

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:)
)
BERNARD EDWARDS,) **Supreme Court #SC92013**
)
Respondent.)

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

This action is one in which Informant, the Chief Disciplinary Counsel, is seeking to discipline an attorney licensed in the State of Missouri for violations of the Missouri Rules of Professional Conduct. Jurisdiction over attorney discipline matters is established by this Court's inherent authority to regulate the practice of law, Supreme Court Rule 5, this Court's common law and Section 484.040 R.S.Mo. 2000.

STATEMENT OF FACTS

Background and Disciplinary History

Respondent is Bernard Edwards who was licensed to practice law in Missouri in 1974. Respondent has been the subject of prior discipline. In September of 1985 Respondent received an admonition for violating Missouri Supreme Court Rules DR 1-102 (A)(5,6), DR 2-111(A)(2), DR 6-101(A)(2,3) and DR 7-101(A)(1,2,3). The basis of the admonition, accepted by Respondent, was that Respondent, in representing his client in a personal injury case, delayed in obtaining medical records, never filed a lawsuit, and delayed for over four years after being retained before communicating with his client that Respondent was not going to continue with his representation. **App. 109-113** Respondent received another admonition in April of 1996, in this case for violation of Rule 4-1.3 (Diligence) 4-1.4 (Communication) of the Rules of Professional Conduct. The basis of the 1996 admonition, again accepted by Respondent, was that Respondent was retained to represent his client for personal injuries in November of 1993 and filed a lawsuit in December of 1993. Respondent however did not obtain service on the defendant in the case and, when Respondent failed to appear at a court hearing in February of 1994 the lawsuit was dismissed without prejudice. Respondent failed to notify his client about the February 1994 hearing and did not notify his client about the dismissal until May of 1995. **Id.**

The Genatt Perry Complaint

A. The Iron Mountain Case

In May of 2000 Respondent was retained by Genatt Perry (“Perry”) to represent her in a claim for employment discrimination against her former employer, as Iron Mountain. Respondent agreed to represent Perry for payment of a “non-refundable” retainer of \$3,500, which Perry paid. **App. 33-34 (T.53-56); 52 (130).**

On February 15, 2002, Respondent’s claim against Iron Mountain was settled during mediation for \$10,000. Respondent received a settlement check from Iron Mountain in that amount made payable to Respondent, issued a check to Perry in the amount of \$7,500 and retained the difference of \$2,500 as additional fees. **App. 88; 34(T.58); 35(63).**

B. The Pro Rehab Case

On May 6, 2002, Perry again retained Respondent to represent her in a lawsuit for employment discrimination against another employer, Pro Rehab. Perry’s employment with Pro Rehab had been terminated two months previously. Respondent and Perry entered into a written “Contract for Legal Services” that provided for payment of a \$1,500 “non-refundable” retainer by Perry, against which an hourly fee of \$175 was to be charged plus a contingency fee of one-third of any settlement amount. **App. 86**

Shortly after retaining Respondent to represent her in her claims against Pro Rehab, Perry filed a charge of discrimination with the Equal Employment Opportunity Commission and the Missouri Commission on Human Rights. **App. 37(T. 68)** In March

of 2003 Perry received a “Right to Sue” letter from the Missouri Commission on Human Rights dated March 5, 2003 and promptly provided Respondent with a copy of the letter. The letter specifically stated that any legal cause of action had to be brought by Perry within ninety days of the date of the letter or her right to sue would be lost. **App. 87; 37-38(T.71-72).**

On June 4, 2003, *ninety-two* days after the date of the Right to Sue letter, Respondent filed a cause of action against Pro Rehab alleging a violation of the Missouri Human Rights Act. **App. 87; 93-96.** The lawsuit was filed in the Missouri Circuit Court, Twenty-Second Judicial Circuit. Pro Rehab filed a Motion to Dismiss with the Court on the basis that the lawsuit had not been filed within the time frame prescribed by statute and accordingly the Court did not have jurisdiction over Perry’s claims. **App. 53 (T.133-134).** Respondent did not inform Perry that a Motion to Dismiss had been filed or the basis for the Motion. **App. 38-39 (T.75-76).**

On October 20, 2003, Respondent sought, and was granted, leave to amend his Petition in the Pro Rehab case to assert a claim under federal law for employment discrimination. **App. 96** At that same time, Respondent consented to a dismissal of the Missouri state law claims that had formed the initial basis for the employment discrimination action filed with the Circuit Court. **App. 97.** Thereafter the lawsuit was removed to the U.S. District Court, Eastern District of Missouri. **App. 54 (T.139).** Respondent did not inform Perry that he had amended the Petition, consented to a partial dismissal or that Perry’s claim had been removed to federal court. Respondent did

however contact Perry sometime in October of 2003 and told her that she no longer had a case. **App. 38 (T.73-74); 39 (T.76).**

Perry's lawsuit remained pending in U.S. District Court following its removal and in December of 2003 the U.S. District Court issued its Order scheduling a Rule 16 conference for January 15, 2004, at which counsel for both parties were to attend, and ordering counsel to submit a joint proposed scheduling plan. **App. 98-106.** Contrary to the Court's Order, Respondent did not attempt to contact Pro Rehab's counsel, nor did Respondent respond to Pro Rehab's counsel efforts to contact him, for the purpose of preparing a joint scheduling plan. As a result, Pro Rehab's counsel unilaterally submitted the scheduling plan to the Court. Similarly, Respondent failed to attend the Rule 16 conference. The Court subsequently issued a Case Management Order requiring the parties to submit Initial Disclosures pursuant to Federal Rules of Civil Procedure prior to February 20, 2004. Respondent failed to submit Initial Disclosures on behalf of Perry. Respondent did not inform Perry of the District Court's Orders, nor did Respondent inform Perry that Respondent had failed to comply with those Orders. **App. 39 (T.77); 55-56 (T.141-144).**

Counsel for Pro Rehab served written discovery requests on Respondent in July of 2003. Respondent did not inform Perry that the discovery requests had been received or that any additional information was needed from Perry. Respondent never provided a response to those discovery requests. **App. 98-106; 56 (T.144).**

On February 20, 2004, counsel for Pro Rehab filed a Motion to Compel with the District Court and served a copy of the Motion on Respondent. Respondent did not

inform Perry that a Motion had been filed and served and made no response to the Motion. **App. 98-106; 39 (T.77).**

On March 22, 2004, the District Court granted Pro Rehab's Motion to Compel and Ordered Perry provide responses to Pro Rehab's written discovery requests no later than March 30, 2004. Respondent was sent a copy of the District Court's Order but did not inform Perry of the Order and Respondent made no response to Pro Rehab's discovery requests. **App. 98-106; 56 (T.144).**

Subsequently counsel for Pro Rehab filed a Motion to Dismiss Perry's lawsuit, with prejudice, for failure to comply with the orders of the District Court and failure to prosecute the lawsuit. **App. 98-106.** On August 4, 2004, the District Court entered its Order of Dismissal finding that "Because of [Perry's] complete disobedience to court orders and her failure to comply with court rules, the Court believes that the drastic sanction of dismissal is appropriate". Accordingly, the Court dismissed Perry's lawsuit against Pro Rehab, with prejudice, with costs assessed against Perry. At no time did Respondent inform Perry that the Pro Rehab lawsuit had been dismissed. **App. 107-108; 39(T.76).**

Respondent's Trust Account

Respondent utilizes a form retainer agreement in his law practice that provides for advance retainer payments to be made and that such retainers are "non-refundable". Upon receipt of a non-refundable retainer payment from a client Respondent deposits the payment into his firm's general operating account. **App. 86** Respondent's law firm

maintains a trust account but he does not deposit non-refundable retainer payments into that account. **App. 26(T.25-26).**

On or about June 1, 2010, the OCDC received notification of an overdraft in Respondent's IOLTA trust account maintained at U.S. Bank. **App. 77** On June 4, 2010, OCDC wrote to Respondent and requested that within ten (10) days of that date Respondent provide a copy of his February, March, April and May, 2010, trust account statements as well as copies of all items presented against the trust account in the month of May, 2010. **App. 78** Respondent did not provide the requested documentation within the ten day period and accordingly on June 25, 2010, OCDC again contacted Respondent by letter and requested that he provide a response to the June 4 letter and the supporting documentation. **App. 79; 26 (T.24).**

By letter dated June 29, 2010, Respondent provided OCDC with a copy of his bank trust account statements for January and May, 2010 but did not provide the other information or documentation requested. **App. 80-84; 27 (T.29-30).** As a result, by letter dated July 1, 2010, OCDC renewed its request for the February, March and April 2010 trust account statements and copies of checks presented against the account in May of 2010. At that time OCDC requested additional information from Respondent relating to Respondent's receipt of monies from his clients and information relating to the bank accounts into which those monies were deposited. **App. 85** Notwithstanding the repeated requests by OCDC, Respondent did not provide the requested information or documentation to OCDC. **App. 31 (T.45-47).**

Investigation into Ethics Complaint

On or about May 14, 2010, a Special Representative for the Office of Chief Disciplinary Counsel (“OCDC”) wrote to Respondent requesting additional information from Respondent relating to its investigation into the ethics complaint filed by Perry and another complaint against Respondent filed by Harry Maul.¹ Respondent failed to respond to the request for information. **App. 91-92; 49-50 (T.119-121).**

Subsequently an Information was prepared and served on Respondent to which Respondent filed an answer on or about October 4, 2010. **App. 3-11; 18-19**

After the OCDC filed its Information in this matter Respondent refunded Perry her initial retainer fee of \$1,500 paid in the Pro Rehab matter. **App. 89-90**

DHP Hearing and Decision

The Disciplinary Hearing Panel (“DHP”) held its hearing in regard to this matter on April 22, 2011. Based upon the evidence presented at the hearing the DHP concluded that Respondent had violated Rule 4-8.1(c) (failure to respond to a lawful demand for information from a disciplinary authority) by failing to respond to OCDC’s request for information concerning the Maul matter. The DHP found Respondent guilty of

¹ The substantive allegations in the Maul Information were dismissed by Informant at the time of the Disciplinary Hearing Panel because OCDC was unable to locate Mr. Maul to testify. The allegations of Respondent’s failure to reply to OCDC’s request for information regarding the Maul complaint, and the related violation of Rule 4-8.1(c), were not dismissed however and were considered by the Panel.

professional misconduct in his representation of Perry under Rule 4-1.1 (competence), Rule 4-1.3 (diligence), Rule 4-1.4 (communication), Rule 1.5(a)(reasonableness of fees), Rule 4-1.5(c)(contingent fee agreement to be in writing), Rule 4-3.2(expediting litigation), Rule 3.4(d)(fairness to opposing party and counsel), Rule 4-8.1(c)(failure to respond to a lawful demand for information from a disciplinary authority) and Rule 4-8.4(d)(conduct prejudicial to the administration of justice) of the Missouri Rules of Professional Conduct. Finally, in regard to the evidence relating to the charging of a non-refundable retainer and Respondent's handling of his client trust account, the DHP found Respondent guilty of professional misconduct for violating Rule 4-1.5(reasonableness of fee), Rule 4-1.15(f)(deposit of advance payments by clients into a client trust account), Rule 4-1.16(d)(refund to client of unearned advance fee payment) and Rule 4-8.1(c)(failure to respond to a lawful demand for information from a disciplinary authority). **App. 114-123.**

Based upon its findings of fact and conclusions of law, the DHP recommended that Respondent be suspended for six months from the practice of law.² **Id.**

² The DHP also recommended that Respondent refund to Perry the \$2,500.00 fee that was attained as a contingency fee in the Iron Mountain case because Respondent failed to produce a copy of any written fee agreement with Perry relating to this contingent fee. Subsequent to the DHP hearing, and thus not a part of the record before the DHP, Respondent sent to the Chair of the DHP a copy of a document that he represented to be

the written fee agreement with Perry relating to his representation of her in the Iron Mountain case.

POINTS RELIED ON

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

(A) FAILING TO COMPETENTLY REPRESENT GENATT PERRY IN VIOLATION OF RULE 1.1 OF THE RULES OF PROFESSIONAL CONDUCT;

(B) FAILING TO DILIGENTLY REPRESENT GENATT PERRY IN VIOLATION OF RULE 4-1.3 OF THE RULES OF PROFESSIONAL CONDUCT;

(C) FAILING TO INFORM HIS CLIENT GENATT PERRY THAT HER LAWSUIT HAD BEEN AMENDED, PARTIALLY DISMISSED BY THE CIRCUIT COURT AND REMOVED TO FEDERAL COURT AND THE REASONS FOR THAT DISMISSAL IN VIOLATION OF RULE 4-1.4 OF THE RULES OF PROFESSIONAL CONDUCT;

(D) ENGAGING IN DILATORY TACTICS BEFORE THE FEDERAL COURT IN HIS REPRESENTATION OF GENATT PERRY INCLUDING BEING NONRESPONSIVE TO DISCLOSURE AND DISCOVERY REQUIREMENTS, COURT RULES AND

COURT ORDERS IN VIOLATION OF RULES 4-3.2, 4-3.4(D) AND 4-8.4(D) OF THE RULES OF PROFESSIONAL CONDUCT;

(E) KNOWINGLY FAILING TO RESPOND TO A LAWFUL DEMAND FOR INFORMATION FROM A DISCIPLINARY AUTHORITY IN VIOLATION OF RULE 4-8.1(C) OF THE RULES OF PROFESSIONAL CONDUCT; AND

(F) COLLECTING “NONREFUNDABLE” RETAINER PAYMENTS AT THE COMMENCEMENT OF HIS REPRESENTATION OF CLIENTS AND FAILURE TO DEPOSIT SUCH ADVANCE FEE PAYMENTS INTO A CLIENT TRUST ACCOUNT IN VIOLATION OF RULES 4-1.5, 4-1.15(F) AND 4-1.16(D) OF THE RULES OF PROFESSIONAL CONDUCT.

Rule 4-1.3

Rule 4-1.4

Rule 4-3.2

Rule 4-8.4(d)

POINTS RELIED ON

II.

IN ORDER TO PROTECT THE PUBLIC THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE BECAUSE: (A) RESPONDENT'S CONDUCT IN HIS REPRESENTATION OF GENATT PERRY WAS ESPECIALLY EGREGIOUS REFLECTING A DISREGARD FOR HIS CLIENT, THE COURT AND OPPOSING COUNSEL; (B) RESPONDENT HAS RECEIVED TWO PRIOR ADMONITIONS FOR SIMILAR MISCONDUCT AND SUSPENSION IS CONSISTENT WITH PREVIOUS MISSOURI SUPREME COURT DECISIONS AND THE ABA SANCTION STANDARDS, ESPECIALLY WHEN, AS HERE, THE ATTORNEY FAILS TO ACKNOWLEDGE HIS MISCONDUCT; AND (C) THE DISCIPLINARY HEARING PANEL RECOMMENDS A SUSPENSION.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

In re Lavin, 788 S.W.2d 282 (Mo. banc 1990)

In the Matter of Stribel, 744 S.W.2d 778 (Mo. banc 1988)

In re Crews, 159 S.W.2d 355 (Mo. banc 2005)

ARGUMENT

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

(A) FAILING TO COMPETENTLY REPRESENT GENATT PERRY IN VIOLATION OF RULE 1.1 OF THE RULES OF PROFESSIONAL CONDUCT;

(B) FAILING TO DILIGENTLY REPRESENT GENATT PERRY IN VIOLATION OF RULE 4-1.3 OF THE RULES OF PROFESSIONAL CONDUCT;

(C) FAILING TO INFORM HIS CLIENT GENATT PERRY THAT HER LAWSUIT HAD BEEN AMENDED, PARTIALLY DISMISSED BY THE CIRCUIT COURT AND REMOVED TO FEDERAL COURT AND THE REASONS FOR THAT DISMISSAL IN VIOLATION OF RULE 4-1.4 OF THE RULES OF PROFESSIONAL CONDUCT;

(D) ENGAGING IN DILATORY TACTICS BEFORE THE FEDERAL COURT IN HIS REPRESENTATION OF GENATT PERRY INCLUDING BEING NONRESPONSIVE TO DISCLOSURE AND DISCOVERY REQUIREMENTS, COURT RULES AND

COURT ORDERS IN VIOLATION OF RULES 4-3.2, 4-3.4(D) AND 4-8.4(D) OF THE RULES OF PROFESSIONAL CONDUCT;

(E) KNOWINGLY FAILING TO RESPOND TO A LAWFUL DEMAND FOR INFORMATION FROM A DISCIPLINARY AUTHORITY IN VIOLATION OF RULE 4-8.1(C) OF THE RULES OF PROFESSIONAL CONDUCT; AND

(F) COLLECTING “NONREFUNDABLE” RETAINER PAYMENTS AT THE COMMENCEMENT OF HIS REPRESENTATION OF CLIENTS AND FAILING TO DEPOSIT SUCH ADVANCE FEE PAYMENTS INTO A CLIENT TRUST ACCOUNT IN VIOLATION OF RULES 4-1.5, 4-1.15(F) AND 4-1.16(D) OF THE RULES OF PROFESSIONAL CONDUCT.

A. Respondent failed to Competently Represent Ganett Perry

After retaining Respondent to represent her for her claims of discrimination against Pro Rehab, Perry filed a charge of discrimination with the Missouri Commission on Human Rights and the Equal Employment Opportunity Commission. On March 5, 2003, Perry received a “Right to Sue” letter from the Missouri Commission on Human Rights, which she promptly delivered to Respondent. **App. 87; 37 (T.68); 37-38 (T.71-72)**. The Right to Sue letter specifically stated that any legal cause of action had to be brought within ninety days of the date of the letter. **App. 87**

Respondent failed to file Perry's lawsuit against Pro Rehab until June 4, 2003, ninety-two days following the date of the Right to Sue letter and two days after the statutory time frame to file the claim had elapsed. **App. 87; 93-95** As a result of Respondent's failure to satisfy the jurisdictional requirement to file Perry's lawsuit within ninety days of the date of the Right to Sue letter, Perry's lawsuit filed before the Circuit Court was partially dismissed and removed to U.S. District Court. **App. 53 (T.133-134); 97.**

Once the action was pending before the District Court, Respondent did nothing to pursue the cause of action or protect Perry's interest. Respondent failed to cooperate in the preparation of the joint proposed scheduling plan, failed to appear for the Rule 16 scheduling conference, failed to make Rule 26 disclosures, failed to respond to interrogatories and document requests, failed to comply with the Case Management Order entered by the Court and failed to comply with the Court's Order requiring a response to the discovery requests. As a result of Respondent's "complete disobedience to court orders" and "failure to comply with court rules" Perry's lawsuit against Pro Rehab was dismissed by the District Court, with prejudice, and costs were assessed against Perry.

Respondent's failure to timely file the lawsuit before the Circuit Court, and his failure to comply with Court rules and obey Court Orders once the cause of action was removed to the District Court shows a lack of the "skill, thoroughness and preparation reasonably necessary" to represent Perry in her claims as required by Rule 4-1.1.

B. Respondent failed to diligently represent Perry

Perry provided Respondent with a copy of the Right to Sue letter she received from the Missouri Commission on Human Rights promptly following her receipt of the letter. Respondent however failed to timely file Perry's lawsuit with the Missouri Circuit Court, Twenty-Second Judicial Circuit and as a result the lawsuit was dismissed by the Court and, after Respondent amended the Petition to include a claim under the federal statute, transferred to U.S. District Court. Respondent initially had filed the action in the St. Louis City Circuit Court because he believed that venue provided Perry with a strategic advantage, an advantage that was lost when Respondent failed to timely file the petition. **App. 54 (T.137).**

Once Perry's lawsuit was removed to U.S. District Court, Respondent appears to have abandoned his representation of Perry. Respondent failed to abide by the Court's Orders or comply with the Court rules. Respondent's actions reflected an absence of the "commitment and dedication to the interest of the client" and the "zeal in advocacy upon the client's behalf" required under Rule 4-1.3. Comment, Supreme Court Rule 4-1.3.

The delay in filing Perry's lawsuit and the failure to timely comply with the District Court rules and Orders is evidence that Respondent was not diligent in connection with his representation of Perry in violation of Rule 4-1.3.

C. Respondent did not adequately communicate with Perry

Respondent did not inform Perry that counsel for Pro Rehab had filed a Motion to Dismiss her lawsuit because it was filed two days late nor did Respondent inform Perry that as a result of that late filing Respondent had amended Perry's lawsuit to include a claim of discrimination under the federal statute, agreed to a dismissal of the state claims and the case had been removed to federal court. Respondent told Perry nothing about the federal court proceedings. Respondent failed to tell Perry about the outstanding discovery requests, the requirements of the court rules to which her lawsuit was subject, the Motions filed by Pro Rehab's counsel, the Court's Order or the Court's eventual dismissal of the lawsuit, with prejudice, and the award of costs against Perry. Indeed, Perry was not even informed by Respondent that she had a lawsuit pending before the U.S. District Court. The only information Respondent provided to Perry was in October of 2003 when Respondent told her she "did not have a case".

Based upon this conduct, Respondent did not keep Perry reasonably informed about the status of her claims against Pro Rehab and accordingly Respondent violated Rule 4-1.4.

D. Respondent's actions unnecessarily delayed the litigation and was unfair to the opposing party, its counsel and the Court

Respondent's failure to participate in the proceedings before the District Court is undisputed. Respondent's abandonment of Perry's lawsuit once it was removed to federal court worked a prejudice against Perry, Pro Rehab, opposing

counsel and the Court. The lawsuit, removed to federal court in November of 2003, was dismissed with prejudice by the Court in August of 2004. **App. 107-108**

In the intervening nine months discovery requests served on Respondent went unanswered, Court Orders directed to Respondent went ignored, Court scheduling requirements were disregarded by Respondent, Motions filed by Pro Rehab's counsel went unanswered and ultimately the Court was caused to enter its Order of Dismissal.

Respondent knowingly disobeyed the rules of the Court, failed to make reasonably diligent efforts to comply with proper discovery requests served by opposing counsel, and disobeyed and ignored the Court's orders. Based upon the foregoing, Respondent violated Rule 4-3.2 (expediting litigation), Rule 4-3.4 (fairness to opposing party and counsel) and Rule 4-8.4(d) (conduct prejudicial to the administration of justice).

E. Respondent failed to respond to a demand for information from a disciplinary authority

During the course of its investigation into two separate ethics complaints filed by Harry Maul and Perry against Respondent, OCDC requested Respondent provide certain information to it relating to those complaints. Respondent failed to make any response to this demand for information.³

³ It should be noted that this Court has previously found that lawyers failing to respond to disciplinary investigations are subject to discipline under Rule 4-8.1 even in

Similarly, after receiving notification from Respondent's bank of an overdraft in Respondent's trust account, on June 4, 2010 OCDC requested Respondent provide information and documentation relating to that account. On June 25, 2010, having not received the requested information from Respondent, OCDC renewed its request. On June 29, 2010, Respondent partially provided some of the documentation previously demanded by OCDC but gave no explanation for his failure to fully comply with the request for information. Accordingly, on July 1, 2010, OCDC again demanded information and documentation from Respondent related to OCDC's investigation into Respondent's trust account and his handling of client payments. Respondent failed to make any response to the July 1 demand for information.

Respondent's failure to respond to these multiple demands for information from a disciplinary authority constitute a clear violation of Rule 4-8.1(c).

F. Respondent's fee agreement charged non-refundable retainer fees which

Respondent failed to deposit into his trust account

The retainer agreement used by Respondent to form his agreement to represent Perry was the same retainer agreement form Respondent generally used with his other clients until sometime after the instant action was commenced.

App. 46 (T.105-106). This retainer agreement provides that "Retainers are non-

circumstances such as in the Maul case, where the underlying complaint was dismissed or unfounded. *In re Hardge-Harris*, 845 S.W.2d 557 (Mo. banc 1993).

refundable”. Respondent’s specific contract with Perry called for a payment of \$1,500 “cash in advance” as a retainer for his services.

The Advisory Committee of the Supreme Court of Missouri addressed the issue of “non-refundable” fees in Formal Opinion 128, issued May 18, 2010. As the Formal Opinion points out, characterizing fee payments as non-refundable raises serious ethical issues under Rule 4-1.5, Rule 4-1.15(f) and Rule 4-1.16(d). Rule 4-1.5 forbids a lawyer from making an agreement for, charging or collecting an unreasonable fee. A non-refundable fee, charged and collected at the commencement of representation, runs afoul of the principals and requirements of Rule 4-1.5. Under Rule 4-1.5, the factors to be utilized to determine the reasonableness of a fee are set forth. If representation ends before completion of a matter, the attorney must analyze the factors set out in Rule 4-1.5 to determine if the fee collected is reasonable and if not, refund all or a portion of the fees received in advance. Even if representation has been completed the attorney is still bound to analyze the Rule 4-1.5 factors to assure the reasonableness of the advance fee collected. Thus, if the advance fee collected at the commencement of representation ultimately proves to be unreasonable under a Rule 4-1.5 analysis, the unreasonable portion must be refunded. To do otherwise would also violate Rule 4-1.5 and Rule 5-1.16(d) which requires that at the end of representation an attorney refund any advance payment of fee or expense that has not been earned or incurred. To call the advance fee or retainer “non-refundable” is therefore misleading.

The problem of a “non-refundable” fee or retainer is exacerbated when considering the impact of Rule 4-1.15(f) which provides that “A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.” In this case, Respondent did not place the “non-refundable” retainers he received from his clients into his trust account. Indeed, the trust account information received by OCDC reflects little activity in the trust account other than administrative charges which, according to Respondent, was the reason for the overdraft.

For these reasons, Respondent’s contracting for, charging and collecting “non-refundable” retainers, and not depositing such advance fee payments into his client trust account, is evidence of a violation of Rule 4-1.5, Rule 4-1.15(f) and Rule 4-1.16(d).

ARGUMENT

II.

IN ORDER TO PROTECT THE PUBLIC THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE BECAUSE: (A) RESPONDENT'S CONDUCT IN HIS REPRESENTATION OF GENATT PERRY WAS ESPECIALLY EGREGIOUS REFLECTING A DISREGARD FOR HIS CLIENT, THE COURT AND OPPOSING COUNSEL; (B) RESPONDENT HAS RECEIVED TWO PRIOR ADMONITIONS FOR SIMILAR MISCONDUCT AND SUSPENSION IS CONSISTENT WITH PREVIOUS MISSOURI SUPREME COURT DECISIONS AND THE ABA SANCTION STANDARDS, ESPECIALLY WHEN, AS HERE, THE ATTORNEY FAILS TO ACKNOWLEDGE HIS MISCONDUCT; AND (C) THE DISCIPLINARY HEARING PANEL RECOMMENDS A SUSPENSION.

This Court has relied on the American Bar Association's Standards for Imposing Lawyer Sanctions ("ABA Standards") to determine the appropriate discipline to be imposed in attorney discipline cases. *See, e.g., In re Crews*, 159 S.W.3d 355, 360-61 (Mo. banc 2005); *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994); *In re Oberhellman*, 873 S.W.2d 851 (Mo. banc 1994).

According to ABA Standards, suspension is appropriate when a lawyer knowingly: (a) fails to perform services for a client (Section 4.42(a) of the ABA Standards), (b) deceives a client (Section 4.62 of the ABA Standards), (c) violates a court order or rule (Section 6.22 of the ABA Standards), (d) violates a duty owed to the profession (Section 7.2 of the ABA Standards), or (e) engages in the same or similar misconduct for which they were previously disciplined (Section 8.2 of the ABA Standards); the result of which causes injury or potential injury to a client, the public or the legal system. See also, *In re Cupples*, 979 S.W.2d 932, 936 (Mo. banc 1998).

The Missouri Supreme Court has previously found suspension to be the appropriate sanction in cases involving neglect of client business by attorneys. In *In re Lavin*, 788 S.W.2d 778, (Mo. banc 1990) the Court suspended Lavin indefinitely from the practice of law with leave to reapply after four months and compliance with certain preconditions to reinstatement. In *Lavin* the Court found the attorney guilty of neglect because of his failure to timely take action after being retained in the matter, failing to keep the client informed of the progress of the matter and, once the case was filed, failing to either withdraw his appearance in the matter, speak with opposing counsel about the status of the case or warn his client about an impending hearing in the court action. The Court noted, “Suspension is an appropriate intermediate sanction for attorney discipline where a reprimand is insufficient to protect the public and to maintain the integrity of the legal profession and where the court does not believe the acts of the attorney are

such that he should be disbarred.” *Lavin* at 284-285; citing *In re Littleton*, 719 S.W.2d 772 (Mo. banc 1986). See also, *In the Matter of Stribel*, 744 S.W.2d 778 (Mo. banc 1988), where the Court suspended the attorney for sixty days finding that he had accepted employment from his client and then neglected the matter and prejudiced his client’s interest by allowing a default judgment and garnishment to be taken against the client.

In this matter, Respondent (a) failed to pursue Perry’s case after its removal to federal court, (b) deceived Perry when he informed her in October of 2003 merely that she “didn’t have a case” but failed to inform her that the case had been filed by Respondent two days late, resulting in her claim being amended, partially dismissed and removed to federal court or that the claim remained pending in federal court until August of 2004, (c) failed to obey the Court Order’s issued by the District Court, (d) failed to respond to a lawful demand for information from a disciplinary authority and charged his clients non-refundable retainer fees, and (e) engaged in the same or similar misconduct as that for which he received prior admonitions.

The ABA Standards provide that after misconduct has been established, aggravating and mitigating circumstances may be considered in determining an appropriate sanction. Respondent’s prior disciplinary offenses, pattern of misconduct, multiple offenses, failure to cooperate with disciplinary authority, refusal to acknowledge the wrongful nature of his conduct and Respondent’s substantial experience in the practice of law could be considered aggravating

factors. Section 9.22 of the ABA Standards. Mitigating factors could include the remoteness of the prior offenses. Section 9.32 of the ABA Standards.

Respondent's misconduct constitutes violations of duties owed to his clients and duties owed to the profession. The fundamental purpose of an attorney disciplinary proceeding is to "protect the public and maintain the integrity of the legal profession." *In re Crews*, 159 S.W.3d 355, 360 (Mo. banc 2005). Given the totality of the violations, as well as the aggravating and mitigating circumstances, an indefinite suspension, with leave to reapply in six months, as recommended by the Disciplinary Hearing Panel, is the appropriate sanction.

CONCLUSION

Respondent committed professional misconduct by: (a) failing to provide competent representation to Perry in violation of Rule 4-1.1 (competence); (b) failing to diligently pursue Perry's lawsuit in violation of Rule 4-1.3 (diligence); (c) failing to communicate with Perry regarding the status of her lawsuit in violation of Rule 4-1.4 (communication); (d) charging non-refundable fees and not properly utilizing his trust account in violation of Rules 4-1.5 (reasonableness of fees), 4-1.15(f)(advance fees to be deposited into client trust account), and 4-1.16(d)(refund of advance fees unearned at end of representation); (e) abandoning Perry's lawsuit once it was removed to District Court resulting in unnecessary delay in the litigation and unfairness to the opposing party and its counsel in violation of Rule 4-3.2 (expediting litigation) and 4-3.4 (fairness to opposing party and counsel); (f) failing to reply to OCDC's request for information during the course of its investigation of a disciplinary matter in violation of Rule 4-8.1(c)(failure to respond to disciplinary authority; and (g) failing to comply with or obey the District Court orders or rules in violation of Rule 4-8.4(d)(conduct prejudicial to the administration of justice).

The referenced violations, and the presence of aggravating circumstances and mitigating circumstances, support the imposition of discipline as described herein. Accordingly, Informant respectfully requests that this Court indefinitely suspend Respondent from the practice of law with leave to apply for reinstatement after six months, consistent with the recommendation of the Disciplinary Hearing Panel decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2011, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First

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Barry J. Klinckhardt

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 5,731 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. That Trend Micro Security Agent software was used to scan the disk for viruses and that it is virus free.



Barry J. Klinckhardt

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