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## **STATEMENT OF JURISDICTION**

Jurisdiction over this attorney discipline matter 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 1994.

## STATEMENT OF FACTS

Respondent has been in the private practice of law since 1971. **T.** 221. Respondent earned a Master's degree in tax law from Washington University in 1976 but is not a tax practitioner. **T.** 221-222. Respondent is admitted to practice law in Missouri and Illinois. **Ex.** 3, p. 4. Respondent has no prior disciplinary history in Missouri. **T.** 306-307.

Nancy Kessler and Dane Banks operated a Subway sandwich shop franchise in Olathe, Kansas, from April of 1989 till September of 1990. **T.** 64; **Ex.** D, p. 17. The franchisor (hereinafter Subway) filed suit in the District Court of Johnson County, Kansas, against Kessler and Banks in 1990 under lease contracts incident to the franchise agreement. Respondent was retained to represent Kessler and Banks in 1991 and was admitted pro hac vice to represent his clients in the Kansas case. **Ex.** 1, p. 1. Representing clients in litigation around the country against the Subway franchisor accounted for about 20% of Respondent's law practice. **Ex.** 3, p. 4.

H&R Block prepared a 1989 U. S. Partnership Return of Income (hereinafter the original 1989 partnership return) for Kessler and Banks. **T.** 58; **Ex.** I. The original 1989 partnership return was filed in September of 1990. **Ex.** 1, p. 3. Gross receipts as reflected on the original 1989 partnership return were compiled from the shop's Weekly Inventory and Sales Reports (WISRs), standard forms on which Subway franchisees are supposed to record information about the shop's operation, including sales. **Ex.** 1, p. 4. The original 1989 partnership return reported gross receipts/sales in the amount of

\$139,369. **Ex. I, l. 1a.** The original 1989 partnership return reported taxable income in the amount of \$20,143. **Ex. I, l. 21.**

In September of 1991, Respondent retained certified public accountant Robert Seiffert to serve as an expert witness in the Kansas litigation. **Ex. LLL.** Seiffert, a personal friend of Respondent's whose accounting firm is located in St. Louis, served as Respondent's expert witness in five other cases in which Respondent represented clients in litigation against Subway. **Ex. 3, p. 4.** The law firm of Reinert and Duree, in which Respondent was a named partner, was Seiffert's client in the work he performed in the course of the Kansas litigation. **T. 157.**

In January of 1993, Seiffert prepared an amended 1989 U. S. Partnership Return of Income for the Kessler and Banks partnership (hereinafter the 1989 amended partnership return). **T. 174.** The 1989 amended partnership return prepared by Seiffert reported gross receipts/sales in the amount of \$71,543. The 1989 amended partnership return reported a taxable loss of \$17,247. **Ex. J, ll. 1a, 21.** Seiffert's accounting firm included a disclaimer with the 1989 amended partnership return acknowledging that it was unable to determine whether the information used to complete the return was complete and accurate. **Ex. J, 12<sup>th</sup> unnumbered page.** It is rare for an accountant to include such a disclaimer with a return. **Ex. 1, p. 5; Ex. 3, p. 5.**

Seiffert used the bank deposits method to prepare the 1989 amended partnership return. **T. 124, 201.** Seiffert was aware that Kessler had testified that 50% to 60% of the cash that came into the Subway shop was never deposited in the bank. **T. 144, 197; Ex. 3, p. 5.** The information on the amended return is accurate to the extent that the bank

statements were accurate, but is not complete, because bank deposit records did not reflect a significant portion of the business activity of the Subway shop. **T.** 181-182.

Seiffert did not consult the WISRs in preparing the 1989 amended partnership return because they were not all available to him. **Ex.** 3, p. 5; **Ex.** 2, p. 3; **Ex.** 1, p. 5. At a subsequent deposition, opposing counsel quickly located all of the 1989 WISRs in a box of records in Seiffert's possession. **Ex.** 1, p. 5. Kessler testified at her deposition that the WISRs were relatively simple forms to fill out, that she understood how to complete them, and that she completed them accurately. **Ex.** 1, p. 4; **Ex.** 3, p. 3; **T.** 145. She testified at her deposition that her store's operations could be reconstructed by relying on her WISRs for accurate information. **T.** 145.

Seiffert forwarded the 1989 amended partnership return to Respondent's firm, where he expected it would be reviewed. **T.** 162. Respondent's office sent the return (and various individual returns Seiffert prepared for Kessler and Banks) to their local counsel's office in Kansas City. The local counsel, Su Linda Jamison, had Kessler and Banks come in to her office and sign the returns, which were then mailed to the IRS. **T.** 160-161. Jamison produced unsigned copies of the 1989 amended partnership return to Subway in response to discovery requests. **Ex.** G, p. 6.

On behalf of Kessler and Banks, Respondent, as lead counsel, and Robert Carter, another lawyer in Respondent's firm, and local counsel Jamison filed a counterclaim, which ultimately evolved into a fifth amended counterclaim, against Subway. The counterclaim alleged fraud and sought punitive damages. **Ex.** XX. Discovery between the parties was lengthy and hard fought, necessitating the appointment of a special master

to resolve discovery disputes. **Ex. 1**, p. 2. At his deposition in December of 1994, Seiffert was asked about the 1989 amended partnership return. Seiffert could not say whether the return had ever been filed with the IRS. **T. 277**; **Ex. D**, p. 44-45. Subway eventually filed a motion for summary judgment against the fifth amended counterclaim that posited 167 uncontroverted facts. **Ex. D**, p. 33. Mr. Seiffert's affidavit was attached to the pleading filed in response to Subway's statement of uncontroverted facts. **Ex. B**, p. b20-b27. In response to Subway's uncontroverted fact numbered 143, Seiffert averred that it was "misleading and inaccurate" and that the 1989 tax return used by Subway's expert was the return "originally filed. That tax return was subsequently amended and all numbers on that tax return were amended. Mr. Karns [Subway's expert witness] should have quoted the correct figures found on the Amended Return." In response to posited fact numbers 158 and 159, Seiffert averred that the contentions were "misleading and based on incomplete facts. The 1989 tax return, as prepared by H&R Block, was based upon incomplete financial records and, as a result, was subsequently amended." **Ex. B**, p. b24-b25.

The day before the hearing on the motion for summary judgment, Kessler and Banks' attorneys filed a motion for sanctions against Subway and its attorneys, notably a Mr. Dunham. **Ex. C**. The sanctions motion does not recite Subway's use of the 1989 original partnership return figures as a basis for sanctions. **Ex. C**. Kessler and Banks' attorneys also filed a brief opposing the motion for summary judgment. **Ex. D**, p. 33. The District Court of Johnson County, Kansas, Judge Janice Russell, conducted a hearing on the motion for summary judgment on April 13, 1995. **Ex. D**. Respondent argued

against the motion on behalf of Kessler and Banks. Dunham argued in favor of the motion on Subway's behalf.

At the April 13, 1995, hearing on the motion for summary judgment, in arguing in favor of his client's motion, Dunham addressed the contentions raised in Respondent's legal team's pleadings opposing the motion: a brief (that brief is not part of the record in this disciplinary case), the response to plaintiffs' statement of uncontroverted facts, and the motion for sanctions. **Ex. D**, p. 32-33. Dunham pointed out to Judge Russell that throughout the brief opposing Subway's motion, it is argued that the partnership's 1989 return had been amended, and that Subway, and Mr. Dunham, deceptively failed to cite the correct tax figures in its pleadings with the court. **Ex. D**, p. 42-43.

Whether the 1989 amended partnership return was ever filed with the IRS, and hence, whether the figures used by Subway in the facts cited in support of its motion for summary judgment were accurate, became a contentious issue during the hearing. In defense of his team's use of the figures from the original 1989 partnership return in the "uncontroverted facts" posited with the motion for summary judgment, Dunham noted that Seiffert, in his deposition, could not say whether the amended return had been filed, only that he prepared it. **Ex. D**, p. 42-47. Dunham took the position that an amended return had never actually been filed. **Ex. D**, p. 23.

Respondent argued to Judge Russell, in his turn, that the issue of the amended tax return was "an evidentiary detail which is not controlling on any of the ultimate issues in . . . the case." **Ex. D**, p. 60-61. When Judge Russell asked Respondent whether, in fact, the 1989 amended partnership return was ever filed, Respondent replied that he could not

say without checking. **Ex. D**, p. 62. Judge Russell responded that it disturbed her that Respondent would attack “another attorney’s ethics based upon a tax return that you can’t tell me if it has been signed or filed. That disturbs me.” **Ex. D**, p. 62. Judge Russell subsequently granted Subway’s motion for summary judgment. **Ex. 3**, p. 7. Respondent thereafter withdrew the pending motion for sanctions against Subway and Dunham. **T. 229; Ex. G**, p. 5.

Subway filed a motion for sanctions against Respondent and moved the court to reopen discovery to take evidence about the facts relating to the 1989 amended partnership return. Judge Russell held a hearing on those motions on August 7, 1995. **Ex. G**. At the August 7, 1995, hearing, Judge Russell asked Respondent whether it was significant that Respondent was using the 1989 amended partnership return to “tell me that Mr. Dunham was behaving unethically.” **Ex. G**, p. 36. Respondent’s answer to the Judge reiterated his position that the Kessler and Banks legal team had produced the 1989 amended partnership return years before in response to discovery requests, so the amended return figures should not have been anything new to Subway/Dunham. **Ex. G**, p. 37-38. At the August 1995 hearing, Respondent and his local counsel, Jamison, were confused about whether an amended 1989 partnership return had ever even been prepared, or whether there was just one 1989 partnership return. **Ex. G**, p. 27-36. The court gave Respondent a 15 minute recess to try to sort out the facts, and after the recess Respondent told the court that while Seiffert amended the individual returns, the partnership return prepared by Seiffert was an original. **Ex. G**, p. 29. Respondent later filed a pleading with the court acknowledging that he and Jamison had incorrectly

referred to the amended return as an original return at the August 1995 hearing and otherwise clarified Respondent's position with respect to the amended return. **Ex. H**, p. 5.

Before adjourning the August 1995 hearing, Judge Russell ordered sanctions in the amount of \$5,250 against the Kessler and Banks legal team for what she found to have been bad faith in the pleadings filed in opposition to the motion for summary judgment. **Ex. G**, p. 61-62. With respect to Subway/Dunham's motion to reopen discovery on the 1989 tax return issue, Judge Russell granted Subway/Dunham's motion and ordered that Subway's attorneys be allowed to depose Seiffert and the Kessler and Banks legal team. **Ex. G**, p. 63.

Both Seiffert and Respondent were thereafter deposed (these deposition transcripts are not in the record of this disciplinary case) on the 1989 amended partnership return sanctions issue. Respondent testified in his deposition that he directed Seiffert to prepare an amended 1989 partnership return on the basis of trial strategy so that Respondent would not be put in the position of arguing that the original 1989 partnership return was inaccurate. Respondent testified that case management was his primary objective in directing the preparation of the amended return. Respondent averred that the amended return was proper. **Ex. 3**, p. 8, 10; **Ex. 1**, p. 4; **Ex. 2**, p. 3. Seiffert testified at his deposition that he had the WISRs in his possession when he prepared the amended return, that he knew that the bank deposits understated both gross receipts and revenues, but that he based the amended return on bank deposit records, not the WISRs. **Ex. 3**, p. 8-9; **Ex. 1**, p. 4-5; **Ex. 2**, p. 3-4. Subsequent to discovery on the 1989 amended partnership return

sanctions issue, Judge Russell conducted a two day hearing on the motion for additional sanctions and to revoke Respondent's pro hac vice status. Respondent testified in the narrative and additional witnesses testified. **Ex. 3**, p. 10.

Based on the record created from the depositions and the two day hearing, Judge Russell found that the 1989 amended partnership return was neither reliable nor correct, but that Respondent used it in the litigation as an accurate and reliable return. **Ex. 2**, p. 4; **Ex. 3**, p. 24. She found that Respondent made an executive decision to have an amended tax return prepared, as a matter of trial strategy, because he knew the original return would be a problem at trial because it showed a profit. **Ex. 1**, p. 4. Judge Russell noted that Subway's motion for summary judgment was premised, in part, on the fact that Respondent's fraud claim could not lie because Respondent's clients could not show any actual loss in their business (based on the original 1989 partnership return). **Ex. 1**, p. 3. She also noted that Respondent had "vehemently" argued against the summary judgment motion, relying on the 1989 amended partnership return to dispute the fact of the partnership's profitability. **Ex. 1**, p. 3.

As to the "falsity" of the return, Judge Russell found that Seiffert calculated the gross receipts reflected on the amended return from bank deposit slips because he did not believe all the WISRs were available, even though Dunham quickly located all the WISRs for 1989 in a box of Mr. Seiffert's files during Seiffert's deposition. **Ex. 1**, p. 5. Seiffert calculated gross receipts from bank deposit records even though he acknowledged knowing that only 50% to 60% of the partnership's cash was ever deposited in the bank. **Ex. 1**, p. 5. Judge Russell found it significant that Seiffert

disclaimed to the IRS the accuracy of the figures reflected on the amended return, yet Respondent tendered the amended return to the court as an accurate and reliable document. **Ex. 2**, p. 4.

Judge Russell concluded that Respondent “deliberately caused to be prepared a false tax return for use” in the Subway litigation. **Ex. 1**, p. 5. Judge Russell revoked Respondent’s pro hac vice status and sanctioned Respondent \$408,445.25, the amount of attorney’s fees and expenses incurred by Subway after the filing of the fifth amended counterclaim. **Ex. 1**, p. 7. Respondent was sanctioned pursuant to K.S.A. 60-2007 (repealed 1997), which required a finding that the attorney asserted a claim without a reasonable basis in fact and not in good faith as prerequisite to sanction assessment. **Ex. 3**, p. 19.

About a week before issuing the sanctions memorandum opinion, Judge Russell discussed with a lawyer friend in chambers some of the players in the case. Based on this discussion, Judge Russell decided to recuse herself before ruling on Respondent’s motion to alter or amend her decision. **Ex. 3**, p. 12. The judge who was reassigned the case eventually held an evidentiary hearing on the issue of whether the in-chambers discussion influenced Judge Russell’s sanctions decision and concluded it did not. **Ex. 3**, p. 13-14.

The sanctions case was appealed to the Kansas Supreme Court, which affirmed Judge Russell’s sanctions decision, finding in its turn that there was substantial competent evidence to support Judge Russell’s assessment of sanctions, that Respondent “orchestrated the preparation of the amended 1989 tax return,” and “directed Seiffert to prepare the amended return.” **Ex. 3**, p. 22. The Kansas Supreme Court cited with

approval Judge Russell's findings that Respondent realized his clients' fraud claim was baseless and that Respondent therefore had the return amended relying solely on bank deposit records to bolster his clients' case despite his knowledge that Kessler failed to deposit more than half of the shop's gross receipts in the bank and despite the fact that Kessler had testified that the WISRs were accurate records of the shop's business. **Ex. 3**, p. 22-25.

Evidence Adduced by Respondent at the Hearing

Before the Disciplinary Hearing Panel

Mr. Seiffert, not Respondent, originated the idea of using bank deposit records as the basis for the amended return. Seiffert concluded, after reviewing the WISRs and other primary source business records compiled by Kessler and Banks, that their records were incomplete, inconsistent, or incorrect. **T. 122, 131.** When a CPA is confronted with the situation of a filed return that is incorrect, the CPA must so advise the taxpayer and recommend the filing of an amended return. **T. 94.** If only incomplete or inaccurate records are available to the tax return preparer, he can prepare a return using the incomplete and inconsistent records but must include a disclosure or disclaimer with the return, or withdraw from the case. **T. 124-126.**

The bank records method used by Seiffert to prepare the amended return is recognized by the IRS. **T. 126.** Seiffert did not consult with Respondent about which method to use in preparing the amended return, other than to tell Respondent that Seiffert would have to file a disclaimer with the amended return. **T. 123-124.** Respondent never directed Seiffert to prepare an incorrect or false return. **T. 124.**

Seiffert concluded early on in his involvement in the case that Respondent's clients' Subway shop had not been profitable. **T.** 73. That being the case, Respondent's clients' fraud counterclaim was premised on an out-of-pocket damages theory, not on a lost profits theory. **T.** 73-74. The difference between what Respondent's clients' damages case was worth if the original 1989 partnership return figures were used and if the 1989 amended partnership return figures were used was the difference between \$255,257 and \$218,000, or approximately \$37,000. **T.** 75-76, 168. Seiffert could not have relied on the original 1989 partnership return as the basis for an out-of-pocket damages claim because the original return was obviously inaccurate. **T.** 166.

While both 1989 partnership returns were prepared from incomplete records, Seiffert wanted the return amended because he did not want to be cross examined at trial about a return he felt was full of errors and because he felt that Circular 230 and CPA ethics guidelines required him to recommend the filing of an amended return. **T.** 170-171. The IRS treated the 1989 amended partnership return as the operable return without complaint or inquiry. **T.** 59.

After the Kansas Supreme Court issued its decision against Respondent in the sanctions case, Dunham filed a complaint against Seiffert with the Missouri State Board of Accountancy. **T.** 43, 46, 48. Seiffert's attorneys persuaded the Board to dismiss the complaint without prejudice so the charges could be investigated. **T.** 48. After a presentation to the Board by Seiffert's attorneys and an investigation by the Board, the Board of Accountancy, in a two sentence letter dated September 7, 1999, closed the complaints made against Seiffert and his employer "because the Board found no

violations of Chapter 326 RSMo or the Board's rules and regulations." **Ex.** AA, p. AA-21; **T.** 23-24, 49-56.

#### Present Disciplinary Case

An information alleging violations of Rules 4-3.1, 4-3.3, 4-3.4, 4-4.1, and 4-8.4(c) was filed on May 27, 1999. The hearing was conducted before a Disciplinary Hearing Panel on October 25, 1999, with some short supplemental proceedings on October 26, 1999. The DHP rejected the argument made by Respondent during the hearing that both the Panel and this Court were collaterally estopped by the Board of Accountancy's action with regard to the complaints filed against Seiffert. **T.** 292-293. The Panel rejected Respondent's offer of Exhibits AA through FF, which had been offered in support of that argument, but did take the exhibits as an offer of proof. **T.** 293-294.

The DHP issued its decision on May 7, 2001. The Panel found, on pages one and two of the decision, that Respondent had violated each of the Rules charged in the information. Contrarily, on page eight of the decision, the Panel stated that it could not conclude that Respondent was guilty of violating the charged Rules. The DHP recommended that the Court assign the matter to a Master in light of the Missouri Board of Accountancy's action on the complaints made against Mr. Seiffert. The Panel concluded that it could not recommend dismissing the information, nor did the Panel recommend discipline.

**POINT RELIED ON**

**I.**

**THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT BECAUSE THE ULTIMATE FINDINGS OF THE KANSAS COURTS AND THE RECORD CREATED IN THIS DISCIPLINARY CASE PROVIDE THE BASIS FOR CONCLUDING THAT RESPONDENT VIOLATED RULES 4-3.1 AND 4-8.4(C) IN THAT RESPONDENT ACTED IN BAD FAITH BY PROPOUNDING MISLEADING EVIDENCE IN THE KANSAS LITIGATION.**

K.S.A. 60-2007 (repealed 1997)

*Subway Restaurants, Inc. v. Kessler*, 266 Kan. 433, 970 P.2d 526 (1998)

*In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997), cert. denied, 524 U.S. 940, 118 S.Ct. 2347, 141 L.Ed.2d 717

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

*Buckley v. Buckley*, 889 S.W.2d 175, 179 (Mo.App., E.D. 1994)

Rule 4-3.1

Rule 4-8.4(c)

ABA Standards for Imposing Lawyer Sanctions

POINT RELIED ON

II.

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BASED ON THE EXISTING RECORD BECAUSE THE DISCIPLINARY HEARING PANEL'S RECOMMENDATION THAT THE CASE BE REFERRED TO A SPECIAL MASTER IS NOT APPROPRIATE IN THAT RESPONDENT HAS ALREADY HAD TWO OPPORTUNITIES TO LITIGATE HIS CONDUCT IN THE KANSAS CASE, THE RECORD DOES NOT NEED TO BE SUPPLEMENTED, AND THE ACTION BY THE MISSOURI BOARD OF ACCOUNTANCY IS NOT BINDING ON THE COURT IN THIS ATTORNEY DISCIPLINE CASE.**

*In re Weier*, 994 S.W.2d 554 (Mo. banc 1999)

*Subway Restaurants, Inc. v. Kessler*, 970 P2d 526, 536 (1998)

## ARGUMENT

### I.

**THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT BECAUSE THE ULTIMATE FINDINGS OF THE KANSAS COURTS AND THE RECORD CREATED IN THIS DISCIPLINARY CASE PROVIDE THE BASIS FOR CONCLUDING THAT RESPONDENT VIOLATED RULES 4-3.1 AND 4-8.4(C) IN THAT RESPONDENT ACTED IN BAD FAITH BY PROPOUNDING MISLEADING EVIDENCE IN THE KANSAS LITIGATION.**

Sanctions were assessed against Respondent under K.S.A. 60-2007 (repealed 1997), which required a finding that a party or an attorney assert a claim or defense or deny the truth of a factual statement in pleading or discovery, without a reasonable basis in fact and not in good faith. The Kansas Supreme Court, in upholding Judge Russell's sanctions order, said that Judge Russell's findings that the amended return was neither reliable nor correct, and that Respondent directed its preparation notwithstanding his own knowledge of his client's "creative personal financing," supported the conclusion that Respondent litigated in the Kansas court and actively used the amended return without any good faith basis in fact or law. *Subway Restaurants, Inc. v. Kessler*, 266 Kan. 433, 970 P.2d 526 (1998). These, then, are the ultimate findings from the Kansas case that form the basis of this disciplinary action.

These ultimate findings by the Kansas judiciary, which resulted in a final and valid judgment against Respondent, are the appropriate basis for a disciplinary case in

Missouri. *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997), cert. denied, 524 U.S. 940, 118 S.Ct. 2347, 141 L.Ed.2d 717. Cf. *King General Contractors, Inc., v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495 (Mo. banc 1991). See also *In re Storment*, 873 S.W.2d 227 (Mo. banc 1994) (sister state court findings properly used as basis for Missouri discipline).

The purposes of collateral estoppel are to relieve parties of the cost and vexation of multiple litigation, to conserve judicial resources, and to encourage reliance on adjudication by avoidance of inconsistent judicial decisions. *In re Caranchini*, 956 S.W.2d at 914; *Buckley v. Buckley*, 889 S.W.2d 175, 179 (Mo.App., E.D. 1994). The ultimate issues as to Respondent's good faith in relying on the amended return to oppose Subway's motion for summary judgment and as an affirmative tool to impugn his opponent's professional conduct, as well as whether his legal positions were reasonably based in fact, have been decided adversely to Respondent, and he was without latitude to relitigate those issues in this disciplinary case.

Of course, the offensive use of non-mutual collateral estoppel is appropriate only when the issues involved in the prior adjudication and the disciplinary case are identical, the prior adjudication was on the merits, Respondent was a party to the prior adjudication, and Respondent was afforded a full and fair opportunity to litigate the issues for which Informant is asserting preclusive effect. Here, Respondent's role in the preparation of the amended return and his role as proponent of the amended return are identically implicated in the Kansas sanctions case and the Missouri disciplinary case. The sanctions case was on the merits and Respondent was a named party. Discovery was

allowed on the sanctions motion, and Judge Russell presided over a two day hearing at which experts testified, and at which Respondent was permitted to testify in the narrative. Respondent appealed the sanctions order to the Kansas Supreme Court and retained appellate counsel to brief and argue his case. There can be little doubt that Respondent had a full and fair opportunity to litigate the issues.

Second guessing the ultimate findings of the Kansas courts is not an appropriate function in the determination of whether collateral estoppel should apply. The complete record that was before the Kansas courts is not part of this disciplinary record. For example, the transcript of the April 13, 1995, hearing on the motion for summary judgment makes repeated reference to accusations made in Respondent's brief opposing the motion. Judge Russell and Mr. Dunham both make reference to the brief's allegations of deception by Dunham/Subway due to their reliance on the figures reported on the original 1989 partnership return. That brief is not part of this disciplinary record. Likewise, the deposition transcripts wherein Respondent and Seiffert acknowledged their various roles in the preparation of and motive for preparing the amended return are not in our record. It is reasonably inferable that these portions of the record before the Kansas courts played a significant role in the decisions.

The pivotal issue before the Court is whether the ultimate findings from the Kansas sanctions case translate into sanctionable conduct. Clearly, the ultimate finding that Respondent propounded a claim without a reasonable basis in fact and not in good faith constitutes a violation of Rule 4-3.1. The comment to the Rule notes that an advocate has a duty not to abuse legal procedure. The Kansas Supreme Court observed

that the “purpose of K.S.A. 60-2007 is to penalize willful misuses of the judicial process.” 970 P.2d at 535. Respondent’s affirmative use of the amended tax return, which by Respondent’s own accountant’s admission reported incomplete information, as a litigation tool to controvert facts posited with a motion for summary judgment, was frivolous and a misuse of legal procedure.

Respondent likewise violated Rule 4-8.4(c) by directing the preparation of and propounding a misleading piece of evidence and legal argument. The Kansas courts obviously believed that the 1989 amended partnership return was “false.” We can only speculate whether the courts meant that the return was false in the sense that it violated tax law, as that issue was certainly not before them. What is apparent from the Kansas decisions is that Judge Russell and the Kansas Supreme Court found that the amended return was created under suspicious circumstances and was used affirmatively by Respondent as a litigation tool without any attempt by Respondent to clarify the amended return’s shortcomings.

While the evidence offered by Respondent during the hearing before the Disciplinary Hearing Panel, the IRS’ acceptance of the amended return, and the dismissal by the Missouri Board of Accountancy of the complaint against Seiffert, all indicate that the amended return was prepared in conformity with IRS regulations and CPA ethics guidelines, the fact remains that the amended return reported grossly incomplete financial information about Respondent’s clients’ sandwich business. Respondent’s failure to acknowledge this deficiency, his expert’s affirmative representation of the amended return financial figures as the “correct figures” in court pleadings, and Respondent’s

accusation that his opposing counsel was practicing deception in failing to cite the amended return's figures, was conduct involving dishonesty and misrepresentation.

Informant recommends a public reprimand as the appropriate sanction for Respondent's misconduct. Respondent violated a duty owed to the legal system, not a client. ABA Standards for Imposing Lawyer Sanctions, Rule 6.2. The evidence shows that Respondent acted knowingly in advancing the amended return as a litigation tool in controverting the summary judgment motion and without acknowledging the amended return's deficiencies as a financial statement. Further, Respondent is estopped from relitigating that element of the case because K.S.A. 60-2007 (repealed 1997) specified that an attorney could be held individually liable under the statute only if he acted "knowingly and not in good faith." The injury from Respondent's professional misconduct appears primarily to have been suffered by himself, inasmuch as he, and only he, was sanctioned to the tune of \$408,445 by the Kansas court. Summary judgment had already been entered against Respondent's clients' counterclaim before the amended return sanctions case was heard and decided. In light of Respondent's lack of prior discipline in Missouri, and the severity of the sanction already imposed for the conduct, public reprimand is the appropriate sanction.

## II.

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BASED ON THE EXISTING RECORD BECAUSE THE DISCIPLINARY HEARING PANEL'S RECOMMENDATION THAT THE CASE BE REFERRED TO A SPECIAL MASTER IS NOT APPROPRIATE IN THAT RESPONDENT HAS ALREADY HAD TWO OPPORTUNITIES TO LITIGATE HIS CONDUCT IN THE KANSAS CASE, THE RECORD DOES NOT NEED TO BE SUPPLEMENTED, AND THE ACTION BY THE MISSOURI BOARD OF ACCOUNTANCY IS NOT BINDING ON THE COURT IN THIS ATTORNEY DISCIPLINE CASE.**

In a disciplinary case, the Supreme Court reviews the record de novo, and the recommendation of the Disciplinary Hearing Panel is advisory. See In re Weier, 994 S.W.2d 554 (Mo. banc 1999). In this case, the DHP concluded the hearing on October 26, 1999, and issued its decision on May 7, 2001. The Panel recommended neither discipline nor dismissing the information. Rather, the Panel recommended referral of the case to a Special Master in order that further evidence could be gathered and consideration given to the effect of the dismissal of professional complaints against Mr. Seiffert by the Missouri Board of Accountancy. The Panel said it was “troubled over the fact that the singular basis of the sanctions imposed by the Kansas Trial Court was that Respondent deliberately caused to be prepared a false 1989 income tax return for his client to support the client’s damage claim.” DHP Decision, p. 8.

Informant respectfully suggests that the Panel misperceived the import of the Kansas decisions and the collateral estoppel effect of those decisions in Respondent's Missouri disciplinary case. The issue of the lawfulness of the 1989 amended partnership return prepared by Mr. Seiffert was never before the Kansas courts. The findings that form the basis for this disciplinary case derive from decisions made by the Kansas courts on a motion to revoke Respondent's pro hac vice status and to impose sanctions pursuant to K.S.A. 60-2007 (repealed 1997). That statute required findings that the attorney knowingly asserted a claim or defense or denied the truth of a factual statement in pleading or discovery without a reasonable basis in fact and not in good faith. It was not necessary that the courts decide whether the amended return was "false" in the sense that it could be so characterized by application of IRS regulations and statutes. Indeed, while a fair reading of the Kansas decisions would lead one to conclude that the judges before whom Respondent was litigating held the opinion that the amended return would not pass tax review muster, their conclusion with respect to the actual issue before them was that the amended return was neither reliable nor correct, that Respondent directed its preparation notwithstanding his own awareness that gross receipts would be greatly underreported, and then presented the amended return in court pleadings as the "correct" return and actively used it as a litigation tool on a number of issues without clarifying its deficiencies. Those are the findings upon which Missouri discipline turn.

The record in this case is prolix. The record in the Kansas litigation, only a small portion of which is part of this disciplinary case, is even more so. See *Subway Restaurants, Inc. v. Kessler*, 970 P2d 526, 536 (1998). The question of Mr. Seiffert's

ethical accountability as a certified public accountant, which was the issue before the Missouri Board of Accountancy, is not identical to the issues facing Respondent in this attorney discipline case. The Office of Chief Disciplinary Counsel, which is the party against whom Respondent sought to assert collateral estoppel as a consequence of the Board's dismissal of the complaints against Mr. Seiffert, was not a party to the Board of Accountancy proceedings. This matter is ready for decision, and Informant respectfully requests that the Panel's recommendation of a referral not be followed and that the Court publicly reprimand Respondent for his conduct in the Kansas litigation.

**CONCLUSION**

Respondent is guilty of professional misconduct by violating Rules 4-3.1 and 4-8.4(c) of the Rules of Professional Conduct. The Supreme Court should publicly reprimand Respondent for his violation of the Rules.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_, 2001, two copies of Informant's Brief have been sent via First Class mail to:

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\_\_\_\_\_  
Sharon K. Weedon

**CERTIFICATION: SPECIAL RULE NO. 1(c)**

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

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Special Rule No. 1(b);
3. Contains 5,920 words, according to Microsoft Word 97, 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. Weedon