IN THE SUPREME COURT

STATE OF MISSOURI

IN RE:	)	
	)	
JOEL B. EISENSTEIN,	)	**Supreme Court #SC95331**
	)	
Respondent.	)	

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

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

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STATEMENT OF FACTS

This case is before the Court following Respondent's rejection of the disciplinary hearing panel's recommendation that he be indefinitely suspended from the practice of law with no leave to apply for reinstatement until after twelve (12) months. Respondent was found by the Disciplinary Hearing Panel to have engaged in the following acts of misconduct in relation to his representation of a client in a divorce lawsuit: (1) using methods of obtaining evidence that violated the rights of a third person in violation of Rule 4-4.4(a) and 4-8.4(c); (2) possessing illegally obtained evidence in violation of Rule 4-8.4(c); (3) unlawfully concealing a document having potential evidentiary value in violation of Rule 4-3.4(a); (4) using illegally obtained evidence in violation of Rule 4-8.4(c); and (5) threatening opposing counsel in violation of Rule 4-8.4(d). **App. pg. A236-243; A245.**[1]

Background and Disciplinary History

Joel B. Eisenstein ("Respondent") was licensed as an attorney in Missouri on April 27, 1974, with Missouri Bar number 21476. **App. pg. A4.** Respondent has a significant disciplinary history, to wit:

[1]The facts contained herein are drawn from the record on appeal, the testimony at the hearing, and the exhibits received. Citations to the record are denoted by the appropriate Appendix page, for example **"App. pg. A__"**.

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On March 9, 1991, Respondent was admonished for communicating ex parte with the judge on two occasions during the pendency of a lawsuit in violation of Rule 4-3.5(b). **App. pg. A225.**

On June 17, 1997, Respondent was suspended by this Court with leave to apply for reinstatement not sooner than six (6) months as a result of a guilty plea in the U.S. District Court for the Eastern District of Missouri to the misdemeanor of willfully failing to submit an Income Tax Return. **App. pg. A226.**

On November 2, 1999, Respondent was admonished again for communicating ex parte with the judge during the pendency of a lawsuit in violation of Rule 4-3.5(b). **App. pg. A229.**

On January 18, 2001, Respondent was admonished for failing to respond to the OCDC on three occasions for requests for information regarding an ethics complaint in violation of Rule 4-8.1(b). **App. pg. A230.**

On July 6, 2004, Respondent was admonished for a Rule 4-3.3(d) violation for failing to inform the tribunal in an ex parte proceeding of all material facts known to the lawyer enabling the tribunal to make an informed decision, whether or not the facts are adverse. Specifically: "When asked by Judge Dildine of Lincoln County what the exigent circumstances were that required his signature on a consent order presented by Respondent, Respondent replied that it was necessary to get the minor child at issue on a health insurance policy. The statement to the Court was inconsistent with Respondent's testimony before the Division IV Committee wherein he stated that obtaining the judge's signature

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on the order was necessary in order that Respondent's clients regain custody of the minor child from parties whom his clients considered inappropriate." **App. pg. A231-232.**

The Information

In the instant disciplinary matter, Informant filed a First Amended Information on June 19, 2015. **App. pg. A40-46**.

Respondent represented Gregory Koch ("Greg") and Attorney, Stephanie L. Jones ("Jones") represented Katie Koch ("Katie") in a dissolution of marriage lawsuit in the Family Court of St. Louis County, 21st Judicial Circuit. On at least three occasions during the pendency of the lawsuit, Greg, without permission, deliberately accessed and obtained documents from Katie's personal e-mail account. Included were Katie's most current payroll document and a seven-page, privileged list of direct examination questions Jones had drafted and e-mailed to Katie in preparation for the upcoming trial. Greg made handwritten notes next to some of the questions on the list. He gave both the payroll document and the list of direct examination questions to Respondent. **App. pg. A40-46**

During a settlement conference prior to trial, Respondent utilized Katie's payroll document, yet failed to notify Jones he had obtained the document. **App. pg. A40-46.**

On the second day of trial, Respondent handed Jones a stack of updated exhibits that included Jones' list of direct examination questions with Greg's handwritten notations, three-hole punched and stapled. When Jones realized that Respondent had her list, she challenged him as to the circumstances of his acquisition and requested a conference with the trial court in chambers. **App. pg. A40-46**

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In chambers, Respondent initially told the judge that he had not seen Jones' list before that morning, but then admitted having previously read part of it. Thereupon, Jones demanded a hearing on the record. **App. pg. A40-46.**

On the record, Greg admitted to improperly accessing Katie's personal e-mail account and viewing the list of direct examination questions and the payroll document. He admitted to marking up Jones' list and giving it to Respondent. Respondent testified that at some point in time he had read the first portion of the list and realized "that it was verboten; it was something I should not have." Respondent never came to Jones and said: "I have your outline." **App. pg. A40-46.**

Informant charged Respondent with violating: Rule 4-4.4.(a) for using methods of obtaining evidence that violated the legal rights of a third person; Rules 4-8.4(c) and (d) for reviewing and using improperly obtained evidence; Rule 4-3.4(a) for unlawfully concealing a document having potential evidentiary value; and Rule 4-3.3(a) for initially misrepresenting facts to a tribunal. **App. pg. A40-46.**

The Disciplinary Hearing

At the disciplinary hearing held on July 1, 2015, Jones (via videotaped deposition), Katie, and Respondent testified. Greg died prior to the disciplinary hearing, but his sworn testimony in the underlying lawsuit was accepted into evidence by the Disciplinary Hearing Panel. **App. pg. A37, 109-122**.

Jones testified that she worked for Zerman & Mogerman in Clayton since 2005. She estimated having handled 300 family law matters; approximately 30 per year. **App. pg.**

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A155-156. She represented Katie in her Petition for Divorce against Greg, who was represented by Respondent. **App. pg. A156-157.**

According to Jones, during a settlement conference at Jones' office on July 23, 2013, Respondent asserted that Katie Koch had received additional compensation from her employer, and that Greg was entitled to a share. In support of his argument, Respondent utilized Katie's most recent pay document. Jones had never seen the pay document prior to Respondent handing her a copy at the settlement conference. **App. pg. A158-160.**

On the pay document was the current pay period of July 7, 2013-July 20, 2013 and her year-to-date compensation, which included a restricted stock distribution of $22,007.70 that Katie had received in March. **App. pg. A108, A159.** Jones did not know Respondent came into possession of her client's pay document. She later learned, however, that Greg had illegally accessed Katie's personal e-mail account and had given Respondent documents. The pay document was one of the documents Greg subsequently would admit viewing. **App. pg. A112-120.**

Greg's scheme and Respondent's misconduct were revealed during an exhibit exchange on the second day of trial, February 11, 2014. Jones handed Respondent an updated trial notebook. Respondent handed Jones a stack of documents which he said were "his exhibits." **App. pg. A162-63.**

In the stack was Jones' list of direct examination questions she had drafted and e-mailed to Katie to review for the upcoming trial. **App. pg. 163-165.** The list was seven-pages long. There was a staple in the upper left hand corner and a three-hole punch along the left side. There was also handwriting next to several of the questions. **App. pg. A131-**

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137. The list contained detailed questions concerning nearly every issue at trial. **App. pg. A131-137.**

After she recognized the document, Jones asked Respondent why he had her outline. Respondent responded "that it contained a lot of leading questions and that he planned to object to them" and then walked away. **App. pg. A164.**

Jones started to panic. She checked her notebook to make sure her direct examination list was still there, which it was, and checked to make sure that Katie had her copy, which she did. Jones then made some phone calls including one to an attorney-colleague for advice on what to do. **App. pg. A165.** Ultimately, Jones told the clerk that she wanted to have a conference in chambers with Respondent and the judge. **App. pg. A165.**

According to Jones, the atmosphere in chambers was "heated." **App. pg. A166.**

> **"**I addressed the judge, and I handed him this document and said that this was a part of Mr. Eisenstein's exhibits, and I wanted to know how he came to be in possession of it. And the judge addressed Joel and asked him how he got this document. And initially Joel denied that he – he didn't know what it was. He had never read it. He had never seen it, nothing. And then he said – I think I responded at that point, "Well, you had to have seen it because it's copied, and it's an exhibit. Somebody saw it."

> And then he said, "Well, I looked at it, and once I realized what it was, I put it down and didn't read it."
>
> And then – I mean, this was a very heated conversation, I said, "Well, when – you know, when did you get it, because this is my outline from November." And this was February when we had this conference. And I said, "You've had it for four months, and you've never contacted me." And he said he didn't have to." … "The story evolved."

App. pg. A166-168.

Jones asked to go on the record so she could cross examine Greg and Respondent. She was concerned someone hacked her firm's computer system. The judge swore in both Greg and Respondent. **App. pg. A111, A122**

Greg testified that on "four different times" prior to November 1, 2013, without the permission of Katie, he accessed Katie's personal e-mail account and viewed "a total of maybe three e-mails." **App. pg. A118.** Attached to one of the e-mails was Jones' list of direct examination questions. In one of the other e-mails "was a verification of her W-2, or something like that." **App. pg. A117-A118.** The reason Greg gave for accessing Katie's e-mails without permission was: "I was just getting information trying to figure out what direction we're heading with this thing." **App. pg. A118.** Greg admitted to writing notations on Jones' list of direct examination questions and giving it to Respondent on November 1, 2013. **App. pg. 118-120.** According to Greg: "Well, it was that day we were here and I just said, *Hey, here's some stuff or testimonial stuff.* And [Respondent] just kind

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of said, okay, fine, and he just put it in a stack of things and said *we'll see what happens today*." **App. pg. A120.** Greg denied discussing the contents with Respondent. **App. pg. A121.**

After Greg's testimony concluded, Respondent made the following statement:

> "And with regard to Exhibit No. 57 [Jones' list of direct examination questions with Greg's handwritten notes], at no time have I reviewed or written notes, separate or included in that document; nor have I used it in any manner whatsoever that would in any way create a disadvantage for the Petitioner or Petitioner's counsel. I don't recall my client handing that to me but he indicated he did it in a stack of papers and I may have looked at it and said fine, but I have not since that date reviewed it in any fashion, as I previously stated.
>
> In addition, I must have lost track of the item because it was given to counsel this morning in a stack of documents that were supplements to discovery.

App. pg. A123.

In response to Jones' questioning, Respondent testified that his paralegal put together the exhibits he had given Jones and had placed a yellow sticker on top with Jones' name. **App. pg. A124.** Respondent also confirmed he had told Jones in chambers that he had previously seen Jones' list, knew he should not have had it, and never alerted Jones:

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Q. And you said you were going to object to all of my leading questions that are contained in the outline?

A. Well I was teasing you, counsel, I haven't read –

Q. Did you say that or not?

A. I teasingly said that to you, yes I did.

Q. So you said that?

A. I told you that I had read the – that at some point in time I had read the first portion of that and realized that it was verboten, it was something that I should not have.

Q. But you never came to me and said *I have your outline,* however, you came to be in possession of it, did you?

A. No, I didn't counsel. I handed it to you this morning.

Q. Thank you.

App. pg. A126.

Jones then made a motion to strike Mr. Koch's pleadings, which the judge denied**.** **App. pg. A128.**

Following the trial, Jones "felt that [she] was the subject of a lot of gossip. "A lot people approached me … who were in the courtroom, and a lot of people who weren't in the courtroom approached me and asked questions. I had a judge approach me. I had – it seemed like everyone knew about it. It caused some conflict within my firm. Mr. Eisenstein has a connection to our firm." **App. pg. A178.**

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A few days later on February 14, 2014, Respondent sent Jones an e-mail with the subject line "gossip". It said:

> "Rumor has it that you are quite the "gossip" regarding our little spat in court. Be careful what you say. I'm not someone you really want to make a lifelong enemy of, even though you are off to a pretty good start. Joel"

App. pg. A148.

After receiving Respondent's e-mail, Jones told Respondent that she hadn't spread any gossip. **App. pg. A179.**

Katie also testified at the disciplinary hearing. She has two bachelor's degrees, one in business administration, focused on human resources, and one in psychology. Since 1994, she has worked full time in St. Louis and went back to school in the evenings to get her MBA. She has worked for her current employer for 15 years. **App. pg. A52.**

Katie and Greg married in 1996. For the last five years of their marriage, they lived in Greg's parent's home. They separated, and she moved out in December, 2011. After moving out, Katie changed her personal email account and her password. She never told Greg her new password. **App. pg. A53.**

Katie identified the pay document Respondent utilized during the July 23, 2013 settlement conference. **App. pg. A53.** She testified that her pay document was viewable in her work HR system a few days prior to the bank check date of July 25, 2013, and that she had forwarded it to her personal e-mail account so that she would have it available for her tax accountant. **App. pg. A53-54.** Katie confirmed that she had not provided anyone

with a copy of the pay document. **App. pg. A54.** In addition, Katie stated: "…this pay stub would have been too recent for [Respondent] to have at that settlement conference. The [financial] discovery documents we would have given him would have been from several months prior, because that was the last time the information was needed for court updates." **App. pg. A59.**

Katie became aware that Greg accessed her e-mail during the court proceeding on February 11, 2014. **App. pg. A54.** In the courtroom that morning, Katie saw Respondent walk over to give Jones some documents. Shortly after:

> "Stephanie…grabbed me and said we need to go to the hallway, I need to ask you some questions. We went to the hall and she showed me a copy – the piece of paper that had my testimony outline with some handwriting on it and asked me if I had given that document to anyone. I said, no, but that's Greg's handwriting.
>
> And she asked had I given it to him, had I provided it. I said, no. She then asked if I had left it behind when we were there in October of November. I said, no. That's when we realized that the only way – she asked me had I e-mailed it anywhere else. I said I had e-mailed it to my personal e-mail account in order to print it for [tax] preparation. That's when we realized he had been accessing my e-mail."

App. pg. A55.

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Following this revelation, Katie was shaken. **App. pg. A56.** She listened to Greg and Respondent's subsequent testimony on the record. According to Katie, Respondent "changed his story several times regarding whether or not he knew he had the documents, had read the documents, whether or not he had – should have said something to someone at court. The series of the testimony that he gives and then subsequently responds to questions from Stephanie changed on multiple occasions." **App. pg. A56.**

Respondent also testified at the disciplinary hearing. He was licensed to practice law in Missouri in May of 1974. His office is in St. Charles, Missouri. **App. pg. A63.**

Respondent testified that on the morning of February 11, 2014, he handed Jones a "stack of documents." Several minutes later, she came up to him with a paper in her hand and asked: "How did you get this?" Respondent started looking at it and started reading it. **App. pg. A63.**

According to Respondent:

> "That's the first time I ever closely examined that document. That's when I said – I made the flippant remark, well – she said to me, This is my direct examination. She identified it. Because it didn't say direct examination on the top.
>
> That was the first time I ever read that document, realized what it was and said, I shouldn't have this. Or I think I said, I'm going to object to all your leading questions. And I

said it in a joking manner. Because she was – she described herself as being panicked.

She was, I'm going to strike your pleadings, I'm going to blah, blah, blah. I didn't take her seriously at that moment. I thought what is she talking about. That's the first time that I ever closely read that or read it at all."

App. pg. A63.

When questioned about his statement under oath on February 11, 2014, "that at some point in time [he] had read the first portion of that and realized that it was verboten, it was something that [he] should not have," Respondent testified that when he said "at some point in time" he meant "that day" in court when Jones confronted him with the list. **App. pg. A68.**

According to Respondent, the inclusion of Jones' list of direct examination questions in the stack of documents he gave Jones was just a mistake: "It's patently absurd that I would give her back a document that I intended to use as an exhibit which she prepared. It made no sense." **App. pg. A72.**

Respondent did acknowledge that he is responsible for his paralegal, who stickered, stapled and three-hole punched Jones' list which was part of the stack of documents he gave to Jones. **App. pg. A69.** Respondent also acknowledged that he is duty bound to make sure his staff abides by the Rules of Professional Conduct. **App. pg. A70.**

With respect to his possession of Katie's pay document, **Respondent** testified that he didn't have any specific recollection of it because he had a number of her pay

documents. **App. pg. A64.** "I really have no recollection of that document at all, other than if she says we used in that settlement, I'm not going to question her about that." **App. pg. A65.** As to how he came into possession of the pay document, Respondent stated: "Obviously it came from Greg Koch, apparently. I didn't ask him where'd you get this, who gave this to you. I didn't do that. I presume they came from his business. So no, I didn't ask him where'd you get this, who gave this to you. I didn't do that." **App. pg. A67.**

When asked whether he thinks that a lawyer has the duty to inquire about the source of a document given to him by his client, Respondent replied: "I suppose. "So the answer to your question is, I do my due diligence. Do I think that I have to question every document that comes in my office, I don't have time and my clients don't have the money for that. I don't operate the way Clayton lawyers do." **App. pg. A67.**

Respondent admitted his previous disciplinary history of four admonitions and one suspension **(App. pg. A223-232)** and testified to having received commendations and medals during his military service in Vietnam. **App. pg. A70-71**

The Disciplinary Hearing Panel's Decision

On August 26, 2015, the Disciplinary Hearing Panel ("DHP") filed its unanimous Decision. **App. pg. A236-243**.

A. Findings of Fact

According to the DHP, Respondent's client, Gregory Koch, without permission, deliberately accessed and obtained evidence from Katie Koch's personal e-mail account, which included her most recent pay document and the list of her attorney's direct

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examination questions. Greg wrote some notes on the list of direct examination questions and delivered copies of the documents to Respondent. **App. pg. A236-243.**

Respondent used Katie's improperly obtained pay document during settlement negotiations. **App. pg. A236-243.**

On the second day of trial, February 11, 2014, Respondent handed to Jones a stack of documents, stapled, stickered, and hole-punched by Respondent's office staff, which he stated were updates to his previous exhibits. When Jones discovered her list of direct examination questions in the updates and confronted Respondent, Respondent told Jones that her outline contained lots of leading questions and that he was planning to object to all of them. **App. pg. A236-243.**

Respondent initially denied having knowledge of the improperly obtained direct examination questions prior to February 11, 2014, but then admitted in chambers that he had read the outline and put it down after he realized what it was. **App. pg. A236-243.** Respondent knew that his possession of the direct examination questions was forbidden, or as Respondent stated, "verboten," yet failed to notify Jones of his possession of the same until his delivery of exhibits on February 11, 2014. Respondent admitted that he never came to Jones prior to February 11, 2014 and said, "I have your outline." **App. pg. A236-243.**

On February 14, 2014, Respondent sent an e-mail to Jones stating, "Rumor has it that you are quite the "gossip" regarding our little spat in Court. Be careful what you say, I'm not someone you really want to make a lifelong enemy of, even though you are off to a pretty good start. Joel." **App. pg. A236-243.**

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B. Conclusions of Law

The DHP found Respondent guilty of violating Rule 4-8.4(c) by using illegally obtained evidence, being Katie's pay stub information, in settlement negotiations.

The DHP found Respondent guilty of violating Rule 4-8.4(c) by his office staff reviewing illegally obtained information, being opposing counsel's trial outline e-mailed to her client, Katie Koch, which was reviewed by office staff under Respondent's direct supervision and was copied and hole-punched by Respondent's office staff. Further, Respondent admitted reading the illegally obtained outline of opposing counsel.

The DHP found Respondent guilty of violating Rule 4-3.4(a) by unlawfully concealing a document having potential evidentiary value by having in his possession the direct examination questions of Jones, yet failing to notify Jones of his possession of the same until delivery of the exhibits to Jones in court on February 11, 2014.

The DHP found Respondent guilty of violating Rule 4-4.4(a) by using methods of obtaining evidence that violated the legal rights of a third person by receiving illegally obtained communications and work product between opposing counsel and opposing counsel's client in that the illegally obtained e-mailed outline had clearly been reviewed and handled by Respondent's office staff in that it had been copied, hole-punched and placed in a stack of documents to be given to opposing counsel at trial on February 11, 2014. Further, on the record, Respondent knew that the possession of the direct examination questions was forbidden, or as Respondent stated "verboten" and, when presented with the outline by Jones, Respondent stated that her outline contained lots of leading questions and he was planning to object to all of them.

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The DHP found Respondent guilty of violating Rule 4-8.4(d) by threatening opposing counsel Jones with the February 14, 2014 e-mail.

The DHP took into consideration Respondent's prior disciplinary history and sanctions already imposed previously against Respondent, as well as the credibility of Respondents testimony, in making its recommendation that Respondent be suspended indefinitely with no leave to apply for reinstatement for twelve (12) months. **App. pg. A236-243**.

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POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE:

(A) USED METHODS OF OBTAINING EVIDENCE THAT VIOLATED THE RIGHTS OF A THIRD PERSON IN VIOLATION OF RULES 4-4.4(a) AND 4-8.4(c);

(B) REVIEWED ILLEGALLY OBTAINED EVIDENCE IN VIOLATION OF RULE 4-8.4(c);

(C) UNLAWFULLY CONCEALED A DOCUMENT HAVING POTENTIAL EVIDENTIARY VALUE IN VIOLATION OF RULE 4-3.4(a);

(D) USED ILLEGALLY OBTAINED EVIDENCE IN VIOLATION OF RULE 4-8.4(c); AND

(E) THREATENED OPPOSING COUNSEL IN VIOLATION OF RULE 4-8.4(d).

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010)

In re Hess, 406 S.W.3d 37 (Mo. banc 2013)

In re Farris, No. SC94418, 2015 WL 5240375, 2015 LEXIS 157 (Mo. Sep. 8, 2015)

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Supreme Court Rule 4-3.4

Supreme Court Rule 4-4.4

Supreme Court Rule 4-8.4

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POINTS RELIED ON

II.

UNDER A PROGRESSIVE DISCIPLINARY SCHEME AND THE AGGRAVATING FACTORS PRESENT IN THIS CASE, THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE INDEFINITELY, WITH NO LEAVE TO REAPPLY FOR REINSTATEMENT FOR TWELVE (12) MONTHS.

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

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010)

ABA Standards for Imposing Lawyer Sanctions (1991)

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ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE:

(A) USED METHODS OF OBTAINING EVIDENCE THAT VIOLATED THE RIGHTS OF A THIRD PERSON IN VIOLATION OF RULES 4-4.4(a) AND 4-8.4(c);

(B) REVIEWED ILLEGALLY OBTAINED EVIDENCE IN VIOLATION OF RULE 4-8.4(c);

(C) UNLAWFULLY CONCEALED A DOCUMENT HAVING POTENTIAL EVIDENTIARY VALUE IN VIOLATION OF RULE 4-3.4 (a);

(D) USED ILLEGALLY OBTAINED EVIDENCE IN VIOLATION OF RULE 4-8.4(c); AND

(E) THREATENED OPPOSING COUNSEL IN VIOLATION OF RULE 4-8.4(d).

"Although this Court gives considerable weight to the panel's suggestions, it is well-settled that a Disciplinary Hearing Panel's recommendations are advisory in nature." *In re Donaho*, 98 S.W.3d 871, 873 (Mo. banc 2003). In a disciplinary proceeding, this Court reviews the evidence *de novo*, independently determining all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of

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law. *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). "Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed." *In re Ehler*, 319 S.W.3d 442, 448 (Mo. banc 2010).

(A) Respondent used methods of obtaining evidence which violated the rights of a third person:

Missouri Rule 4-4.4(a) (Respect for Rights of Third Persons) prohibits a lawyer who is representing a client from using "methods of obtaining evidence that violate the legal rights of a [third] person." According to Comment [1]: "Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons." This rule requires lawyers to be vigilant about the source of their evidence, particularly when they receive documents from their client which on their face are personal or privileged as to another person. *See e.g.* Mo. Informal Advisory Op. 970129 (procuring spouse's confidential therapy records outside a properly noticed deposition is inappropriate under the Rules of Civil Procedure and the Rules of Professional Conduct); Conn. Informal Ethics Op. 96-4 (1996) (even though lawyer did not participate in client's procurement of client's ex-wife's psychiatric records, statute prohibiting disclosure of psychiatric records meant that lawyer would be violating Rule 4-4.4 if he reviewed them); *Furnish v. Merlo*, 1994 WL 574137, 1994 U.S. Dist. LEXIS 8455, 128 Lab. Cas. (CHH) P57, P755 (D. Oregon 1994) (lawyer who through client misconduct receives documents which on their face appear to be attorney-client or otherwise confidential should refrain from further examination and notify opposing counsel).

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In this case, Respondent's client illegally procured Katie's pay document and Jones' list of direct examination questions and gave the documents to Respondent. The pay document, on its face, contained Katie's most recent personal financial information, including a stock distribution. That information provided Respondent ammunition to argue at the settlement conference that Greg was entitled to a share. While Respondent was entitled to receive Katie's personal financial information in the course of the litigation, he failed to obtain it through proper methods of discovery.

As for Jones' list of direct examination questions, it was, on its face, confidential, legally privileged, and subject to the attorney work product rule. Respondent would never be entitled to receive the list under any circumstances. Nevertheless, Respondent accepted the list from Greg.

Respondent, through the illegal actions of his client, was in possession of Katie's pay document and her lawyer's list of direct examination questions. On their face, both documents revealed personal, confidential, and privileged information which put Respondent on notice that his possession was made possible only through methods which violated the legal rights of Katie in violation of Rule 4-4.4(a). Because Respondent's conduct necessarily involved dishonesty and deceit, the Panel properly found that Respondent violated Rule 4-8.4(c). *In re Farris*, No. SC94418, 2015 WL 5240375, 2015 LEXIS 157, at *6 (Mo. Sept. 8, 2015).

(B) <u>Respondent reviewed illegally obtained evidence:</u>

Missouri Rule 4-8.4(c) (Misconduct) prohibits a lawyer from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation."

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Jones testified that Respondent utilized Katie's pay document during the settlement conference. Therefore, Respondent necessarily reviewed the pay document.

Respondent testified at various times --in chambers, on the record, and at the disciplinary hearing-- that he had reviewed Jones' list of direct examination questions. In addition, Respondent's paralegal who prepared the exhibits for the hearing, necessarily reviewed the list.

In summary, Respondent reviewed illegally obtained evidence which was conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 4-8.4(c).

(C) Respondent unlawfully concealed a document having potential evidentiary value:

Missouri Rule 4-3.4(a) (Fairness to Opposing Party and Counsel) prohibits a lawyer from unlawfully concealing from opposing counsel a document having potential evidentiary value. According to Comment [1]: The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

On November 1, 2013, according to both him and his client, Respondent took possession of Jones' list of direct examination. Respondent knew that his possession of the list was "verboten," yet failed to notify Jones until his delivery to her of exhibits in court on February 11, 2014. *See In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997) (This Court held that it is misconduct to withhold material information in a legal proceeding).

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In summary, Respondent had possession of the illegally obtained list for over three months, yet concealed it from Jones.

(D) <u>Respondent used illegally obtained evidence:</u>

Missouri Rule 4-8.4(c) (Misconduct) prohibits a lawyer from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Jones testified that Respondent used Katie's pay document at the settlement conference.

Respondent testified that his paralegal stapled, stickered, and hole punched Jones' list of direct examination questions and returned it to Respondent, who then gave it to Jones in a stack of exhibits.

In summary, Respondent used illegally obtained evidence which was conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 4-8.4(c). *See Hilmer v. Hezel*, 492 S.W.2d 395 (Mo. App. 1973) (court upheld sanction of excluding improperly obtained evidence in a civil case).

(E) <u>Respondent threatened opposing counsel:</u>

Missouri Rule 4-8.4(d) (Misconduct) prohibits a lawyer from engaging "in conduct prejudicial to the administration of justice." "A lawyer should demonstrate respect for the legal system and for those who serve it, including…other lawyers…" *In re Hess*, 406 S.W.3d 37, 44 (Mo. banc. 2013) citing Section 5 of Rule 4 of the Preamble to the Missouri Rules of Professional Conduct.

On February 14, 2014, three days following the revelation of Respondent's misconduct, Respondent e-mailed Jones: "Rumor has it that you are quite the "gossip"

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regarding our little spat in court. Be careful what you say. I'm not someone you really want to make a lifelong enemy of, even though you are off to a pretty good start. Joel"

Such a threat, particularly in the course of litigation, clearly violates the norms of acceptable conduct under Rule 4-8.4(d). *See In re Madison*, 282 S.W.3d 350 (Mo. banc 2009) (A lawyer should demonstrate respect for the legal system and for those who serve it, including other lawyers); *Leimer v. Hulse*, 178 S.W.2d 335 (Mo. banc 1944) (disbarring attorney for misconduct including making baseless false charges and threatening physical violence to opposing lawyers).

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ARGUMENT

II.

UNDER A PROGRESSIVE DISCIPLINARY SCHEME AND THE AGGRAVATING FACTORS PRESENT IN THIS CASE, THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE INDEFINITELY, WITH NO LEAVE TO REAPPLY FOR REINSTATEMENT FOR TWELVE (12) MONTHS.

The purpose of attorney disciplinary proceedings is "to protect the public and maintain the integrity of the legal profession." *In re Ehler*, 319 S.W.3d 442, 451 (Mo. banc 2010). In imposing discipline, the Court considers the ethical duty violated, the lawyer's mental state, the extent of actual or potential injury caused by the attorney's misconduct, and any aggravating or mitigation factors. The Court looks to the ABA Standards for Imposing Lawyer Sanctions (1991) for guidance when imposing discipline, which includes a progressive disciplinary scheme. *Ehler*, 319 S.W.3d at 451-52.

Lawyers owe ethical duties to the legal system. They are officers of the court, and must abide by the rules of substance and procedure which shape the administration of justice. Lawyers must always operate within the bounds of the law, and cannot create or use false evidence, or engage in any other illegal or improper conduct. ABA Standard 3.0. In the instant case, Respondent's conduct of receiving, concealing, and using illegally obtained documents, and later threatening opposing counsel, is a significant breach of Respondent's duty to the legal system.

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According to the ABA Standards, "knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. ABA Standards Definitions, p. 17. Respondent acted knowingly. At the disciplinary hearing, Respondent admitted that a lawyer has the duty to know the source of a document given to him by his client. Therefore, when a document, on its face, contains personal or privileged information of another person, Respondent cannot simply close his eyes to the obvious and ignore his obligations. *See, e.g.,* Comment [8] of Rule 4-4.2 (A lawyer cannot close his eyes to obvious indications that a person to whom he directly speaks is represented by counsel.)

Moreover, with regard to Respondent's state of mind, the DHP found that Respondent had a credibility issue. When Respondent's possession of Jones' list of direct examination questions initially came to light, he admitted that at some point in time he had read part of the list and recognized his possession was wrong, and never notified Jones. At the DHP hearing, however, Respondent attempted to recant his admission by testifying that "at some point in time" really meant "today," February 11, 2014. The DHP did not find Respondent's testimony credible and correctly concluded that Respondent knew he had possession of illegally obtained documents at an earlier time.

As to the resulting injury, Respondent's misconduct caused considerable anxiety for both Katie and Attorney Jones. Katie was shocked and Jones was shaken to learn that Respondent had possession of Katie's personal financial information and Jones' direct examination questions. Potential injury was caused by Greg's intimate knowledge of Jones' list of direct examination questions (as evidenced by his written commentary next

to several of the questions), providing Respondent with an improper advantage during trial. Jones suffered actual injury when she received Respondent's threatening e-mail and was forced to withstand the scrutiny of her colleagues and law partners as to the events of the day.

When the Court finds an attorney has committed multiple acts of misconduct, "the ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among the violations. *Ehler*, 319 S.W.3d at 451. In this case, each of Respondent's acts of misconduct is equally egregious. They all involve issues of honesty and integrity—particularly as to following the rules of the legal system. "Honesty and integrity are chief among the virtues the public has a right to expect of lawyers. Any breach of that trust is misconduct of the highest order and warrants severe discipline." *In re Carey*, 89 S.W.3d 477, 498 (Mo. banc 2002).

According to ABA Standard 6.1, "suspension is generally appropriate when a lawyer knows that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding." ABA Standards 6.1 and 6.12 state that suspension is appropriate when the case involves "conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to the court." *Madison*, 282 S.W.3d at 360-61. Respondent's lack of honesty and integrity regarding his acquisition and use of illegally obtained documents belonging to Katie warrants a suspension.

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The chief aggravating factor in this case is Respondent's refusal to acknowledge the wrongful nature of his conduct. This became evident from Respondent's testimony at his discipline hearing: "Do I think that I have to question every document that comes in my office, I don't have time and my clients don't have the money for that. I don't operate the way Clayton lawyers do." Other aggravating factors include several prior disciplinary offenses, a pattern of misconduct, multiple offenses, vulnerability of the victim, and the substantial experience in the practice of law. The only mitigating factor Respondent presented was character, based upon his commendations and medals from his military service in Vietnam.

This is not Respondent's first involvement with the Missouri disciplinary system. With regard to honesty and integrity in the practice of law, Respondent was previously admonished on more than one occasion for ex parte communications with the judge, one of which involved a misstatement of fact regarding a material issue in a child custody case. Also, Respondent was previously suspended following a guilty plea to willfully failing to file an income tax return in violation of federal law.

In the instant case, the recommended sanction of a twelve (12) month suspension from the practice of law is consistent with a progressive disciplinary scheme. *Ehler*, 319 S.W.3d at 452. The multiple admonitions and prior suspension were meant to assist Respondent in understanding the importance of following the ethics rules. Respondent has not learned from those past opportunities. The cumulative effect of Respondent's discipline and the long shadow it casts create significant doubt as to Respondent's fitness to continue to practice law without the legal profession falling into disrepute. (*Compare*

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the Miller decision where, unlike here, "[t]he Respondent, now 70 years of age, has for years borne an excellent professional reputation among his colleagues, outstanding lawyers and respected judges, for honesty, integrity, good character and professional competence as a lawyer. From 1936 to 1948 respondent served the public as a state senator. Twice he received the nomination of his political party for state-wide offices (Lieutenant-Governor and Attorney-General). While these facts constitute no defense in this type of proceeding the Court may consider them in determining what action should be taken under the circumstances." *In re Miller*, 568 S.W.2d 246 (Mo. banc 1978)).

CONCLUSION

A clear preponderance of the evidence demonstrates that Respondent has engaged in the following acts of misconduct: (1) using methods of obtaining evidence that violated the rights of a third person in violation of Rule 4-4.4(a) and 4-8.4(c); (2) possessing illegally obtained evidence in violation of Rule 4-8.4(c); (3) unlawfully concealing a document having potential evidentiary value in violation of Rule 4-3.4(a); (4) using illegally obtained evidence in violation of Rule 4-8.4(c); and (5) threatening opposing counsel in violation of Rule 4-8.4(d).

In order to protect the public and the integrity of the profession, Informant respectfully requests that this Court adopt the DHP recommendation and enter an order indefinitely suspending Respondent from the practice of law with no leave to apply for reinstatement until after twelve (12) months.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December 2015, the Informant's Brief was sent via the Missouri Supreme Court e-filing system to Respondent's counsel:

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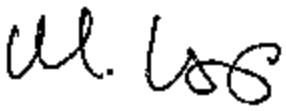


Marc A. Lapp

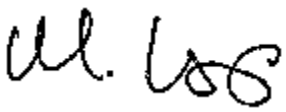
CERTIFICATION: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;

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

3. Contains 7,301 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and



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