Standard of Review

Since the proper standard of review was discussed in depth above, then the Respondent will incorporate said portions as set forth in the Argument section of Points Relied Upon I as though stated herein *haec verba*.

B. There is No Evidence Supporting a Rule 4-1.4 Violation

Respondent asserts that there is no evidence supporting a Rule 4-1.4 violation and urges this Court to affirm the Hearing Panel's decision that the Respondent did not violate Rule 4-1.4 and its recommended dismissal of the Information. Since the basis for the Respondent's assertions and the Panel's findings were discussed in depth above, then the

Respondent will incorporate said argument as set forth in the Argument section of Points Relied Upon I as though stated herein *haec verba*.

C. Discipline if this Court Determines that Respondent violated 4.1.4(a)(b)

Assuming arguendo that this Court finds that there is a preponderance of evidence to show that Respondent violated Rule 4-1.4 and reverses the Disciplinary Hearing Panel's decision to dismiss the Information, the facts do not support the level of discipline recommended by the Informant and the recommendation of the Informant does not comport with prior Missouri cases or substantial justice in this matter. Since the recommendation of the Informant were discussed in depth above, then the Respondent will incorporate said argument as set forth in the Argument section of Points Relied Upon I as though stated herein *haec verba* in addition to the following.

The Informant's Argument on the Second Points Relied Upon is centered upon an explanation as to why the Informant recommended the imposing of a public reprimand upon the Respondent. The most crucial element of the Informant's recommendation is a seven (7) year old admonishment which was accepted by the Respondent in 1998 for events which occurred a couple of years after the Respondent had been in the practice of law. Although the Informant did not provide this Court with any background facts as to this previous admonishment, the Respondent did provide an explanation at the hearing for the Hearing Panel.

As testified to by Respondent, a couple of years after he had been in practice, he took on a contingency fee case with the agreement that the client would be responsible

and pay all of the expenses when the client refused to pay the deposition costs of thousand or couple of thousand dollars and told Respondent that he was not going to pay and that the Respondent would have to pay them (Inf. App. 97 Tr. 255:12-25 and Tr. 256:1-2). The Respondent testified that, as a young attorney he “didn’t know probably on how to properly handle that situation” because he had a client who had refused to pay the expenses and he assumed that “clients who refuse to pay, their lawyers are entitled to withdraw from representing them”. (Inf. App. 97 Tr. 256:3-7). The Respondent testified that what he did was he sought to withdraw close to the trial although he also sought and obtained a continuance so the client could hire other counsel and that in his preparation of a motion to withdraw, he copied and pasted in the regular language of a motion to withdraw which stated incorrectly that the client had refused to pay fees and costs due to the Respondent when actually the client had only refused to pay the costs. (Inf. App. 97 Tr. 256:8-25). The Respondent testified that when the OCDC investigator pointed out that the motion to withdraw had incorrectly stated that the client had refused to pay the Respondent’s fee rather than just the costs, the Respondent accepted a private letter of admonition. (Inf. App. 97 Tr. 256:16-25 and Tr. 257:1-24). The Respondent further testified that, from the admonition, the Respondent had learned “a lot more about the process of withdrawing and when and how on what grounds and what you should or should not say” (Inf. App. 97 Tr. 257:3-8).

The facts in the instant case do not resemble the unfortunate mistake made by the

Respondent some 9-10 years ago in improperly withdrawing from the previous client's case by not giving adequate notice of the motion to withdraw and by filing an inaccurate motion by mistakenly stating that the client had refused to pay fees and costs in the motion to withdraw when the client had only refused to pay the costs since the fees were on a contingency fee basis. Further, it is clear that the Respondent recognized the "shot across the bow" of warning to be more mindful of the violated rules as evidenced by the Respondent's testimony that he had learned "a lot more about the process of withdrawing and when and how on what grounds and what you should or should not say" (Inf. App. 97 Tr. 257:3-8).

Again, assuming *arguendo* that this Court finds that there is a preponderance of evidence to show that Respondent violated Rule 4-1.4 and reverses the Hearing Panel's decision to dismiss the Information, the facts do not support imposing a reprimand which would be "a scar" on the Respondent's record. In so considering any potential discipline, this Court is urged to consider the lack of aggravating factors and the many mitigating factors.

As testified to at the hearing by the Respondent, other than his family consisting of his wife and four (4) children, the practice of law is his life (Inf. App. 89; Tr. 224:14-20). Imposing a reprimand upon the Respondent would be a "scar" on his record and cause public embarrassment to the Respondent that would only serve punitive purposes in the circumstance. Another mitigating factor is the absence of deceit or dishonesty on the part

of the Respondent who reasonably believed that Mr. Hammond had properly taken over primary responsibility for the client file. This Court should also consider that even if this Court finds a violation of Rule 4-1.4 by either Respondent or Mr. Hammond in his separate companion case, this Court should consider the appropriate discipline in proportion with the actions or omissions between the said attorneys in light of the Panel's recommendation that the Information be dismissed as against the Respondent and the Panels' recommendation that Mr. Hammond be given an admonishment.

Further, it is clear that the Respondent is remorseful. The Respondent testified that he wanted to apologize to Mr. Meier because "the firm that bears my name one way or another let him down" (Inf. App. 95; Tr. 246:19-23). The Respondent also testified he was disappointed that Mr. Meier was disappointed in the Respondent and the Respondent's firm (Inf. App. 95; Tr. 246:23-25 and Tr. 247:1). Respondent has been ashamed and embarrassed by the allegations in this case because the Respondent likes "to take care of people and I like to do things for them and I like to help them in their cases and it's great to get a great result for a client. It's – I mean, it's the best feeling you probably ever have in the world. I mean, I've had a lot of great cases over time, and this – this – one way or another, I mean pales (corrected spelling from "pails" in transcript) in comparison to the great triumphs that I've had" (Inf. App. 95; Tr. 247:3-25 and Tr. 248:1-5).

CONCLUSION

For the reasons stated, the Respondent respectfully requests this Court to affirm the Disciplinary Hearing Panel's decision dismissing the Information or, in the alternative, assuming arguendo that this Court finds that the Respondent knowingly and willfully violated Rule 4-1.4(a)(b), suggests that the proper discipline in this case is no greater than an admonition.

Respectfully submitted,

By: _____
Eric A. Farris MOBar #42649
P.O. Box 490
Branson, Missouri 65615
(417) 334-7278
Fax (417) 334-7503

RESPONDENT

PROOF OF SERVICE

The undersigned hereby certifies that two (2) copies of Respondent's Brief and a diskette containing the brief in WordPerfect format was served, by regular United States Mail, postage pre-paid, on this 22nd day of November, 2005, upon the following counsel of record:

Sharon K. Weedin
Chief Disciplinary Counsel's Office
3335 American Avenue
Jefferson City, Missouri 65109

ERIC A. FARRIS

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 12,971 words, according to WordPerfect 11, 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.

ERIC A. FARRIS