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JURISDICTIONAL STATEMENT

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

STATEMENT OF FACTS

Respondent, Josh P. Tolin, is a law school graduate of Washburn University, class of 1986. He was licensed as an attorney on or about April 25, 1986 (Tr. 81)¹. Respondent's Missouri Bar number is 35836. He practices exclusively in the area of plaintiff's medical malpractice/negligence (Tr. 81) and maintains an office for the practice of law at 2642 Highway 109, Suite G, Wildwood, Missouri 63040. Respondent handles large cases and therefore has only approximately 30 litigation files at a time (Tr. 151).

Respondent is rated as an "AV" attorney by Martindale-Hubbell (Tr. 81-82). His good reputation among the members of the Bar is amply evidenced by the letters from Missouri lawyers of impeccable standing in Respondent's Appendix A1-A6. He was previously disciplined by the Missouri Supreme Court for conduct arising out of his relationship with Amy Lennen (hereinafter Lennen) (Tr. 85, 89). In that case, Respondent's license to practice law was suspended on June 14, 2002. The suspension was for a period of 150 days, but this Court retroactively applied the suspension to begin April 13, 2002. Sixty days of the 150 day

¹ Citations to the trial testimony of June 20, 2005, are denoted by the actual page numbers shown on the transcript itself which is included in Informant's Appendix, pages A2-A43.

suspension were for medical reasons pursuant to Rule 5.23(b) and the remainder were for violation of Rules 4-1.15 and 4-8.4(d) of the Rules of Professional Conduct (Appendix A7).

Respondent entered into a Stipulation and Agreement with the Chief Disciplinary Counsel that set out the following transgressions:

"4. Beginning in or about December 1999 and continuing until in or about June 2000, Respondent commingled personal funds with the Tolin & Zevan trust account at First Bank. Such commingled funds were transferred by wire transfer from the Tolin & Zevan trust account through the trust account of a third-party attorney for Respondent's personal expenditures.

5. All funds utilized by Respondent which passed through the Tolin & Zevan trust account belonged to Respondent. There is no evidence that any client funds in the Tolin & Zevan trust account were affected as a result of Respondent's conduct."

Following Respondent's Application for Reinstatement and upon the recommendation of the Chief Disciplinary Counsel approving the reinstatement, the Supreme Court reinstated Respondent's license to practice law in the State of Missouri on October 22, 2002 (Appendix A8). With the exception of the prior discipline set forth above and the pending matter before this Court, Respondent had never been the subject of any other complaint made with the Office of Chief Disciplinary Counsel (Tr. 83, l. 5-11; Tr. 119, l. 2-4). Respondent's only complaints, both the prior event and this current matter, arose out of his misguided relationship with Lennen (Tr. 83, l. 5-11; Tr. 84, l. 22-25; Tr. 85, l. 1-2).

Respondent had represented Brenda Dietrich (hereinafter Dietrich) and her brother in a medical malpractice-wrongful death suit in which it was alleged certain healthcare providers in Hannibal, Missouri had caused the death of Dietrich's mother. Because of events which occurred and are at issue in the instant case, Dietrich discharged Respondent and the case was eventually tried to a jury in Federal District Court in Hannibal by another attorney. On May 10, 2003, a jury returned a verdict in favor of the defendant doctor and against Dietrich and her brother. On May 13, three days after the jury verdict, Dietrich filed a Complaint against Respondent (Informant's Appendix A71-A108). Dietrich waited until after the jury verdict was returned to file the Complaint, even though she was aware of the matters raised in her complaint for seven or eight months.

In June 2004, acting on Dietrich's complaint, Informant filed an Information alleging that Respondent was guilty of: (1) professional misconduct pursuant to Rule 4-1.6(a)-- Intentionally or negligently revealing confidential information to a third party for purposes unrelated to the representation; (2) professional misconduct pursuant to Rule 4-8.4(c)-- Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and (3) violating Rule 4-8.4(d)--Engaging in conduct prejudicial to the administration of justice (Informant's Appendix A55-A63).

Respondent's Relationship with Amy Lennen

Respondent met Lennen at a club in Las Vegas in Fall 1999 (Tr. 122, l. 2-15). Although Respondent was married with two children at the time he met Lennen, he became deeply infatuated with and intimately involved with her (Tr. 122, l. 16-18). Respondent

eventually broke off the relationship with Lennen, but not before spending significant personal funds on Lennen, sending her money every month and buying her gifts (Tr. 85, l. 14-15; Tr. 122, l. 24- pg. 123, l. 7). Some of the funds used for Lennen were passed through his prior firm's trust account and through the trust account of a third-party attorney in order to hide the expenditures from Respondent's then-wife (Tr. 120, l. 12 - Tr. 121, l.14). The romantic relationship was ended some time prior to the filing of the first complaint against Respondent.

Even after Respondent terminated the intimate relationship with Lennen, she continued to contact him, mostly for the purpose of making monetary demands and threats against him and his family. Respondent continued to pay money to Lennen after the relationship ended (Tr. 130, l. 20 - Tr. 131, l. 1). Respondent was forced to change his cell phone number as Lennen made threats not only to him but to kill his children (Tr. 89, l. 16-21; Tr.129, l. 5-6). He acknowledges "every day of my life" that he exercised poor judgment in being involved with her (Tr. 90, l. 9-12).

Between November 1999 and Spring 2000, Lennen accompanied Respondent on several business trips. Respondent often carried case files with him on the trips (Tr. 91,, l. 12 - Tr. 92, l. 11). Lennen also visited Respondent's St. Louis office a couple of times after business hours when no one else was there (Tr. 94, l. 19-21). Once Respondent stopped seeing Lennen romantically, he saw her only a couple more times (Tr. 131, l. 20 - Tr. 132, l. 23). One of those times was in 2000 or 2001, as Lennen passed through St. Louis on her way

to treatment for her drug addiction. Respondent picked Lennen up at the airport during a lengthy layover and she accompanied him to his office (Id.).

At no time did Respondent discuss Dietrich with Lennen (Tr. 133, 1.6-10; Tr.154, 1. 15 - 16). Respondent did not give Lennen any personal identifying information from any client file; however, there would be no way Lennen would know Dietrich's maiden name except by going through the files.

Respondent's personal office was down the hall from the file office which was as far away in the 3,300 square foot office as possible (Appendix A9). The litigation files were kept in one cabinet. If Respondent was on the phone, in the restroom, or not paying attention to her, Lennen could have gone through files to get information (Tr. 95, 1.23 - Tr. 96, 1. 16).

In Spring 2002, Respondent received a call from Lennen and later from her attorney, Mr. David Demergian. Lennen was in jail in the State of California on a drug charge (Tr. 98, 1. 1- Tr. 100, 1. 18). Demergian strongly urged Respondent to come to California and said he would get a court order so that Respondent could see Lennen in jail (Id.). Respondent traveled to California that April and met with Lennen in the jail for the purpose of finding out information. Respondent had been provided with a Court Order that allowed him access to the prisoner (Appendix A10). He had had no contact with Lennen at all in 2002 until this situation arose (Tr. 133). It was during the jailhouse meeting that he learned Lennen had stolen Brenda Dietrich's identity, and was the first time he learned of any connection between Lennen and Dietrich (Tr. 100, 1. 6-13). Respondent found out Lennen was arrested under the name of Brenda Harrison, Dietrich's maiden name.

Respondent also learned while he was in California that a vehicle had been purchased by Lennen in the name of Harrison or Dietrich. He demanded that the vehicle be transferred out of her name immediately (Tr. 101, 1.21-23). Lennen's attorney advised him that if Respondent would make one payment on the car loan, it would be transferred out of her name, which Respondent did (Id.).

Respondent witnessed Lennen's conviction and sentencing on the drug charge, noted no other client names showed up under the aliases used by Lennen, and presumed that everything had been resolved (Tr. 101, 1. 21 - Tr. 103, 1. 13). He wrote the check for the car payment on May 18, 2002 (Informant's Appendix A107).

Respondent was also advised that there was a cancelled credit card in Dietrich's name, which Respondent paid off (Tr. 102, 1. 16-25; Tr. 103, 1. 1-2). Respondent reasonably believed that because the credit card had been cancelled and he had paid off the balance, and because the car would either be sold or title transferred to another person, that Dietrich's problems would be cleared up (Tr. 103, 1. 5-8; Tr. 106, 1. 4-12; Tr. 107, 1. 11-17). At this time, Lennen had not been charged with identity theft, and was only being held on the drug charges.

Respondent felt an obligation to Dietrich and wanted to tell her what Lennen told him, but was told by Demergian that he could not, due to the California Court Order. That Order established that Respondent was visiting with the prisoner on condition that he be subject to the same "obligations, as if he were licensed as an attorney within the State of California." Since Lennen had made admissions to him about the uncharged identity theft, (Tr. 106, 1. 23 -

Tr. 107, l. 16), Demergian took the position that the specific language of the Court Order cloaked Lennen's disclosures to Respondent with attorney/client privilege (Tr. 106-107, 109; Appendix A10). Demergian needed to protect his client, Lennen, but also wanted Respondent to find out about the identity theft so Respondent could take steps to protect Dietrich (Tr. 107, l. 3-17).

Respondent's relationship with Lennen was not in character for him. He had never had an affair before (Tr. 85, l. 22 - Tr. 86, l. 5). His lapse of judgment caused him many hardships: his license to practice his profession was suspended, his wife divorced him, he lost the ability to see his children every day, his law partnership broke up, his credit was destroyed, and he lost time and money, to say nothing of the embarrassment he suffered. (Tr. Id.). He continues to receive credit card solicitations in Lennen's name although Respondent has moved twice since June 2000 (Appendix A11).

Respondent's Relationship with Brenda Dietrich

Some time during Fall 1999, Brenda Harrison Dietrich contacted Respondent by telephone regarding a wrongful death case arising out of alleged medical negligence concerning her mother that she and her brother were interested in pursuing against Hannibal Regional Hospital and a physician (Tr. 12, l. 22 - Tr. 14, l. 3). Dietrich and Respondent spoke several times by telephone and Dietrich provided Respondent paperwork to review so Respondent could determine whether or not he wanted to accept the case, which he did (Id.). Respondent filed the lawsuit in November 2000 (Informant's Appendix A82).

When Respondent and his previous law partner ended their professional relationship (due to the trust account issues upon which the prior partner, David Zevan, had made a complaint to OCDC), Respondent sent Dietrich a letter advising that she had the choice of continuing with Respondent's representation or his former partner. Dietrich chose Respondent (Tr. 16, l.14-21; Informant's Appendix A78-A79).

Dietrich and Respondent met for the first time in approximately Spring 2000 (Tr. 14, l. 11-13). In response to a discovery request from the defendants in the wrongful death case, Dietrich gave her birth certificate to Respondent to prove she was a statutory Class I beneficiary (Tr. 93, l. 13-24). Dietrich was very interested in the progress of the lawsuit and kept in frequent contact with Respondent. She desired that she or her brother attend all the depositions, including those taken out of state (Tr. 61, l. 2-7).

Dietrich accompanied Respondent to New York for an expert witness deposition in approximately October 2001 (Tr. 19, l. 9-14). From Dietrich's first meeting with Respondent, he had been interrupted by cell phone calls from a person he told Dietrich was named "Amy." The phone calls were, in fact, from Amy Lennen. Respondent, attempting to hide the fact he had an affair, lied to explained away the calls by saying that "Amy" was his "half sister" who had drug and legal problems (Tr. 14, l. 15 - Tr.15, l. 3). While in New York, Lennen called frequently and Dietrich finally realized she was not Respondent's half sister (Tr. 21, l.1-15).

The lawsuit brought on behalf of Dietrich and her brother was first set for trial in April 2002. However, because Respondent was then on suspension, the trial was rescheduled for

November 2002 (Tr. 23, l. 8-24). Respondent withdrew from all of his cases in April 2002 and talked with Dietrich about her case being ready for trial (Tr. 111, l. 20 - Tr. 113, l. 13).

Dietrich first learned of the identity theft in September 2002 when she applied for a loan (Tr. 25, l. 13-25). After investigating, Dietrich identified the thief as Amy Lennen. The only connection between Lennen and Dietrich was Respondent (Tr. 26, l. 14 - 25). No one knows exactly how Lennen got Dietrich's personal identifying information.

Dietrich received documents from Chase Bank that showed a car loan issued in her maiden name, Brenda Harrison (Tr. 26, l. 1; Tr. 27, l. 13; Informant's Appendix A94; A99-A102). In the documents, Dietrich discovered that numerous checks from the account of Donald J. Solomon and one check from the account of Josh P. Tolin had been issued to make the car loan payments (Informant's Appendix A103-A108). Her investigation revealed that in addition to the car loan, credit cards and driver's licenses from three different states had been issued for Lennen in the name of Brenda Harrison (Tr. 34, l. 20-24). Dietrich had never provided the name of Harrison to Respondent except that it was on her birth certificate (Tr. 77, l. 3-11). After Respondent learned from Lennen about the stolen identity, he checked Dietrich's file to see if her birth certificate was still there and it was (Tr. 93, l. 25 - Tr. 94, l. 5). All loans and credit card payments in the fictitious name were current (Tr. 32-34, 37).

As mentioned above, Lennen had been arrested on drug charges in the name of Brenda Harrison (Tr. 35, l. 23 - Tr. 36, l. 5). Dietrich contacted the police who supposedly told her to have no further contact with Respondent (Tr. 39, l. 14-20).

To begin to remedy the stolen identity issues, Dietrich had to send her fingerprints and a copy of her driver's license to police in California, work with credit reporting agencies to clear her credit history, get the drug crimes that had been charged in her name cleared from her record, and go to California to testify at Lennen's trial. Contrary to Informant's assertion, Dietrich made only one trip to California (Tr. 67, l. 20-21). The clearing of Dietrich's name and credit record has now been accomplished (Tr. 37-38, 54, 67-68), but it cost her time, aggravation, and emotional upset (Tr. 52). She was not paid for lost time from work, but all of her direct expenses were paid for by the State of California for appearing at trial (Tr. 54, 55). Restitution in the amount of approximately \$7,600 was ordered but not paid (Tr. 55).

Some time prior to October 14, 2002, Dietrich fired Respondent from handling her lawsuit. Dietrich admits she was fully satisfied with Respondent's work on the wrongful death lawsuit until the time she discharged him and it was her choice that Respondent not continue representing her (Tr. 66, l. 2-5). Prior to being discharged, Respondent kept in close contact and communication with Dietrich, kept her informed on everything going on in the case, and, according to Dietrich, did an excellent job (Tr. 60, l. 9 - Tr. 61, l. 1).

Respondent, unaware that Dietrich knew of the stolen identity, wrote her a letter on October 14, 2002, stating in part:

". . . while I understand your concerns, I will be reinstated this Thursday and have been doing nothing but preparing for your case along with Alvin Wolff. The last time I spoke with you, you didn't express your concerns." (Informant's Appendix A84).

The letter urged Dietrich to meet with Respondent and Alvin Wolff (Id.). Before Dietrich discharged Respondent and before Respondent's October 14, 2002, letter to Dietrich, Respondent contacted Dietrich and advised her that Wolff was willing to help her with her case (Tr. 113, l. 8-17).

At the hearing of this matter, Dietrich testified that her federal case was again continued from November 2002 by Mr. Wolff "so he could get more familiar with the case" (Tr. 40). However, her letter of complaint states:

"Alvin Wolff, Jr., Agreed [sic.] to take on my case and said that he could be ready for trial in November. Unfortunately, the case got postponed again due to the defendants wanting it held in Hannibal, MO instead of St. Louis." (Informant's Appendix A74, ¶1).

The wrongful death case was then set for April 2003 and was tried by Alvin Wolff. The jury found in favor of the defendant doctor; however, Hannibal Regional Hospital had settled with plaintiffs before trial (Tr. 41, l.12-19).

Dietrich understood that the experts her attorneys had used were costly, and also knew that Respondent had paid their fees up-front and would be reimbursed at the end of the case if there was a recovery (Tr. 62, l.8-22). Respondent presented a statement for the expenses (which he discounted) at the end of the case and was reimbursed for expenses from the recovery from the hospital. He earned no fee (Tr. 62, l. 23; Tr. 63, l. 3; Informant's Appendix A89). Dietrich was satisfied that she had been well represented by Alvin Wolff and that all of the background work had been done well by Respondent (Tr. 65, l. 20-25).

General Facts

Respondent has taken steps to make his files more secure. In his new office location, the files are kept in the paralegal's office and no one has access without the paralegal or his secretary getting them (Tr. 97, l. 5-8).

There is an age difference of approximately 15 years between Lennen and Dietrich, with the only obvious similarities being they are both Caucasian and have brown hair (Tr. 154-155). The sales manager for the dealership where Lennen obtained the car and filled out credit application papers realized her identification indicated she should be 40 years old, and also realized that Lennen did not look like she could be 40, but he processed the loan anyway (Appendix A34)².

Respondent did not know whether paying the credit card bills and contributing to paying off the car loan was the best way to handle the matter, but he thought he had taken

² Informant claims Dietrich and Lennen were "of similar age," which was apparently, in Informant's view, crucial to these events. The record actually shows that Lennen was much younger than Dietrich and that simple observation of Lennen was enough to determine she was not the 40 year old Brenda Dietrich.

steps to protect Dietrich's credit (Tr. 109, l. 8 - Tr. 111, l. 19). He acknowledged that Dietrich has every reason to be upset but believes he did what he thought was in her best interests by paying off everything that was in her name (Id).

Respondent did not intentionally or negligently reveal confidential information regarding Dietrich to a third party, nor did Respondent provide personal information about Dietrich to Lennen. Lennen, acting alone, illegally removed personal information about Dietrich from Respondent's file, without Respondent's knowledge or consent (Tr. 92-93, 96).

Respondent made the payments on the accounts that were illegally and falsely established by Lennen in Dietrich's name in good faith and to clear Dietrich's credit history. Respondent received no benefit from paying these accounts. On the contrary, he paid money from his own pocket solely because of his concern for Dietrich.

POINTS RELIED ON

POINT I

THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT JOSH TOLIN FOR VIOLATIONS OF RULES 4-1.6(a) OR 4-8.4(c) BECAUSE HE DID NOT REVEAL ANY INFORMATION ABOUT A CLIENT TO A THIRD PARTY OR ENGAGE IN ANY CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION IN THAT AN ATTORNEY CANNOT AND SHOULD NOT BE HELD RESPONSIBLE FOR THE CRIMINAL ACTS OF ANOTHER THAT MAY DISCLOSE CONFIDENTIAL CLIENT INFORMATION NOR SHOULD AN ATTORNEY FACE DISCIPLINE FOR HIS GOOD FAITH EFFORTS TO REPAIR THE HARM CAUSED BY THE CRIMINAL.

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

Wright v. St. Louis Produce Market, Inc., 43 S.W.3d 404 (Mo.App. E.D. 2001)

Nappier v. Kincade, 666 S.W.2d 858 (Mo.App. E.D. 1984)

POINT II

RESPONDENT SHOULD NOT BE DISBARRED IN THIS MATTER BECAUSE HE DID NOT REVEAL CONFIDENTIAL CLIENT INFORMATION TO A THIRD PARTY, NOR DID HE DECEIVE A CLIENT WITH THE INTENT TO BENEFIT HIMSELF, IN THAT HIS ACTIONS DO NOT RISE TO THE LEVEL OF DECEITFUL AND FRAUDULENT CONDUCT SUPPORTING DISBARMENT. THE DISCIPLINARY HEARING PANEL JUMPED TO CONCLUSIONS WITHOUT SUPPORT IN THE RECORD, AND THIS COURT HAS NOT ALWAYS IMPOSED THE SANCTION OF DISBARMENT EVEN IN THE FACE OF FRAUDULENT OR DISHONEST CONDUCT.

Kansas City v. Lane, 391 S.W.2d 955 (Mo.App. W.D. 1965)

ABA Standard 4.23 – ABA Standards for Imposing Lawyer Sanctions (1992)

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

POINT III

IF THIS COURT IMPOSES DISCIPLINE GREATER THAN A REPRIMAND, CURRENT CLIENTS OF RESPONDENT WILL BE IRREPARABLY HARMED BECAUSE RESPONDENT HANDLES ONLY COMPLEX MEDICAL MALPRACTICE CASES IN THAT A NUMBER OF THESE CASES ARE SET FOR TRIAL IN THE NEAR FUTURE AND IN THAT THE CLIENTS WOULD BE SEVERELY PREJUDICED IF RESPONDENT WERE NOT PERMITTED TO COMPLETE THEIR CASES.

§538.210.1, RSMo. (2000) (repealed August 28, 2005)

§538.210, RSMo. (2005) (effective August 28, 2005)

POINT IV

THE SUPREME COURT SHOULD NOT DISBAR RESPONDENT BECAUSE DISBARMENT IS A DISPROPORTIONATE REMEDY AND UNNECESSARY TO AVOID A RECURRENCE; BECAUSE RESPONDENT IS NOT A DANGER TO THE PUBLIC; BECAUSE RESPONDENT CAN CONTINUE TO PRACTICE LAW AND MAINTAIN THE DIGNITY AND INTEGRITY OF THE LEGAL PROFESSION; AND BECAUSE HE HAS NOT COMMITTED OFFENSES WARRANTING DISBARMENT.

In re Phillips, 767 S.W.2d 16 (Mo. 1989)

In re Staab, 719 S.W.2d 780 (Mo. banc 1986)

In re Kramer, No. SC82516 (October 3, 2000)

ARGUMENT

POINT I

THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT JOSH TOLIN FOR VIOLATIONS OF RULES 4-1.6(a) OR 4-8.4(c) BECAUSE HE DID NOT REVEAL ANY INFORMATION ABOUT A CLIENT TO A THIRD PARTY OR ENGAGE IN ANY CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION IN THAT AN ATTORNEY CANNOT AND SHOULD NOT BE HELD RESPONSIBLE FOR THE CRIMINAL ACTS OF ANOTHER THAT MAY DISCLOSE CONFIDENTIAL CLIENT INFORMATION NOR SHOULD AN ATTORNEY FACE DISCIPLINE FOR HIS GOOD FAITH EFFORTS TO REPAIR THE HARM CAUSED BY THE CRIMINAL.

The purpose of attorney discipline is to protect the public from harm and to maintain the integrity of the legal profession. *In Re Crews, 159 S.W.3d 355, 360 (Mo. banc 2005)*. Discipline of an attorney “should be fashioned in light of the purpose of lawyer discipline.” *ABA Standards for Imposing Lawyer Sanctions* (1992) (hereafter, “*ABA Standards*”). The standard of review in an attorney discipline case is for this Court to independently view all evidence, make its own determination of the facts and credibility of witnesses, and to use the findings of the disciplinary panel only as “advisory.” *In re Cupples, 952 S.W.2d 225, 228 (Mo. banc 1997)*.

Respondent has been a licensed attorney in Missouri since 1986. He has one prior exposure to the disciplinary process, one that is inextricably intertwined with the facts of this case (Appendix A7). He is facing disciplinary charges this time because of the actions of a criminal, Amy Lennen, and his response to those acts. Prior to her criminal acts, Lennen and Respondent had an affair. That affair was the ignition point for Respondent's first discipline, and the aftermath of that affair is at the heart of the current proceedings.

It is clear that Amy Lennen's criminal acts, stealing the identity of another, harmed Brenda Dietrich. The question is whether Respondent must pay the price for those crimes. Generally speaking there is no duty to protect another from the intervening criminal acts of another. *Wright v. St. Louis Produce Market, Inc.*, **43 S.W.3d 404, 409 (Mo.App. E.D. 2001)**. There are special exceptions to the general rule, however, that impose a duty of protection. Relationships such as innkeeper-guest, common carrier-passenger, school-student, and sometimes employer-employee are enough to impose the duty. **Id. at 409-10**. The special theories that give rise to such a duty generally require that some known risk of the crime be evident. **Id. at 410**. Special facts and circumstances, such as the knowledge of a property owner that violent crimes occur on his property, can also give rise to liability when someone becomes the victim of that type of violent crime. *See Faheen, by and through Hebron v. City Parking Corp.*, **743 S.W.2d 279, 272 (Mo.App. E.D. 1987)**.

In *Wright*, the court held that an employer could be held liable for a physical attack on a worker by a co-worker if it knew the co-worker had a history of violence or physical attacks. **43 S.W.3d at 410**. The plaintiff argued the employer knew there were ex-convicts

being hired by a lessee on employer's property. The court said, however, that without specific knowledge that the co-worker had violent tendencies – some degree of knowledge he had physically harmed someone before or had the nature to do so – the employer could not be liable. The fact ex-convicts worked there was not enough. “General knowledge of lessee's hiring practices . . . fails to impart [employer] with knowledge of [co-worker's] dangerous nature.” **Id. at 411.**

Informant makes much in its brief about the fact Amy Lennen suffered from addiction problems. Informant blames Respondent for allowing “a person Respondent knew to be a drug addict who had a criminal record” (Informant's Brief, page 20) to be in his law office after normal work hours. Informant cites to no section of the record for its claim that Lennen had a criminal history that was known to Respondent. Respondent can only assume that Informant, in its zeal, has assumed every person with an addiction is a known criminal. But even if she had a criminal past, there is nothing in the record that even hints that Respondent could have known Lennen intended to misappropriate someone else's identity. Having an addiction does not make one a suspect for every crime imaginable. It certainly does not put someone on notice that the addict (who was having a brief visit with Respondent while on her way to a treatment center) will root through files, cabinets, drawers and briefcases in an effort to obtain the kind of source documents needed to perpetrate an identity theft.

In *Nappier v. Kincade*, 666 S.W.2d 858 (Mo.App. E.D. 1984), a restaurant owner was sued for the wrongful death of a customer. The case was before the court after plaintiff's petition was dismissed for failure to state a claim against the restaurateur. At issue was the

duty owed by the restaurateur and whether it had been sufficiently pled. “The special circumstances exist where the business owner realizes, or should realize, through special facts within his knowledge, that criminal acts of a third party are occurring or are about to occur on his premises.” **Id. at 860.** Those “special facts” mean Respondent had to have known Lennen was prone to stealing confidential information or that he knew she was an identity thief. Neither circumstance exists in this case.

Had Lennen perpetrated other identity thefts in her past, and had Respondent known of that past, or had sufficient reason to suspect such a string of crimes similar to what she did to Dietrich, then Informant might be able to make a case that allowing a known identity thief to stay, unescorted, in a law office is problematic. It may, under different facts and circumstances, be able to make a case that a special duty existed to protect a client from the kind of crime Lennen was known to perpetrate. But those facts are not present here, and Respondent cannot be held responsible when the type of damage inflicted on Brenda Dietrich was unforeseeable.

A reading of Informant’s Brief would give the false impression that Respondent was a willing accomplice in Lennen’s criminal acts, that he routinely gave Lennen personal and protected information about his client, Brenda Dietrich, and that he wished to, and did, personally benefit from Lennen’s actions. How it can be said that the payment of thousands of dollars for credit card bills and bank loans he did not personally incur and the loss of his marriage and family are personally beneficial to Respondent is a mystery, but that is the position the Informant has taken.

It is undisputed that Respondent paid off credit card balances that were illegally incurred by Lennen in the name of Brenda Dietrich. Respondent was attempting to “clear the books,” thereby protecting Dietrich’s credit history. (Tr. 102 - 03). It is undisputed that Respondent made a payment on Lennen’s car loan about the same time and for the same reasons (Tr. pg. 101, l. 15 to pg. 103, l. 8; Tr. pg. 142, l. 3-17; Tr. pg. 109, l. 8-20). It is also undisputed that Respondent did not notify Brenda Dietrich of the misappropriation of her identity or his own efforts to eliminate the problems the misappropriation could cause. (Tr. pg. 140, l. 20 to pg.141, l. 7). “An attorney should not allow himself or herself to be used to perpetrate civil offenses, but what an attorney must do to avoid running afoul of his ethical obligations is another matter.” ***Roth v. La Societe Anonyme Turbomeca France,120 S.W.3d 764, 777 (Mo.App. W.D.2003).***

Respondent believed he was prohibited from reporting the matter to Dietrich because he was under a California Court Order that said he could speak with Lennen under the same obligations “as if he were licensed as an attorney within the State of California” (Appendix A10). As the Court Order was obtained so he could visit with Lennen for the benefit of her California attorney, David Demergian, Respondent reasonably believed this order of the California court cloaked his conversations with Lennen under the confidentiality of the attorney-client relationship (Tr. pg. 108, l. 11 to pg. 109, l. 23). The Disciplinary Hearing Panel (hereinafter DHP) agreed that the court order made Respondent “Demergian’s agent, and under the cloak of attorney-client privilege” (Informant's Appendix A48-A49). Respondent found himself in a “damned if I do, damned if I don’t” situation. Had he revealed

the confidential information he had received from Lennen to Dietrich, he would have been guilty of transgressing the very ethical rules he is now accused of violating.

Informant, citing Rule 4-8.4(c), has charged that Respondent engaged in “dishonesty, fraud, deceit and misinformation” by his failure to notify Dietrich of the identity theft. The words “dishonesty,” “deceit” and “misrepresentation” are not defined under the Rules of Professional Conduct. *See* Rule 4-9.1. However, the word “fraud” is defined. Its definition includes the words “deceit” and “misrepresentation”, so we can reasonably believe the words are inextricably intertwined. The question here is whether Respondent’s silence about the confidential information he received from Lennen and his failure to share those confidences with Dietrich or anyone else, can establish grounds for discipline under the rules. Both “deceit” and “misrepresentation” require an affirmative act that causes another to believe something.³ Supreme Court Rule 4-9.1 states that fraud requires an affirmative act by a perpetrator: “‘Fraud’ or ‘fraudulent’ denotes conduct having a purpose to deceive and not

³ Deceit: “the act or practice of deceiving,” “an attempt to deceive: a declaration, artifice, or practice designed to mislead another.” *Webster’s Third New International Dictionary*, pg. 584. “To lead another into error, danger, or a disadvantageous position by underhanded means. *Deceive* involves the deliberate misrepresentation of the truth.” *The American Heritage Dictionary (2000); Houghton Mifflin Co.*

Misrepresentation: “an untrue, incorrect, or misleading representation.” (Id.)

merely negligent misrepresentation or **failure to apprise another of relevant information.**" Supreme Court Rule 4-9.1 (emphasis added).

It goes almost without saying that an attorney has a fiduciary relationship with his clients. *See, generally*, Rule 4, "PREAMBLE"; *also see*, Comment to Rule 4-1.7 ("Loyalty is an essential element in the lawyer's relationship to a client."). However, the clear wording of Rule 4-9.1 says Respondent did not violate that trust, did not commit fraud, did not misrepresent and was not dishonest when he remained silent about the identity theft. His silence was compelled by Rule and the Rules exempt such silence from claims of fraud.

In addition, Informant has not simply charged that the fraud, dishonesty and deceit occurred, but that Respondent engaged in this behavior **for his own personal benefit**. As mentioned above, Respondent did not benefit from the fact that he paid off these debts. He did not benefit from having to make the trip to California during which he discovered this bizarre scheme of Lennen's. He did not benefit from the conundrum he faced under the terms of the California court order. And he certainly did not benefit from the loss of his wife, children, and reputation.

A simple failure to apprise Dietrich of the relevant information regarding the identity theft cannot rise to the level of an offense requiring discipline under the Rules. Withholding the information from Dietrich is meaningless in a disciplinary sense unless Respondent's intent was to mislead her. Respondent's actions were not an attempt to deceive, but were an attempt to protect Dietrich by correcting the problems Lennen had caused. In fact, Informant never charged that Respondent had a duty to notify Dietrich when he became aware of the

identity theft, so the many references to this supposed failure cannot be the basis for discipline. Therefore, Respondent's reasonable belief that he had to remain silent under the terms of the California court order, his failure to reveal the existence of the identity theft under the reasonable belief he was bound by privilege, and his attempts to eliminate the credit problems that Lennen had caused Dietrich, none of which were done in an attempt to personally benefit, should not be considered disciplinary offenses.

ARGUMENT

POINT II

RESPONDENT SHOULD NOT BE DISBARRED IN THIS MATTER BECAUSE HE DID NOT REVEAL CONFIDENTIAL CLIENT INFORMATION TO A THIRD PARTY, NOR DID HE DECEIVE A CLIENT WITH THE INTENT TO BENEFIT HIMSELF, IN THAT HIS ACTIONS DO NOT RISE TO THE LEVEL OF DECEITFUL AND FRAUDULENT CONDUCT SUPPORTING DISBARMENT. THE DISCIPLINARY HEARING PANEL JUMPED TO CONCLUSIONS WITHOUT SUPPORT IN THE RECORD, AND THIS COURT HAS NOT ALWAYS IMPOSED THE SANCTION OF DISBARMENT EVEN IN THE FACE OF FRAUDULENT OR DISHONEST CONDUCT.

This Point Relied On responds to Informant's second point, and will address reasons why the actions of Respondent are not and cannot be grounds for disbarment. It will also compare Missouri's confidentiality rules with those of other jurisdictions to show why Respondent was unable to reveal the fact of Amy Lennen's duplicity to Brenda Dietrich. Finally, it will dispute whether disbarment could be a proper discipline in this case, even if we were to assume all of Informant's allegations and the report of the Disciplinary Hearing Panel (DHP) are supported by the record, which they are not.

Informant has taken the odd stance that a recommendation of disbarment by the DHP is sufficient grounds for this court to disbar an attorney (Informant's Brief, page 27). This is untrue. Nothing the DHP has stated, suggested, inferred, supposed, or, frankly, guessed at in

this case, can be held as a reason for disbarment. Indeed, this Court simply uses the report of the DHP as it would the study of a consultant – it is advisory and nothing more. *In re Crews, 159 S.W.3d, supra at 358.* As mentioned in Point I herein, “this Court reviews the evidence de novo, independently determining all issues pertaining to the credibility of witnesses and the weight of the evidence, and draws its own conclusions of law.” **Id.** While Informant may seek affirmation of the suggested discipline, this Court is free to disregard the recommendations of the DHP and impose any discipline it deems appropriate, or no discipline at all.

Both the DHP and Informant claim an enhancement of discipline should be applied in this case, supposedly because Respondent has refused to acknowledge the wrongful nature of his conduct. There are two problems with this claim: the first is that it is untrue; the second is that the only “evidence” Informant refers to is his unfounded claim that Respondent won’t acknowledge the wrongfulness of acts **for which he has already been disciplined!** So, even if you believe Informant’s misrepresentation of the record, the prior discipline was handed down and served by Respondent and those acts should not be cause for another discipline in this case.⁴

⁴ Fully twenty percent of the DHP findings, and a considerable amount of Informant’s

Brief are based on these prior events for which Respondent has already served his discipline and been restored to the practice of law.

A look at the record shows Respondent clearly acknowledged his prior wrongful acts. On page 125 of the transcript of the June 20, 2005 hearing in this matter: **Q:** (by Mr. Pratzel) “So, I guess as you sit here today, you still don’t admit that you violated - - knowingly violated the rules of ethics back in 2002 when you got suspended?” **A: “Well, no, that’s not correct.”** Later in that same answer, on page 126: **A: “I knowingly admitted to [combining] funds and that was my understanding.”** On page 121 of the transcript: **Q:** (by Mr. Pratzel) “And you understand today and you understood when you agreed to this suspension [referring to the prior suspension] that that was a violation of the Rules of Professional Conduct?” **A: “Yes.”** What more is needed? If the Informant or the DHP wished Respondent to rend his garments to show contrition, they should have asked for it at the hearing.

The second “aggravating factor” cited by the DHP and Informant is the alleged “dishonesty of motive.” See DHP Findings, page 10 (Informant's Appendix A53) and Informant’s Brief, generally. Supposedly, Respondent abetted Lennen’s crimes of identity theft and fraud when he attempted to clear the credit history of Brenda Dietrich. The word “abet” is well-defined in Missouri law.

“In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed'.” *Kansas City v. Lane, 391 S.W.2d 955, 958 (Mo.App. W.D. 1965)*(citing *L. Hand, J., in U.S. v. Peoni, 100 F.2d 401 (2d Cir. 1938)*).

In what way has Informant proved that Respondent wished to bring about the theft of Dietrich's identity? In what way does his required silence on the issue prove Respondent wanted Lennen's scheme to succeed? In what way do Respondent's efforts (unsuccessful though they were) to clear the taint from Dietrich's credit record become evidence that he wished to be a part of Lennen's crime?

The central issue in this disciplinary proceeding is the inviolability of client confidences. Informant claims in several portions of its brief that Respondent was an active and willing participant in an effort to disclose confidences that would harm and deceive Brenda Dietrich and benefit himself and Amy Lennen.⁵ Respondent, on the other hand, had been told he was bound to not disclose confidences revealed to him by Lennen, even though those confidences revealed her theft of Dietrich's identity.

Missouri's rule governing the disclosure of client confidences is Rule 4-1.6, the relevant portion of which states: "**Confidentiality of Information:** (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." The rule exists, in part, to encourage clients to communicate "fully and

⁵ It is only later in its Brief, at page 27, that Informant admits there is no evidence showing Respondent was a party to revealing Dietrich's information to Lennen.

frankly” with their attorneys (Rule 4-1.6, 2002 Comment). Missouri, however, ascribes to the “crime exception” to this rule of confidentiality, that: “A lawyer **may** reveal such information to the extent the lawyer believes reasonably necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.” Rule 4-1.6(b)(emphasis added). The crime prevention exception, then, refers to “prospective conduct that is criminal and likely to result in imminent death or serious bodily harm.” Rule 4-1.6, 2002 Comment.

Nothing disclosed to Respondent during his meeting with Lennen in a California jail came close to resulting in “imminent death or serious bodily harm.” That is not to diminish the serious impact Lennen’s actions had on Dietrich. Respondent makes the point only to clarify that the Rule did not allow him to breach the confidentiality of that conversation. It is important to note that Missouri is not prohibited from expanding its approach to revealing client confidence when the facts are similar to those in this case; it simply has chosen not to do so. Other states have expanded their exceptions to the rule. Missouri has not.

Maryland, for example, has greatly expanded its equivalent of Missouri Supreme Court Rule 4-1.6. The Maryland rule permits disclosure of confidential client information “to prevent, mitigate, or rectify substantial injury to the financial interests or property of another.” Md. Rule 16-812, MRPC 1.6(a)(3). The comments to the Maryland law show the Court in that state wished to free attorneys from the burden of confidentiality in circumstances “in which the lawyer does not learn of his client’s criminal or fraudulent act . . . until after the act has occurred.” Comment to Rule 16-812, MPRC 1.6.

Similarly, the North Dakota Supreme Court has promulgated rules with wider latitude in allowing the disclosure of potentially harmful information that would be held sacrosanct under the Missouri rules. North Dakota lawyers are permitted to use the “prospective crime” exception if they reasonably believe they can prevent their client from committing “substantial injury or harm to the financial interests or property of another.” N.D. Rule 1.6(d). They are further authorized to reveal otherwise confidential information, under the “past crime” exception, if the revelation can “prevent or rectify the consequences of a client’s criminal or fraudulent act.” N.D. Rule 1.6(f). Texas also follows this last exception to the confidentiality rule. Tex. Discip. R. Prof. Conduct 1.05 (1995).

Respondent did not have the luxury of any of these expansive exceptions to the rule of confidentiality. He reasonably believed the Court Order that let him speak to Lennen bound him to the restrictive Missouri rules that prevented any disclosure. Unless a future crime was revealed by Lennen, one that would cause death or serious bodily injury, Respondent’s lips were sealed. This Court, in promulgating the rules which Missouri attorneys must live by, has narrowly drawn the exceptions to the rule of confidentiality. It has drawn those exceptions much more narrowly than some of our neighbors around the country. Respondent, knowing there was no risk to life or limb in Lennen’s schemes, could not reveal what he had learned in that California jail. Respondent, knowing there was no prospective crime to warn of, could not reveal the confidences imparted to him by Lennen. The narrow

exception put him in the position of trying to help Dietrich's situation without revealing to Dietrich what he had learned from Lennen.⁶

Even had the disclosures from Lennen revealed information that put this case squarely within the Missouri exception, the rule does not require disclosure. Not only does the

⁶ The Court Order that allowed Respondent access to Lennen in jail stated he was bound by the obligations of a California lawyer. California's disclosure exceptions are drawn as narrowly as Missouri's and state: "A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." CA Rule 3-100(B). There is no "financial harm" exception to the California rule.

Missouri rule narrowly define the events that can excuse an attorney from his obligation of silence, it makes disclosure **discretionary** on the part of the attorney! The rule says an attorney “shall not reveal [client] information.” But if it fits the crime exception, the rule says he **may** reveal it, which means he is free **not** to reveal it. The PREAMBLE to Rule 4 says “[Rules] cast in the term 'may' are permissive and define areas under the Rules in which the lawyer has professional discretion. **No disciplinary action should be taken** when the lawyer chooses not to act or acts within the bounds of such discretion. (Emphasis added). *When* a rule says a person “may” do something, it implicitly says he may choose not to do it, and the lawyer’s choice should not and cannot be the cause of a disciplinary action against his license to practice law, especially in circumstances such as these.

Finally, Informant claims that disbarment is the penalty whenever there is an offense involving fraud and deceit. This is untrue. Point IV herein will take a comparative look at offenses and the discipline handed down, and a full investigation of the matter here would be duplicative. But it serves to point this Court to *In Re Crews, 159 S. W.3d 355, supra*, which stands for the proposition that not all such cases require the discipline of disbarment.

The only “aggravating factor” that Informant and the DHP got right was the fact Respondent has been disciplined before. In fact, it is perhaps not too much to say that this disciplinary proceeding is a continuation of the last, with Informant seeking to wrest still more discipline out of this Court for matters which were disposed of when Respondent served his suspension and was readmitted to the practice. The only applicable discipline available under the ABA Standards is a reprimand and even that would require this Court to

find Respondent was negligent in allowing a crime to occur in his law office (ABA Standard 4.23). Should this Court make such a finding and decide to discipline Respondent, a reprimand would be appropriate. Nothing more is needed to protect the public or the profession.

ARGUMENT

POINT III

IF THIS COURT IMPOSES DISCIPLINE GREATER THAN A REPRIMAND, CURRENT CLIENTS OF RESPONDENT WILL BE IRREPARABLY HARMED BECAUSE RESPONDENT HANDLES ONLY COMPLEX MEDICAL MALPRACTICE CASES IN THAT A NUMBER OF THESE CASES ARE SET FOR TRIAL IN THE NEAR FUTURE AND IN THAT THE CLIENTS WOULD BE SEVERELY PREJUDICED IF RESPONDENT WERE NOT PERMITTED TO COMPLETE THEIR CASES.

As previously stated, Respondent limits his practice to complex medical malpractice cases. Each of his cases have difficult and technical medical issues upon which Respondent has fully educated himself. Respondent's entire legal career has been devoted to representing plaintiffs in medical negligence cases (Appendix A52).

Respondent has written numerous articles on the subject of medical negligence and has been active in both Missouri and national associations as a leader on the subject. He currently serves on the Executive Committee of the Birth Trauma Litigation Group for the Association of Trial Attorneys of America (ATLA) (Appendix A53). He has frequently lectured on the subject (Appendix A54-A55). He was invited to and wrote a chapter in the medical text *Shoulder Dystocia* by James O'Leary, M.D., on dystocia and birth trauma cases (Appendix A53). His education and experience of serving as a respiratory therapy technician for seven years prior to entering law school gave him extensive experience in working in a

neonatal intensive care unit, dealing with sick and injured children. Most of his work and training in respiratory therapy was done in critical care (ICU) which gave him expertise in respiratory and cardiac related issues, as well as extensive knowledge of internal medicine, since physicians, nurses, and respiratory therapy technicians work together as a team. Respondent's medical knowledge gives him a clear advantage in evaluating and preparing his cases, as he is conversant and knowledgeable on many medical issues.

Respondent has selected his own expert witnesses and has deposed (or has depositions currently scheduled) of defendant's experts in each of the cases described below. Given the current status of each of these cases, it would be difficult, if not impossible, for any other attorney to step in and adequately represent the plaintiffs. The plaintiffs in these cases all claim significant damages arising out of the alleged malpractice and are relying on Respondent in hopes of obtaining a favorable outcome. Respondent is a sole practitioner and has not educated any attorney to be prepared to handle the trials of these matters.

If any of the cases were required to be non-suited and refiled pursuant to the savings statute, the newly adopted malpractice statutes would then apply to the cases. The result of a non-suit with refiled would, therefore, change each plaintiff's potential recovery for non-economic damages from \$570,000 per defendant (§538.210.1, RSMo. (2000), repealed August 28, 2005) to a total potential recovery for non-economic losses to a total of \$350,000 (§538.210, RSMo. (2005), effective August 28, 2005). The loss of this potential recovery significantly harms the plaintiffs.

These plaintiffs have placed their trust in Respondent and should not be damaged because of poor choices that Respondent made in his personal life by involving himself with Lennen.

Respondent currently has the following cases set for trial⁷:

(2) April 24, 2006: *H. v. Singh, et al.*; Case No. 04CC-002365; pending in St. Louis County; four day trial; wrongful death case involving elderly mother of three Class I beneficiaries.

(3) June 19, 2006: *F. v. St. Alexius Hospital, et al.*; Case No. 022-10856; pending in the City of St. Louis; five day trial; medical malpractice involving failure to diagnose appendicitis. The plaintiff was in coma for two months and has \$600,000 in medical bills. Respondent was specifically hired to handle all the medical issues and medical experts.

(4) June 26, 2006: *M. v. Aubocho*; Case No. 04CC-002480; pending in St. Louis County; four day trial; malpractice case involving a young man in a motor vehicle accident who had a fracture of the tibia. Alleged improper procedure was done and the plaintiff had to use leg lengthening devices and four surgeries to fix the problem. There are approximately \$200,000 in medical bills, plus lost wages.

⁷ First initial of last names used for plaintiffs in these cases to protect their confidentiality.

(5) July 18, 2006: *C. v. Weinberg*; Case No. 03-L-35; pending in Jefferson County, Illinois; four to five day trial; malpractice case involving a child whose arm is useless as a result of an improper delivery, and other injuries.

(6) July 31, 2006: *K. v. Babich, et al.*; Case No. 032-11033; pending in the City of St. Louis; four to five day trial; medical malpractice case involving failure to diagnose non-Hodgkins lymphoma with damages including a useless arm and numerous surgeries. There are \$300,000 to \$400,000 in medical damages. This is a very complex pathology case.

(7) August 28, 2006: *H. v. Barnes-Jewish Hospital, et al.*; Case No. 052-09336; pending in City of St. Louis; four to five day trial; wrongful death involving failure to diagnose and treat hyperthermia.

(8) August 28, 2006: *H. v. Washington University*, Case No. 052-10570; pending in city of St. Louis; a very complex medical malpractice case where plaintiff underwent lumbar fusion and woke up blind due to bilateral optic ischemic neuropathy.

(9) September 18, 2006: *S. v. Anstey*; Case No. 04-CC-005421; pending in St. Louis County; four to five day trial; medical malpractice case involving traumatic birth injuries, causing seizure disorder and developmental delays.

(10) October 2, 2006: *R. v. Singh*; Case No. 05CC -1503; pending in St. Louis County; wrongful death case involving failure to diagnose cancer.

(11) October 30, 2006: *Y. v. Research Medical Center, et al.*, Case No.03V203755; pending in Jackson County; three to four week trial; extremely complicated medical malpractice case involving a brain damaged child who is a spastic quadriplegic.

(12) November 6, 2006: *E. v Scenic Care Nursing Home*, Case No. CV304-5649-CC-J4; pending in Jefferson County; three day trial; wrongful death case involving nursing home negligence.

Whether Respondent actually tries or settles the above-described cases, the plaintiffs rely upon his expertise to bring them the best result. Even complainant Dietrich, in the instant case, acknowledged Respondent's careful preparation, competency, and indeed excellence in his representation of her. Respondent prays that the plaintiffs named above are not prejudiced and harmed by a relationship that ended six years ago, long before any of his current clients employed him. A reprimand for negligence, or no discipline at all, is the only way for Respondent to protect the causes of action that he has been entrusted to protect.

ARGUMENT

POINT IV

THE SUPREME COURT SHOULD NOT DISBAR RESPONDENT BECAUSE DISBARMENT IS A DISPROPORTIONATE REMEDY AND UNNECESSARY TO AVOID A RECURRENCE; BECAUSE RESPONDENT IS NOT A DANGER TO THE PUBLIC; BECAUSE RESPONDENT CAN CONTINUE TO PRACTICE LAW AND MAINTAIN THE DIGNITY AND INTEGRITY OF THE LEGAL PROFESSION; AND BECAUSE HE HAS NOT COMMITTED OFFENSES WARRANTING DISBARMENT.

This Court reviews the evidence *de novo* and independently determines all issues concerning the credibility of witnesses and the weight of the evidence, and this Court makes its own conclusions of law. Rule 5.16; *In re Snyder, 35 S.W.3d 380, 382 (Mo. banc 2001)*.

Charging an attorney with professional misconduct does not create a presumption that such has occurred. *In re Mirabile, 975 S.W.2d 936, 939, 942 (Mo. banc 1998)*. Misconduct must be proved by a preponderance of the evidence. *In re Snyder, 35 S.W.3d at 382*.

Both the nexus and the limit of everything which Respondent did and did not do was related to his relationship with Lennen, and that relationship had wholly ended long prior to his seeing her in jail in April 2002. What we are concerned with here, in reality, has nothing to do with how he practices law or treats his clients. This proceeding, instead, concerns what Respondent did and did not do when he discovered that someone had committed a crime against his legal practice and against one of his clients.

Respondent did not stand inside his office and fire off a gun, commit an offense from the inside of his practice, or do anything in the practice of law--endangering or hurting his clients. Instead, someone on the outside fired in at his practice and at his client. This metaphor and this reality must be held in mind in determining whether Respondent should be disbarred in order to protect the courts and the public. The precise question presented is whether Respondent should be disbarred because of how he responded to a crime against his practice and his client and because he did not, in essence, "call the police." A review of other disciplinary decisions amply shows that attorneys of greater danger to the public than Respondent have not been disbarred.

In *In re Crews*, 159 S.W.3d 355 (Mo. banc 2005), this Court did not disbar the respondent. It held that indefinite suspension rather than disbarment was warranted where the respondent had failed to keep clients informed, inadequately investigated a claim, did not diligently pursue the claim, failed to respond to a motion for summary judgment, failed to prepare an acceptable appellate brief, failed to memorialize a contingency fee agreement in writing, and engaged in conduct which was dishonest, fraudulent or deceitful.

It is clear that attorney Crews was disciplined because he was not in touch with his clients or their cases and that it was not in the public's interests for him to practice law. It is clear that Crews' conduct was of a kind to suggest that all of his clients were in danger. Yet he was not disbarred. Respondent's conduct, on the other hand, was an isolated incident that he could not foresee and is unlikely to recur. He poses no danger to the public.

In re Barr, 796 S.W.2d 617 (Mo. banc 1990), indefinitely suspended the attorney, with leave to reapply after six months, where the attorney was found guilty of the following misconduct: Failure to thoroughly pursue relief for clients; failure to timely file suit; and failure to keep clients informed of developments and give them information about their cases when they requested it. This attorney had deposited a client's settlement check into a non-trust out-of-state bank account without the client's permission to hold the proceeds and had failed to maintain a trust account for the deposit of clients' funds. Again, it is clear that Barr's conduct was of the kind that indicated that all his clients were in danger. This attorney was not disbarred.

In *In re Phillips, 767 S.W. 2d 16 (Mo. banc 1989)*, this Court ordered a one-year suspension for an attorney found culpable for the following misconduct: He placed a client's funds from garnishment checks in an office account without the client's consent; he failed to inform the client about receipt of garnishment checks for two and one-half years; he failed promptly to identify garnishment checks as property of the client; he failed to render an accounting to the client; he failed to deliver garnishment checks to the client despite repeated inquires; and he converted a client's Chapter 13 bankruptcy petition into a Chapter 7 petition without obtaining the client's consent. As in *Crews* and *Barr*, Phillips' conduct outlined a picture of a lawyer practicing in a way which endangered all of his clients. He was not disbarred.

In *In re Staab, 719 S.W.2d 780 (Mo. banc 1986)*, the attorney seriously neglected matters for two different clients, resulting in the dismissal of their claims. The attorney

directly, repeatedly and affirmatively misrepresented to both clients that their claims were still pending and viable. The attorney demonstrated a lengthy and extensive pattern of non-cooperation with disciplinary investigations. This Court expressly considered Staab's admitted lack of honesty and forthrightness. Staab's conduct directly implicated the integrity of his legal practice and relationships with all clients. He was not disbarred. Indeed, a master recommended suspension for 60 days, but this Court issued a reprimand.

The attorney in *In re Gray, 813 S.W.2d 309 (Mo. banc 1991)*, neglected a client's divorce case, resulting in its dismissal. This Court found that he had repeatedly lied to the client about the status of the case and had submitted falsely executed and notarized documents to a court. He was not disbarred. He was reprimanded.

In re Weier, 994 S.W.2d 554 (Mo. banc 1999), involved an attorney who had culpably misrepresented his relationships with various business entities resulting in the concealment of his potentially conflicting financial interests. He was reprimanded.

This Court may judicially notice its unpublished disciplinary decisions. In *In re Kramer, No. SC82516 (October 3, 2000)*, the attorney failed to pursue numerous clients' cases; deliberately misrepresented the status of those cases to her clients, and told one client that a case was settled when it was not. In one instance, the attorney represented that an attorney and a judge in Virginia had been retained to enforce a default judgment; that the Virginia Attorney General had collected the proceeds of the Judgment; and that the proceeds were available to the client in the attorney's office. No Virginia lawyer or judge had been retained. The Attorney General was not involved. No proceeds were available to the client.

An attorney who practices law in this fashion is a substantially greater danger to the integrity of the legal practice, the courts and clients than Respondent is. This attorney was not disbarred. She was reprimanded.

In another unpublished opinion, this Court reprimanded an attorney in *In re Franco*, No. SC83356 (May 29, 2001), who misrepresented his ability to represent a criminal defendant in Kansas, where he was not licensed, and lied to Kansas judicial officials that he was admitted to the practice of law in Kansas. Additionally, he failed competently and diligently to represent and inform a client in a deed modification and failed to cooperate in disciplinary inquiries.

Here, Informant contends that Respondent should be disbarred because of the egregious nature of his conduct; because Respondent's explanation is simply incredible; because of the effect of his conduct on Dietrich; and because Respondent has not taken responsibility for his conduct. Informant claims that Respondent must be disbarred because through his conduct he attempted to financially benefit Lennen and aided and abetted Lennen's scheme by making a payment on a debt which Lennen had incurred in Dietrich's name (or in the name of Brenda Harrison) (Informant's Brief, page 22).

Respondent replies that the record shows that Respondent made a payment of \$717 on an automobile loan in May of 2002 at a time when Lennen was in jail on drug charges and, additionally, that he paid off about \$2,200 in credit card debt in Dietrich's name where the debt had been incurred by Lennen based on identity theft. These payments did not financially benefit Respondent and any incidental benefit to Lennen was collateral to

Respondent's purpose, which was to clear Dietrich's credit. Further, making these payments without Dietrich's knowledge did not aid and abet Lennen's scheme to obtain money on credit by deceit, because she did not receive money as a result of Respondent's paying money.

The payments which Respondent made without telling Dietrich were clearly calculated to return the money so that the victim would not know that a crime occurred. Of course, had Respondent not made the payments, Dietrich would have been damaged more. So the crux is not whether Respondent made the payments. The payments are a red-herring. The question is whether he should have reported the crime to Dietrich.

Informant contends that Respondent must be disbarred because he knowingly allowed a person "then known by Respondent to be addicted to drugs, who had made threats to Respondent against Respondent's family if not given money, and a person with a history of criminal activity" solitary access to clients' files (Informant's Brief, page 27). Respondent replies that there is no support in the record for the assertion that Lennen had made threats or that he knew Lennen had a "history of criminal activity" at a time when she had "solitary access" to files. Informant's counsel engaged Respondent in extensive cross examination on when his relationship with Lennen ended as compared to when she had access to client files (Tr. 129-132). Respondent did not know the time frame when threats were made to him (Tr. 129). He stated that no threats were made during his romantic relationship with Lennen and that that relationship ended in 2000 (Tr. 129). He stated that he saw Lennen after that only a couple of times when she was on her way to rehabilitation and he "babysat" her (Tr. 131-

132). Nowhere does the record in this case support the conclusion that Respondent knew that Lennen had a “history of criminal activity” and then allowed her “solitary access” to client’s files or that he made access possible for her after he was threatened.

Informant claims that Respondent must be disbarred because his explanations for not telling Dietrich what had occurred are incredible (Informant’s Brief, page 26). Respondent explained repeatedly in the hearing that he felt that he should tell Dietrich and wanted to but that he did not because attorney Demergian told him that he could not. That Demergian told Respondent he could not disclose what Lennen had told him is in no way incredible; to find it incredible one must believe that Demergian told Respondent to go into the jail pursuant to the Court Order (Appendix A10), but then to testify against Lennen as to any crimes which she confessed.

Informant claims that Respondent must be disbarred because of the effect of his conduct on Dietrich. Dietrich was badly injured, but this fact does not give Informant a license to exaggerate her injuries to this Court. Informant repeatedly claims that in order to undo the damage done to her, Dietrich had to go to California “multiple times,” including a trip for Lennen’s trial and a trip for her sentencing (Informant’s Brief, page 21, 30). The record is perfectly clear that Dietrich went to California only one time and that she did not attend the sentencing. Informant cites pages 37 and 38 of the transcript, but those pages do not mention that Dietrich went to California multiple times or for sentencing, and page 67 establishes that she went there once.

Informant claims that Dietrich's credit was harmed to the extent that Lennen had defaulted on debts (Informant's Brief, page 30). Dietrich testified that there were no defaults (Tr. 69). Informant's claim is ironic in that had Respondent not made a car payment and paid off a credit card for Lennen while she was incarcerated, she would have defaulted on those obligations, to Dietrich's further injury. Informant misstates to this Court that Lennen was in default and thereby injured Dietrich and at the same time contends that Respondent aided and abetted Lennen's deceitful scheme when he made payments which helped Lennen avoid default.

Respondent's relationship with Lennen led to great harm to Dietrich, but this Court's deliberations are not assisted by Informant's exaggerations and misstatements of the record.

Informant contends that Respondent must be disbarred because he refused to take responsibility for his actions (Informant's Brief, page 32). That assertion is a complete misstatement of the record before this Court.

“Q. What – did you call Ms. Dietrich when you returned to Missouri to talk to her about what happened?

A. No. I did not.

Q. Why not?

A. I was told I could not do that by Mr. Demergian. He told me I was acting as his agent at the time. At that point, I have a clear conflict. I couldn't represent Ms. Lennen. I couldn't represent Ms. Dietrich, and I – when I say I was put, I

take responsibility. So that's, you know – so, you know, **I feel guilty. I feel horrible.**

I mean, I was put in the situation because of an ill-advised relationship, that at the time, I wanted to tell Brenda, but I was told I could not and so I did what I could, what I thought was protecting her by paying everything off financially. And I was under the impression that everything was done. And I was sure Mr. Demergian had his client to protect as well” (Tr. 106-107) (emphasis added).

“Out of context” with the above quoted record and the rest of the record, Informant has “cherry picked” testimony offered to this Court to try to show that Respondent refused to take responsibility. The full record on page 136, to which Informant alludes (Informant’s Brief, page 33), states as follows, clearly referring back to the testimony on page 106 of the transcript:

“Q. And in your judgment, you believe that you didn’t have an obligation to relate what you’d been told to your own client? Is that what your testimony was, because of what Mr. Demergian told you?

A. I believe that I had an obligation to Ms. Dietrich. And I was under the impression that by paying everything off, that the problem had been resolved.

Q. Okay. So you acknowledge you had an obligation to tell Brenda Dietrich about what Amy Lennen told you? You just acknowledged that, correct?

A. I don't think I acknowledged that. I thought what I said was I wanted to, and I was given advice that could not. I didn't.

Q. You accepted that advice with no questions? Didn't look into it yourself, did you?

A. That's not true.

Q. What did you do on your own to determine if you had an obligation to tell Brenda Dietrich about what Amy Lennen had told you in jail?

A. When you say I didn't look into it on my own – what I'm trying to explain is I thought that I did have an obligation. Mr. Demergian said, "I obtained a court order for you to go as my agent and you cannot disclose this."⁸ So yes, I thought I did" (Tr. 136 to 137).

Respondent clearly stated that he had an ethical obligation to tell Dietrich what had happened. He also clearly stated, however, that he was under a court order not to tell her.

⁸ On April 12, 2002, the Superior Court of the State of California for Los Angeles County, Long Beach Judicial District entered the following Order in the case of The People of the State of California v. Amy Gilbert Lennen aka Brenda Harrison, No. NA05218001: "It is hereby ordered that Josh P. Tolin, Esq., an out-of -state attorney, be granted face-to-face, professional, visits with Amy Gilbert Lennen, also known as Brenda Harrison (Booking No. 7228974) in the same manner, **and with the same privileges and obligations**, as if he were licensed as an attorney within the State of California" (Emphasis added).

He acknowledged that he had put himself in this untenable position as a result of an ill-advised relationship for which he took full responsibility and that he felt “guilty” and “horrible.” Informant does not distinguish between “should” and “could.” Respondent clearly stated that at the time of the occurrences he had believed he “should” disclose them to Dietrich. He also, however, stated and explained that he “could” not.

The record clearly shows that Respondent felt the full weight of his responsibilities both at the time he received information from Lennen and did not disclose it to Dietrich and at the time of the hearing on June 20, 2005. He felt the weight both of his professional and moral obligations. He knew and he stated that he was in a conflict which had followed an ill-advised relationship. He clearly stated that he took responsibility for the situation and felt guilty and horrible. Further, the situation amounted to a conflict of interest, and he said that. The conflict of interest was such that he “should have” disclosed the crime to Dietrich but he could not, and Respondent said that.

Respondent's conduct is far less egregious than the conduct of the attorneys in the above-mentioned cases who were not disbarred. In each case cited, the attorney purposefully and knowingly failed to diligently pursue client claims; and/or knowingly lied to clients about their cases; and/or neglected client matters and lied to their clients about it; and/or misrepresented to clients and courts; and/or filed false documents with the court. All of these acts directly implicated the lawyer's ability to represent clients. Respectfully, Respondent's failure to act had nothing to do with his ability and willingness to obey the rules and represent clients. He did not purposefully and knowingly injure Dietrich. He was in a

situation where he felt that he should, but could not, disclose to a client that she was the victim of a crime. Was he wrong? Is the answer simple? Informant states that Respondent should be disbarred because he answered the question with non-disclosure to Dietrich. Would Respondent also be subject to discipline had he made disclosure to Dietrich? Would Respondent be subject to discipline had he alerted authorities about Lennen's crime? These questions don't somehow become easier because Respondent had cheated on his wife or because Dietrich is far more innocent than Lennen.

Respondent does not minimize the realities of what he did and the real nature of his wrongs. He had an affair and that was wrong. And had he not had the affair, he would not have found himself at a jail in California under a Court Order which required him to keep Lennen's communications confidential. Had he not had the affair and had Lennen present in places where client files were kept, Dietrich would not have been hurt. No one is more aware than Respondent as to the damage his misconduct has done to his family and a client.

But a lawyer should not be disbarred for having and breaking off an affair with a woman who then walks into his law office and shoots a client. Granted, in this hypothetical, such a shooting would likely not have occurred but for the affair. But that fact does not resolve the issue of whether an attorney should be disbarred on account of how he answered an ethical question about disclosure which would not have arisen but for the fact that the lawyer had an affair with a woman who became a criminal. Respondent should not be disbarred just because he found himself, as a result of prior sins, in the jail interviewing Lennen.

Nor does Respondent present a danger to the public or the courts just because he did not know how to resolve a disclosure paradox. He may have been wrong; perhaps he should have made disclosure to Dietrich. But this Court must not be pushed into finding that he was wrong by the moral character of his relationship with Lennen, or pushed into finding that the quality of a disclosure error was somehow amplified into the realm of disbarment by the moral character of his initial relationship with Lennen. Compared to the above mentioned disciplinary cases and shorn of "spin," Respondent's disclosure error does not indicate that he will be a threat to the public or the courts if he is allowed to remain in the practice of law. The fundamental purpose of attorney discipline is "to protect the public and maintain the integrity of the legal profession." *In re Weier, 994 S.W.2d 554, 558 (Mo. banc 1999)*. Discipline is not to punish the offender. *In re Coe, 903 S.W.2d 916, 918 (Mo. banc 1995)*. Respondent should not be disbarred. Disbarment should not be punitive, and to find that Respondent must be disbarred, this Court must conclude that an attorney with Respondent's otherwise exemplary record learned little or nothing.

CONCLUSION

Josh Tolin is an excellent attorney who, due to a serious moral lapse in involving himself with Amy Lennen, has already paid the greatest price – loss of his wife, children, and reputation. But-for Tolin's ill-fated and ill-advised affair with Amy Lennen, this Court would likely never see him for the purpose of deliberating discipline. Tolin respectfully requests that this Court, in consideration of all of the facts and circumstances set forth herein, and in consideration of the value that Tolin provides to injured plaintiffs, now and in the future, find no cause for discipline or, in the alternative, issue a reprimand.

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CERTIFICATE OF SERVICE

Now on this 21st day of March, 2006, the undersigned hereby certifies that two complete copies of the foregoing and one diskette containing Respondent's Brief were mailed via UPS Overnight Delivery to Informant's counsel at his last known address as follows:

Mr. Alan D. Pratzel
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St. Louis, MO 63103

Lori J. Levine

CERTIFICATION UNDER RULE 84.06(c)

Comes now Lori J. Levine, Attorney for Respondent, and pursuant to Supreme Court Rule 84.06 hereby certifies that:

1. Respondent's Brief as submitted in the above-styled cause includes the information required by Rule 55.03;
2. Respondent's Brief complies with the limitations contained in Supreme Court Rule 84.06(b);
3. As reported by the undersigned's copy of WordPerfect 12, the word count of Respondent's Brief is 13, 244 words; and
4. The diskettes submitted to the court and to counsel of record have been scanned for viruses using Symantec Anti-Virus Version 7 updated as of March 20, 2006, and they are virus free.

Lori J. Levine

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