

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:)
)
REIDAR O. HAMMOND,) **Supreme Court #SC87065**
)
Respondent.)

INFORMANT'S BRIEF

OFFICE OF
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STATEMENT OF JURISDICTION

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

STATEMENT OF FACTS

Procedural History of Disciplinary Case

On February 10, 2003, the Office of Chief Disciplinary Counsel received a complaint from Gerard Meier against Respondents Eric Farris and Reidar Hammond. Respondents were each advised by letter dated February 26, 2003, that investigation files had been opened on the basis of Mr. Meier's complaint.

On December 4, 2004, an information was filed charging Respondents with the following rule violations.

1. Both Respondent Farris and Respondent Hammond were charged with committing professional misconduct under Rule 4-8.4(a) as a result of violating Rule 4-1.4(b) in that they "failed to communicate to the Meiers that their assessment of the merits of the Meiers' case substantially changed after the defendant filed its motion for summary judgment, thereby denying the Meiers the opportunity to make an informed decision about incurring further and additional legal fees and expenses." **App. 6-7.**

Rule 4-1.4(b) reads: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

2. Only Respondent Hammond was charged with committing professional misconduct under Rule 4-8.4(a) as a result of violating Rule 4-1.1 and 4-1.3 in that he filed an untimely response to a summary judgment

motion, and the response that was filed failed to comply with the minimum requirements specified by Rule 74.04(c). **App. 7.**

Rule 4-1.1 reads: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Rule 4-1.3 provides: “A lawyer shall act with reasonable diligence and promptness in representing a client.”

3. The information charged both Respondents with professional misconduct under Rule 4-8.4(a) as a result of violating Rule 4-1.4(a) and 4-8.4(c) in that each of them failed, over a several month period of time, despite repeated requests from Mr. Meier, to provide Mr. Meier with a copy of the judge’s order issued in his case. **App. 7.**

Rule 4-1.4(a) reads: “A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.”

Rule 4-8.4(c) reads: “It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

Answers were filed by each Respondent. **App. 16-19, 449-452.** The Respondents each denied violation of the charged rules.

On March 2, 2005, the advisory committee chair appointed a disciplinary hearing panel to hear the case. **App. 20.** Hearing was conducted on May 13, 2005. The panel issued its decision on June 27, 2005. **App. 24-31.** The panel concluded Respondent Farris violated no charged rules and recommended dismissal of the information against him. **App. 28-30.** The panel concluded Respondent Hammond violated Rules 4-1.1, 4-1.3, and 4-1.4(a), and recommended an admonition, which the panel issued to him on June 24, 2005. **App. 29-31, 453.** By letter dated July 11, 2005, disciplinary counsel advised Respondents Farris and Hammond that the office did not concur in the panel's decision. **App. 32.** The record was filed with the Missouri Supreme Court on August 23, 2005.

Facts Underlying Disciplinary Case

Complainant's Legal Dispute with Homeowner's Association

In April of 1998, Big Bear Resort and Marina, L.L.C., combined lots 242 and 243 in Yogi Bear Jellystone Park Camp, located in Taney County, Missouri, and recorded the combined lots as Lot 242 in the county recorder's office. **App. 305-306.** In June of 1998, Gerard and Kimberly Meier purchased what had become combined lot 242 and lot 243. **App. 306.** In August of 1998, the Meiers filed a replat in the county recorder's office purporting to combine the already combined lot 242 with lot 243. **App. 283.**

In September of 1999, Big Bear Resort and Marina, L.L.C., sold the Yogi Bear Jellystone Camp Resort Subdivision to Clevenger Branch Membership Corporation. **App. 306.** Clevenger Branch, a homeowners association, thereafter charged the Meiers

dues for two lots. **App. 69 (T. 143-144)**. In October of 2000, when the Meiers failed to pay the multiple lot assessment, Clevenger Branch attached a lien to the property. **App. 293-295**.

Evidence Supporting Rule 4-1.4(b) Violation by Respondents

Hammond and Farris and the Rule 4-1.1 and 4-1.3 Violations

by Respondent Hammond

The Meiers sought legal help in resolving the assessment dispute from a lawyer named Dayrell Scrivener, who practiced law in what was then known as Farris & Associates, L.L.C. **App. 37 (T. 17)**. Mr. Scrivener advised Mr. Meier that he thought the Meiers had a strong case, which he estimated could be settled for an expenditure of about \$1,500.00 for attorney fees. **App. 103**. When Mr. Scrivener left the Farris firm, **App. 105**, Mr. Meier sought assurance from Respondent Farris, who took over the case, that he concurred with Mr. Scrivener's assessment of the Meiers' case as "strong," and that the case would not cost appreciably more than \$1,500.00 to resolve. Mr. Meier sought that assurance from Mr. Farris because the amount at issue was, at most, a \$1,500.00 annual assessment. **App. 38 (T. 19-21)**. Mr. Meier did not want to spend much more on legal fees than it would cost him to resolve the matter with the association on his own. **App. 38 (T. 20-21)**.

Respondent Farris answered Mr. Meier's request for reassurance by saying that he agreed with Mr. Scrivener's opinion that the Meiers had a strong case. He assured Mr.

Meier that a favorable verdict or settlement was likely to come out of the lawsuit. Mr. Farris also agreed with Mr. Scrivener's previous opinion that, "if the other side takes our case seriously, the case could be settled with the attorney fee costing approximately \$1,500.00." **App. 103.** Mr. Farris thought the Meiers' case had merit because a lot of other lot owners in the Jellystone subdivision had been allowed to consolidate lots. **App. 90 (T. 228-229).** Mr. Farris knew Mr. Meier was concerned about limiting his costs. **App. 90 (T. 229).** The Meiers signed a fee agreement with Mr. Farris in July of 2001. **App. 254-255.**

On July 30, 2001, Mr. Farris filed in Taney County Circuit Court a two count petition on behalf of the Meiers against Clevenger Branch. **App. 442-446.** In October of 2001, Mr. Farris filed an amended petition on the Meiers' behalf. **App. 415-431.** As the case proceeded, and invoices for legal fees were submitted to the Meiers, Mr. Meier questioned Mr. Farris about the mounting legal fees. **App. 40 (T. 26-27).** In November of 2001, Meier again asked Farris for assurance that there was "light at the end of this tunnel and we can expect to settle this matter soon and as budgeted," inasmuch as the fees were nearing \$2,000.00. **App. 456.**

In April of 2002, Respondent Farris hired Respondent Hammond to work as an associate lawyer for the Farris law office. **App. 73 (T. 159), 76-77 (T. 173-174).** Mr. Hammond had been licensed in Colorado in 1990 and in Missouri in 2000. **App. 76 (T. 172-173).** In April, Mr. Farris assigned responsibility for the Meiers' file to Mr. Hammond. **App. 73 (T. 159).** Mr. Hammond first contacted Mr. Meier in May. **App. 46 (T. 52).** Mr. Meier understood that Respondent Farris was transferring the case to Mr.

Hammond to handle, **App. 46 (T. 53)**, but Mr. Meier did not understand that to mean that Mr. Farris had no further responsibility to the Meiers. He assumed that Hammond and Farris would work as a team to represent him, as a previous letter from Mr. Farris had described his firm's approach to representation as a "team approach." **App. 69 (T. 145), 105.** Mr. Farris remained attorney of record for the Meiers until June of 2003 and never advised Mr. Meier that he was not still representing him after Mr. Hammond became involved in the case. **App. 67 (T. 136).**

The defendant homeowner's association filed a motion for summary judgment, supported by sixteen exhibits, on May 10, 2002. **App. 238-343.** Mr. Hammond began reviewing the motion on May 11, 2002. **App. 77 (T. 176).** Mr. Meier did not know anything of any importance had occurred in his case until he was contacted in late May, and that contact was to tell the Meiers that they were going to be deposed. **App. 40-41 (T. 29-30), 46 (T. 52).** Mr. and Mrs. Meier met Mr. Hammond about an hour before their depositions were taken on June 6, 2002. **App. 40-41 (T. 29-30).** Mr. Hammond used the meeting before the depositions commenced to explain depositions to the Meiers and prepare them for being deposed. **App. 41 (T. 30), 57 (T. 95), 71 (T. 153), 74 (T. 162-163).** Mr. Meier does not remember any discussion about a motion for summary judgment, or any discussion of the general status of the lawsuit, arising at all during the pre-deposition meeting with Mr. Hammond. **App. 57 (T. 94-95), 66 (T. 133).** The Meiers and Mr. Hammond did not discuss the depositions or the case after the depositions were completed. **App. 72 (T. 155-156).**

The Meiers' response to the motion for summary judgment was due to be filed on June 10, 2002. **App. 77 (T. 175)**. The response was filed, without any accompanying exhibits, discovery, or affidavits, on June 20, 2002. **App. 77 (T. 175), 79 (T. 182)**. No motions requesting extension of time or other relief of any kind on the Meiers' behalf were filed prior to June 20. **App. 79 (T. 182)**. Mr. Hammond had not contacted Mr. Meier about the necessity of controverting the motion with affidavits or other evidence. **App. 79 (T. 182)**. Mr. Meier does not even recall knowing that a summary judgment motion had been filed in the case until late June of 2002. **App. 41 (T. 31), 57 (T. 95-97)**.

Mr. Hammond filed the response to the summary judgment motion ten days out of time because he had been unable to formulate a viable response. **App. 74 (T. 163), 77 (T. 175), 87 (T. 214)**. Hammond saw that the covenants, attached to the summary judgment motion when it was filed, required the Meiers to go through a prescribed process to consolidate their lots, and that they had not followed the procedure. **App. 73 (T. 160-161)**. Mr. Hammond's opinion that the Meiers could not prevail coalesced after the Meiers' depositions were taken in early June. **App. 75 (T. 166)**.

Mr. Farris required his associates to provide him with a weekly or biweekly statement about what was going on in each of the files being handled by the associate. **App. 85 (T. 206)**. The case status memo for June 8 regarding the Meier file stated "Did depos this past week, am trying to get settlement authority." **App. 86 (T. 212 – 213)**. Mr. Hammond discussed the difficulty he was having coming up with a response to the summary judgment motion with Mr. Farris, probably shortly after the depositions had been taken on June 6. Hammond relayed to Farris that the "covenants were the

covenants,” and he did not know how to get around them. **App. 77 (T. 175)**. Farris directed Hammond to a case Farris had recently handled wherein he said he had succeeded in defeating a summary judgment motion by use of equitable arguments. **App. 77 (T. 175)**. Farris suggested to Hammond that he follow the example Farris had set in *Young v. Archer*,¹ where Farris “successfully defeated a Motion for Summary Judgment with no affidavits and based only upon an equitable defense.” **App. 92 (T. 236-237)**.

According to a letter dated March 24, 2003, signed by both Mr. Farris and Mr. Hammond, facts had been “discovered in the course of representation, which undermined Mr. Meier’s position so gravely that led us to conclude that the likelihood of success at trial of the case was virtually nil, that the case would be disposed of in favor of the defendant on summary judgment, and that Mr. Meier needed to settle the case while settlement was still possible.” **App. 106**.

Neither Mr. Hammond nor Mr. Farris communicated to Mr. Meier that the lawyers had come to the realization that the Meiers were likely to lose the case. **App. 41 (T. 31-33)**. Respondent Hammond talked with Mr. Meier by telephone on June 10, but Mr. Meier recalls the conversation being about whether Meier should go out of town on vacation, inasmuch as Meier did not want to leave if anything was expected to happen in his case. **App. 58 (T. 99), 66 (T. 133)**. Mr. Hammond told him nothing was planned, so he should go ahead and leave. **App. 58 (T. 99-100)**. Mr. Meier does not recall any mention during the June 10 telephone call about the advisability of settling the case in

¹ *Young v. Ernst*, 113 S.W.3d 695 (Mo. App. 2003).

lieu of going to trial, or anything about a summary judgment motion. **App. 58-59 (T. 101-103), 66 (T. 133).**²

On June 12, counsel for the homeowner's association filed a notice requesting hearing on its motion for summary judgment. It was noticed to be heard on June 20. Mr. Hammond did not attempt to make Mr. Meier aware of the hearing until the evening of June 19. **App. 59 (T. 104).** The evening before the hearing, June 19, Mr. Hammond put together a response to the summary judgment motion, which was filed the next day. **App. 74 (T. 163).** He called the Meiers on the evening of June 19 to ask whether he could fax them what he had prepared and to get them to sign a verification to file with the response. **App. 74 (T. 163).**³ When Mr. Hammond remembered the Meiers were out of town, he left a message on their telephone answering machine about the next day's hearing. **App. 58 (T. 98).** The message explained what a summary judgment hearing was, that Mr. Hammond would oppose the motion, and that Mr. Hammond expected to come out of the hearing with a good sense of how the judge would rule in their case. **App. 70 (T. 146).** This message, left on the Meiers' answering machine on June 19, is Mr. Meier's first recollection of knowing anything about a summary judgment motion in the case. **App. 59 (T. 103).**

² Mr. Hammond recalls talking with Mr. Meier during the June 10 telephone call about trying to get the case settled. **App. 75 (T. 166).**

³ Mr. Hammond thought that a verified response was essentially the same thing as submitting affidavits with the response. **App. 88 (T. 218).**

At the hearing on June 20, the presiding judge, Judge Eiffert, verbally indicated that he was going to rule against the Meiers. **App. 74 (T. 165)**. In a telephone conversation following the Meiers return from vacation around June 25, Mr. Hammond relayed to Mr. Meier that he thought the Meiers were getting screwed, but that the indication from the hearing was that the Meiers were going to lose the case and that they should settle while they could. **App. 56-57 (T. 96-99), 65 (T. 127-128), 74-75 (T. 165-166)**.

Until that time, in late June 2002, Mr. Meier had had no indication from his lawyers that anything had changed in the case. Mr. Meier returned from vacation confident he had a strong case, and still fully expecting to go to trial and prevail. **App. 41 (T. 31-33), 57 (T. 95), 65 (T. 127-128)**. Had his lawyers apprised him that their evaluation of the case had changed after the summary judgment motion had been filed, he would have “wanted to regroup and cut my expenses at that point. I mean, there would have been no point in going through depositions and additional expenses if my own attorney advised me that I didn’t have a viable case.” **App. 42 (T. 34-35)**. The Meiers were billed, and paid, approximately \$1,749.00 to the Farris law firm after the motion for summary judgment was filed. **App. 54 (T. 83), 457-461**.

In an e-mail sent to Respondent Farris by Mr. Meier dated July 8, 2002, Meier expressed dismay that his once “strong case” had disappeared, that he had already paid twice the initial estimate for attorney fees, and asked Mr. Farris “what discoveries were made that has [sic] weakened my case and caused you to advise that the best resolution may be to separate my lots.” **App. 121**.

Evidence Supporting Rule 4-1.4(a) Violation

by Respondents Hammond and Farris

After the hearing on the summary judgment motion, Mr. Hammond and the homeowners association's lawyer worked out a proposed compromise whereby: Mr. Meier would seek approval from the Taney County planning and zoning board to break the lots out into two distinct lots; the Meiers would owe the assessment on only one lot up until the date the lawsuit had been filed; the Meiers would pay the assessment owing for two lots thereafter. **App. 75 (T. 166-167, 169), 118.** The terms of the proposed settlement were forwarded to Mr. Meier in early July. **App. 66 (T. 132), 75 (T. 166-167).** Given the news that summary judgment was likely to be entered, Meier did not disagree with the terms of the proposal, but was very doubtful that Taney County authorities would allow him to separate the lots. **App. 60 (T. 108), 71 (T. 151).** In Mr. Meier's mind, he could not "authorize" a settlement, nor was there a "settlement," until county authorities agreed to go along with what was being proposed. **App. 67 (T. 136-137), 76 (T. 170).**

On July 12 or 13, Mr. Hammond was in the Taney County Courthouse on a matter other than Mr. Meier's. While there, Mr. Hammond observed a docket entry made by Judge Eiffert in Mr. Meier's case. **App. 75 (T. 167), 88 (T. 219).** The docket entry read as follows:

Defendant filed on 5-10-02 a Motion For Summary Judgment supported by an affidavit of its secretary and 16 exhibits. Sup. Court Rule 74.04(c)(2)

required Plaintiff to file a response to the motion within 30 days. Defendant noticed it's [sic] motion for hearing for 6-20-02, 40 days after the motion was filed. On that date, Plaintiff filed their response to the Motion with the Court. The response raises additional claimed facts, but, these facts are not supported by any exhibits or affidavits nor is there any reference to pleadings or discovery, all as required by Sup. Court Rule 74.04(c)(2). The Court finds that there is no factual dispute and Deft. is entitled to summary judgment. Deft's attorney to submit formal judgment to the Court. **App. 124.**

A letter reciting the docket entry set forth above was received at the Farris law office the following day. **App. 88 (T. 219).**

On returning to the office after seeing the foregoing docket entry, Mr. Hammond called Mr. Meier and told him summary judgment was being entered against him. He urged Meier to agree to the proposed settlement worked out between him and the homeowners association's attorney while they could still do so. **App. 42 (T. 36), 75 (T. 167).** Mr. Meier thereafter applied to county authorities to separate the lots, but his efforts were unsuccessful. **App. 61 (T. 112).**

On October 19, 2002, Mr. Meier e-mailed Mr. Farris about his lack of success in getting the county to allow him to separate the lots. He noted, in the e-mail to Mr. Farris, "I have not received a copy of the summary judgment from Judge Eiffert. I am requesting a copy of this summary [judgment] before I make a decision on how to proceed. I have left a voice mail message with Mr. Hammond and would appreciate a

call.” **App. 120.** On October 24, 2002, Mr. Meier wrote Mr. Hammond a letter about the unsuccessful lot separation efforts. He noted, “I am expecting a copy of the summary judgment from Judge Eiffert and your response.” **App. 462.** In a November 1, 2002, e-mail from Mr. Meier to Mr. Hammond, Meier states “I also expected to receive a copy of Judge Eifferts summary judgment and your response opposing motion for summary judgment. Please send the requested documents and give me an update.” **App. 120.**

On December 9, 2002, Mr. Hammond wrote Mr. Meier a letter advising that the homeowners association’s attorney had agreed to try to get the judge to order county officials to accept the lot separation agreed to by the parties. The body of the letter says nothing about the summary judgment order, but does reflect, at the bottom left corner of the letter, that the order was enclosed with the letter. **App. 463.** Mr. Meier saw the July 8 order for the first time when he received the December 9, 2002, letter. **App. 43 (T. 39), 62 (T. 117).** Mr. Meier was “shocked” when he read the judgment entry. He felt ripped off and like he had not been properly represented, because the entry said Mr. Meier’s evidence had not been properly presented to the court. **App. 43 (T. 40).**

It was standard practice at Farris & Associates for the administrative staff to send copies of incoming documents to clients before the lawyers were even given the mail. **App. 76 (T. 171), 465.** Mr. Farris emphasized perfection in the performance of tasks. **App. 468.** Mr. Hammond assumed the order had been sent to Mr. Meier pursuant to office procedures. When he got the October e-mail from Mr. Meier, he asked his secretary to send the judgment entry to Meier. **App. 76 (T. 171).**

Mr. Farris also assumed the judgment entry had been sent, and he was upset when Meier complained that he still didn't have it. **App. 94 (T. 242-243)**. In a November 8, 2002, memo to Farris, Hammond stated the order had been sent to Meier. **App. 94 (T. 242)**. Neither Farris nor Hammond personally saw to the enclosing of the judgment entry in a mailing to Meier until Hammond did so with the December 9 letter. **App. 79 (T. 184), 97 (T. 254)**.

Postscript

The court's docket sheet shows no activity in the case from July of 2002 until April 30, 2003, when Meier began filing pro se motions with the court. On May 1, 2003, the court issued an order asking the lawyers why no judgment had been timely submitted to the court for its approval. On May 6, 2003, Mr. Hammond, on behalf of Farris and Associates, filed a motion to withdraw, citing a "breakdown in the attorney/client relationship . . . to such a degree that effective representation is no longer possible." **App. 184-185**. On May 7, 2003, the homeowners association's counsel submitted a proposed judgment entry. **App. 170-174**. After hearing on June 5, Hammond and Farris were granted leave to withdraw. **App. 162**. Judgment was entered on behalf of the homeowners association on June 9, 2003. **App. 158**. The final judgment accomplished the compromised goal of providing the Meiers with two lots. **App. 69 (T. 144)**.

Disciplinary History

Mr. Farris was admitted to the bar in 1994. **App. 88 (T. 221)**. He was admonished in February of 1998 for violation of Rules 4-1.4 (communication), 4-1.16(d)

(improper withdrawal), and 4-8.4(d) (conduct prejudicial to the administration of justice).

The admonition was based on Mr. Farris' failure to provide a client with adequate notice of his intention to withdraw, and for providing the court with inaccurate information in the motion to withdraw. **App. 469-470.**

Mr. Hammond, admitted to Missouri's bar in 2000, has no disciplinary history.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD REVIEW THE PANEL'S ISSUANCE OF AN ADMONITION TO RESPONDENT HAMMOND BECAUSE OF THE IMPORTANCE TO THE ATTORNEY DISCIPLINE SYSTEM OF IMPOSING THE APPROPRIATE SANCTION IN THAT REVIEW OF PANEL ISSUED ADMONITIONS SUBSEQUENTLY ACCEPTED BY RESPONDENTS SHOULD NOT BE PRECLUDED BY AN UNREASONABLE INTERPRETATION OF RULE 5.16, IN THE EVENT DISCIPLINARY COUNSEL DOES NOT CONCUR WITH THE PANEL'S ISSUANCE OF THE ADMONITION.

Jones v. Jackson County Circuit Court, 162 S.W.3d 53 (Mo. App. 2005)

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

In re Conner, 207 S.W.2d 492 (Mo. banc 1948)

ABA Standards for Imposing Lawyer Sanctions, (1991 ed.)

Rule 5.16

Rule 5.19

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENTS FARRIS AND HAMMOND BECAUSE THEY VIOLATED THE COMMUNICATION RULE (4-1.4(a)(b)) IN THAT THEY DID NOT COMMUNICATE TO CLIENT MEIER THAT A MOTION FOR SUMMARY JUDGMENT FILED BY OPPOSING COUNSEL SIGNIFICANTLY LOWERED THE CLIENT'S LIKELIHOOD OF PREVAILING AND FAILED TO TIMELY PROVIDE A COPY OF THE DISPOSITIVE ORDER TO THE CLIENT DESPITE THE CLIENT'S MULTIPLE REQUESTS.

Rule 4-1.4(a)(b)

POINTS RELIED ON

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT HAMMOND BECAUSE HE VIOLATED THE COMPETENCE RULE (4-1.1) AND THE DILIGENCE RULE (4-1.3) IN THAT HE DID NOT FILE A TIMELY OR ADEQUATE RESPONSE TO A MOTION FOR SUMMARY JUDGMENT.

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

Rule 4-1.1

Rule 4-1.3

POINTS RELIED ON

IV.

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT HAMMOND BECAUSE HE, AT A MINIMUM, NEGLIGENTLY FAILED TO COMPETENTLY AND DILIGENTLY REPRESENT HIS CLIENT IN THAT HE FILED A RESPONSE TO THE SUMMARY JUDGMENT MOTION TEN DAYS AFTER IT WAS DUE AND FAILED TO CONTROVERT THE OPPONENT'S MOTION, AND THE PRESENCE OF SEVERAL AGGRAVATING FACTORS MAKE PUBLIC REPRIMAND THE APPROPRIATE SANCTION.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

THE SUPREME COURT SHOULD REVIEW THE PANEL'S ISSUANCE OF AN ADMONITION TO RESPONDENT HAMMOND BECAUSE OF THE IMPORTANCE TO THE ATTORNEY DISCIPLINE SYSTEM OF IMPOSING THE APPROPRIATE SANCTION IN THAT REVIEW OF PANEL ISSUED ADMONITIONS SUBSEQUENTLY ACCEPTED BY RESPONDENTS SHOULD NOT BE PRECLUDED BY AN UNREASONABLE INTERPRETATION OF RULE 5.16, IN THE EVENT DISCIPLINARY COUNSEL DOES NOT CONCUR WITH THE PANEL'S ISSUANCE OF THE ADMONITION.

The disciplinary hearing panel issued a written admonition to Respondent Hammond, which he accepted by “[f]ailure to timely respond in writing.” Rule 5.19(b). Subpart (b) of the Rule states that “If accepted, the written admonition shall become part of the record.” Because Informant did not concur in the panel’s issuance of the admonition and believes that public reprimand is the appropriate sanction, the complete record, of which the admonition was a part, was filed with the Court pursuant to Rule 5.19(d)(2).

There may be some question whether the Office of Chief Disciplinary Counsel has authority under the Rules to file the disciplinary record for Supreme Court review in the

event a respondent accepts an admonition per Rule 5.19(b). Subpart (b) speaks to what happens if the respondent rejects the admonition, but is silent as to disciplinary counsel's options if disciplinary counsel does not concur with the panel's issuance of an admonition, which is subsequently accepted by the respondent.

In 2001, Rule 5.19 was amended to add panel-recommended dismissals to the post-panel decision review options available to the parties. Specifically, subpart (d)(1) was amended to permit the chief disciplinary counsel to file the record for the Court's review if the chief disciplinary counsel did not concur in a panel's decision to dismiss an information. The Court's amendment of the Rule in 2001 expressly to allow for Supreme Court review of dismissals leads disciplinary counsel to believe that the Court did not intend, by not expressly speaking to the issue of accepted admonitions, to foreclose Court review of such admonitions, if disciplinary counsel does not concur in the panel's conclusion that admonition was sufficient.

Supreme Court Rules may be interpreted by reference to statutory construction principles. *Jones v. Jackson County Circuit Court*, 162 S.W.3d 53, 61 (Mo. App. 2005). By expressly broadening Supreme Court review to include dismissals in which disciplinary counsel did not concur, it would require an unreasonable construction of Rule 5.19 to conclude that the Court intended to foreclose Supreme Court review of panel-issued accepted admonitions.

The public is better served if the Rules are construed to allow for Supreme Court review in the infrequent case where disciplinary counsel has filed an information, thereby necessarily evincing the belief that sanction greater than admonition is appropriate, but,

after hearing, the panel nonetheless issues an admonition. The disciplinary system exists to protect the public and preserve the integrity of the profession, not to punish the particular respondent attorney. *In re Carey and Danis*, 89 S.W.3d 477, 502 (Mo. banc 2002). Disciplinary counsel bears the Rule 5 responsibility of investigating and prosecuting lawyer discipline cases for the Court. An important part of that responsibility is determining, by reference to the ABA Standards and case law, what sanction is appropriate in each case. Lawyer discipline is a historical and progressive process over the length of an errant lawyer's career. It is essential to the accomplishment of the system's purposes that the appropriate sanction issue in each successive disciplinary case, as the sanctions build on one another. The chief disciplinary counsel should, therefore, have the authority to seek Supreme Court review of any sanction, including admonition, with which she does not concur.

Further, this Court deliberately used the word "review" in Rule 5 rather than "appeal" because the Court intended to give a broad construction to Supreme Court review of lawyer discipline cases. *In re Conner*, 207 S.W.2d 492, 495-496 (Mo. banc 1948). In *Conner*, the Court noted that "review," as referenced in Rule 5, is broader than the more limited word "appeal." The Court also noted that Rule 5, which is ancillary to the administration of justice itself, was "intended to and did enlarge the scope of the Court's review of disciplinary matters." 207 S.W.2d at 495.

Disciplinary counsel is aware that prior to November 13, 2002, Rule 5.16, which governs the "Decision of Disciplinary Hearing Panel – Findings and Recommendations," enumerated the following possibilities for a panel's "recommended discipline": written

admonition, private reprimand, public reprimand, suspension or disbarment.” The November 2002 amendment to the Rule eliminated “written admonition” and “private reprimand” from the foregoing list.⁴

At the time Rule 5.16 was amended to eliminate these two sanction options (reprimand and admonition) from the list available to disciplinary hearing panels, Rule 5.19 was not amended in any way. Rule 5.19, which is entitled “Procedure Following Decision of a Disciplinary Hearing Panel,” continues to reference written admonitions and sets forth a procedure for rejection of that admonition by the respondent. Subpart (a) of Rule 5.19, both before and after the 2002 amendment to Rule 5.16, states that after hearing, a disciplinary hearing panel “may find that the information should be dismissed, a written admonition should be administered to the respondent, or that further proceedings are warranted.” Subpart (b) of the Rule specifies what happens in the case of acceptance by the respondent of the admonition (“the written admonition shall become part of the record”), or rejection by the respondent of the panel-issued admonition (“panel

⁴ Recommendation 10 of the ABA Standing Committee on Professional Discipline’s Report on Missouri’s Lawyer Regulatory System was for elimination of “private reprimand” by the Court. The committee’s rationale for the recommendation was that all Court-issued discipline should be public inasmuch as Missouri admonitions, which can be issued by lesser authorities than the Court, are public to the extent that they are available to the public for three years after acceptance.

shall render a written decision The decision shall include the findings and recommendations required by Rule 5.16.”). As previously noted, the 2002 amendment to Rule 5.16 eliminated written admonition from the possible Rule 5.16 recommendations. While there may be inconsistency between Rules 5.16 and 5.19 in whether a hearing panel has the option of issuing an admonition, the Rules do not expressly preclude Informant from asking for review of an admonition, or of any other disciplinary sanction. Conversely, it would appear contradictory to construe the Rules to allow review of dismissals, but disallow review of admonitions.

ARGUMENT

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENTS FARRIS AND HAMMOND BECAUSE THEY VIOLATED THE COMMUNICATION RULE (4-1.4(a)(b)) IN THAT THEY DID NOT COMMUNICATE TO CLIENT MEIER THAT A MOTION FOR SUMMARY JUDGMENT FILED BY OPPOSING COUNSEL SIGNIFICANTLY LOWERED THE CLIENT'S LIKELIHOOD OF PREVAILING AND FAILED TO TIMELY PROVIDE A COPY OF THE DISPOSITIVE ORDER TO THE CLIENT DESPITE THE CLIENT'S MULTIPLE REQUESTS.

The disciplinary hearing panel concluded that Respondent Hammond violated Rule 4-1.4(a) inasmuch as he failed timely to provide the Meiers with a copy of the uncomplimentary July 11 docket entry, despite their repeated requests that he do so. Disciplinary counsel agrees with that conclusion.

The panel's conclusion, however, that Respondent Hammond did not violate Rule 4-1.4(b) is not supported by the evidence. The panel concluded that the evidence "suggested that the Complainants were made aware . . . and understood" the lawyers' changed evaluation of the merits. The only evidence of record that supports the foregoing conclusion is Respondent Hammond's testimony that he discussed settling the case with Meier during a June 10 telephone conversation. The general topic of "settling

the case” does not necessarily incorporate the specific facts that a summary judgment motion had been filed in early May, that Mr. Hammond was having a very difficult time in coming up with a viable response to it, and the lawyers had come to the realization that the case was not winnable.

In counterpoint to Hammond’s vague testimony that “settlement” had been discussed with him prior to the summary judgment hearing on June 20, Meier recalled no mention during the June 10 telephone call of a summary judgment motion or the advisability of settling the case. Meier testified that the first he knew anything about a dispositive motion, much less how strong Respondents had come to believe it to be, was in late June, after the judge had verbally announced his intention to grant the motion. Before that news came to Meier, he was still expecting to go to trial and prevail on the merits of his “strong” case. Meier denied that his lawyers raised the subject of the disintegrating merits of the case either when the Meiers met with Hammond when they were deposed, or during the June 10 telephone call. Clearly, the evidence supports the conclusion that Mr. Hammond failed timely to communicate enough information to the clients to allow them to make an informed decision about their case, in violation of Rule 4-1.4(b).

ARGUMENT

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT HAMMOND BECAUSE HE VIOLATED THE COMPETENCE RULE (4-1.1) AND THE DILIGENCE RULE (4-1.3) IN THAT HE DID NOT FILE A TIMELY OR ADEQUATE RESPONSE TO A MOTION FOR SUMMARY JUDGMENT.

The facts are undisputed that Respondent Hammond filed a late (ten days after the deadline) and inadequate (failed to controvert facts pled with specific reference to the record, which must be attached to the response) response to the opposing party's motion for summary judgment. "Every practicing attorney should understand the consequences of failing to respond to such a motion." *In re Crews*, 159 S.W.3d 355, 359 (Mo. banc 2005) (per curiam). Mr. Hammond's explanation for the defective and tardy response was just that he had been unable to come up with anything better any sooner. Certainly lawyers face that predicament from time to time, but the ethical way to handle it is to explain and confer with the client and go forth from there.

The panel concluded, on the basis of the evidence of record, that Respondent Hammond violated the competency and diligence rules. Informant agrees with that conclusion.

ARGUMENT

IV.

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT HAMMOND BECAUSE HE, AT A MINIMUM, NEGLIGENTLY FAILED TO COMPETENTLY AND DILIGENTLY REPRESENT HIS CLIENT IN THAT HE FILED A RESPONSE TO THE SUMMARY JUDGMENT MOTION TEN DAYS AFTER IT WAS DUE AND FAILED TO CONTROVERT THE OPPONENT'S MOTION, AND THE PRESENCE OF SEVERAL AGGRAVATING FACTORS MAKE PUBLIC REPRIMAND THE APPROPRIATE SANCTION.

According to the analytical framework proposed in the ABA's Standards for determining the sanction appropriate in any given case, the "ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct. . . . [M]ultiple instances of misconduct should be considered as aggravating factors." ABA Standards for Imposing Lawyer Sanctions, p. 6 (1991 ed.).

Mr. Hammond's Rule violations, competence, diligence, and communication, are all about on an even par of seriousness. The sanction in this case is aggravated, however,

by the multiplicity of the violations. In accordance with the theoretical framework set forth in the ABA Standards, admonition will rarely, if ever, be a sufficient sanction in a case involving multiple Rule violations. This is particularly true where, as here, the Rule violations each implicate a distinct set of facts.

The multiplicity of instances of misconduct, considered with Mr. Hammond's twelve years of legal experience at the time of the misconduct, aggravates the appropriate sanction to public reprimand.

CONCLUSION

Mr. Hammond violated multiple Rules of Professional Conduct in his representation of the Meiers. That factor, along with Respondent's substantial legal experience, aggravates the appropriate sanction level to public reprimand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2005, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First

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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 6,432 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

Sharon K. Weedin

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