

IN THE SUPREME COURT OF THE STATE OF MISSOURI

IN RE:

LAWRENCE JOSEPH FLEMING
MISSOURI BAR NO. 019946

Respondent.

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)
)

Supreme Court #SC91440

RESPONDENT'S BRIEF

Mary Kathleen Justin, #47903
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Kirkwood, MO 63122
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Attorney for Respondent

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STATEMENT OF JURISDICTION

Respondent agrees with Informant that this Court has jurisdiction over this matter pursuant to Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law and Section 484.040 R.S.Mo. 2000.

COUNTER STATEMENT OF FACTS

The "Statement of Facts" submitted by Informant could be (perhaps unintentionally) misleading in that it implies that the facts set out on pp. 7-10 have been proven and found by the Disciplinary Hearing Panel when, in fact, the Disciplinary Hearing Panel did not conduct a hearing or receive any evidence.

Rather, the case was submitted on a very narrowly drawn stipulation of some facts as well as **assertions** by the Complainants which are set out at Appendix p. 32-34 and to which Respondent has agreed that "for purposes of this proceeding only there is sufficient evidence to support the following conclusions" – (followed by conclusions of professional misconduct).

Respondent has not stipulated to the truthfulness of all allegations made, but only that, in order to avoid extended proceedings herein, the assertions noted may be considered as a basis for the disciplinary action suggested in the Stipulation. Among the reasons for this procedure is that set out in Respondent's December 30,

2010 letter to the Legal Ethics Counsel accepting the decision of the panel. (*See* Appendix p. 51.)

In this regard, Respondent particularly disputes the implications that he engaged in unprofessional or fraudulent conduct when he wrote the Special Representative a letter on April 10, 2009 advising her that Complainant Rogers had informed him that he had not written or signed the letter of complaint, and when he thereafter asked Complainant Rogers to sign a statement verifying this (Inf. Br. p. 8). A copy of the April 10, 2009 letter, setting out several discrepancies with Rogers' complaint, has been made part of the record in this case and is attached hereto as Exhibit A. Respondent asserts, and has always asserted, that the statements made therein are true and that Rogers did tell him that the letter of complaint had been written by his former girlfriend. Obviously, it would have been quite foolish to write such a letter to the Special Representative if Mr. Rogers had not made the statements alleged knowing that Rogers would be contacted.

Also, enclosed with the April 10, 2009 letter was an eight page summary of Respondent's dealings with Complainant Goerger containing 13 exhibits. This summary explains Goerger's long history in the trial level and appellate courts, which involved pleadings and appeals filed by no less than four prior attorneys and multiple **pro se** submissions seeking to overturn Goergers 1997 convictions for several counts of assault and armed criminal action, none of which had been

successful and several of which resulted in allegations against his attorneys. It also discussed the work and investigation performed or directed by Respondent in Goerger's criminal matter as well as two civil matters, and why Respondent delayed filing the Motion to Withdraw the Mandate which is the subject matter of Goerger's complaint. Apparently, this summary has not been made part of the record submitted to this Court by the Informant, although it would serve as useful background on the Goerger matter. However, Respondent has agreed that the assertions made by Complainant Goerger, as set out in Informant's Brief (pp. 8 and 9), may be considered for purposes of this proceeding only warranting the disciplinary action insisted upon by the Special Representative and to which Respondent agreed after much negotiation.

That being said, Respondent is not now in a position to dispute the disciplinary action recommended by Informant, but does submit that this should be the outer limits of disciplinary action imposed by this Court and that the Court may exercise its discretion in imposing a lesser disciplinary action should the Court elect to do so.

In this connection Respondent points to the background information provided at paragraphs 4(e)(f) and (g) of the Stipulation (Appendix 31 and 32) which state as follows:

e. Respondent has a background of public service having served as an attorney in the Civil Rights Division of the United States Department of Justice, as a JAG officer in the United States Navy and the United States Naval Reserve, as an Adjunct Associate Professor of Law at St. Louis University School of Law, as an author/contributor to Missouri CLE publications and as a speaker at Missouri Bar CLE classes, as Chairman of the Amicus Committee of the National Association of Criminal Defense Lawyers and Respondent frequently has accepted criminal cases as an appointed attorney in both Federal and State Courts. Respondent also served as an Assistant Federal Public Defender between 1996 and 2003, and worked during that time in the Southern District of Illinois.

f. Respondent has been admitted to practice and has practiced before a number of United States district courts as well as the U.S. Court of Appeals for the Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits as well as the Federal Circuit in Washington, D.C., the United States Court of Military Appeals and the Supreme Court of the United States. Respondent has

been attorney of record in over 150 reported cases in both federal and state courts.

g. Respondent has consistently received an AV rating on peer review surveys conducted by Martindale-Hubbell and has been rated as “AV Preeminent” for the year of 2010, the highest possible rating in both legal ability and ethical standards. In fact, he recently received an award indicating he has received AV peer review ratings for thirty (30) consecutive years. He has also received a President’s commendation from the National Association of Criminal Defense Lawyers for his service to that organization.

It should also be noted that Informant has also stipulated that the three prior admonitions referred to on pages 6 and 7 of Informant’s Brief “All involve conduct that occurred prior to 1993...,” some 18 years ago, including the admonition which was issued in 1998, some 12 ½ years ago. (Inf. Br. p. 23.)

During the past 12 ½ years Respondent has been free of any disciplinary action.

Informant acknowledges this factor when comparing this case with **In re Wiles**, 107 S.W.3d 228 (Mo. banc. 2003). Informant states as follows:

In this case, Respondent likewise has violated Rules 4-1.3 and 4.8.4(d) with regard to several clients. Unlike **Wiles**, however, Respondent has no disciplinary history since 1998, a period of over eleven years, and all conduct for which he was previously disciplined occurred prior to 1993. Furthermore, Respondent here is not accused of any violation regarding the safekeeping of client property as was Mr. Wiles. This case is within the same range as **Wiles**. Therefore, a similar disposition is appropriate. (Inf. Br. p. 24.)

Specifically, Respondent has enjoyed a legal career that spans more than 43 years, during which time he developed a solid reputation as a practitioner and public servant. Respondent's conduct in connection with his representation of Mr. Goerger and Mr. Rogers is not generally indicative of Respondent's conduct throughout his legal career. (Inf. Br. p. 25.) (Emphasis supplied.)

Respondent, of course, appreciates Informant's conclusion that "Respondent's public service, reputation in the legal community, lack of any recent disciplinary history and cooperation with the Office of Chief Disciplinary Counsel in the prosecution of this case could be considered mitigating factors." (Inf. Br. p. 24.) In fact, Respondent did cooperate in negotiating and formulating the stipulation to which the parties ultimately agreed thereby avoiding a protracted and possibly contentious proceeding before the Hearing Panel.

Additionally, it should be noted that neither Complainant Rogers nor Complainant Goerger suffered any harm to their potential causes of action as a result of the delays referred to in the stipulation. A timely lawsuit was, in fact, filed by Respondent on behalf of Mr. Rogers in May, 2009, and Mr. Rogers was furnished all discovery obtained in that lawsuit before Respondent was required to withdraw as his attorney, by leave of the Court, which stayed the proceedings so that Rogers could obtain new counsel. No fee or expenses of any kind were charged to Mr. Rogers. With regard to Mr. Goerger's proposed Motion to Withdraw the Mandate, no time limits of any kind expired while the matter was being investigated, studied and researched by Respondent. In fact, Mr. Goerger had filed numerous timely post conviction motions, all of which had been denied well before he contacted Respondent. Mr. Goerger could still file a Motion to Withdraw the Mandate if the law on which it is based develops further in his favor

and is applied retroactively. Nevertheless, Respondent has accepted responsibility for the delay and any misunderstanding or misinformation provided to his clients on both of these matters and have agreed to disciplinary action as a result thereof.

However, it is submitted that the Court should consider these mitigating factors when exercising its considerable discretion in this matter as to what that disciplinary action should be.

ARGUMENT

A. Standard of Review

Respondent does not disagree with the arguments made by Informant since he has entered into a Stipulation and consented to the Committee's recommendation. However, he does recognize that the stipulation as well as the hearing panel's recommendations are advisory only, **In re Crews**, 159 S.W.3d 355, 358 (Mo. banc. 2005) and **that this Court must review the evidence and reach its own conclusions in a de novo manner. Id.** The arguments here presented are with that factor in mind and are not intended to refute the arguments made by Informant which are consistent with the stipulation and agreement herein.

B. Comparable Actions

The Informant has cited **In re Wiles**, 107 S.W.3d 228 (Mo. banc. 2003) as a case with similar facts, but has also noted several adverse factors in **Wiles** which **are not present here** – Respondent's long history of public service, no recent history of disciplinary actions, and no allegation regarding the safekeeping of client property. Respondent again appreciates Informant's candor in distinguishing this case from the Court's opinion in **Wiles**. Additionally, it appears that this Court has frequently and with success ordered probation as an appropriate remedy when the allegations do not warrant a more serious sanction.

The following is a list of disciplinary cases involving similar conduct in which the sanctions of probation and, in some cases, a private or public reprimand, have been determined to be the appropriate penalties. (Obtained from Chart of Missouri Disciplinary Actions furnished by the Office of Chief Disciplinary Counsel 2003-2009.)

John Allen	Bar #24080	Probation 11/23/09
Candice Bante	Bar #36977	Probation 6/22/04
Steven Belcher	Bar #46075	Probation 10/23/07*
Michael Blum	Bar #47278	Probation 9/1/09
Larry Coleman	Bar #27575	Probation 10/20/09*
Catherine Earnshaw-Hobbs	Bar #23452	Probation 12/17/07*
Renaeh Ehler	Bar #46793	Probation 10/21/05*
Richard Gerber	Bar #34384	Probation 8/25/05*
David Godfrey	Bar #15389	Probation 7/26/07*
Douglas Greene	Bar #24373	Probation 10/26/04
Michael Hanson	Bar #35436	Probation 12/18/07*
Dennis Harney	Bar #55026	Probation 5/30/06*
Sherri Harris	Bar #56104	Probation 12/4/09*
Gerald Harvath	Bar #23032	Probation 11/12/09
Richard Hughes	Bar #26640	Probation 7/25/07*
Gregg Hyder	Bar #28914	Probation 10/28/03
Linda Jarman	Bar #39927	Probation 11/7/09
David Johnson	Bar #23466	Probation 2/1/08
Thomas Klinginsmith	Bar #28276	Probation 10/28/03
Richard Koehler	Bar #25354	Probation 3/30/04

James LaSalle	Bar #45485	Probation 7/12/07*
Travis Mask	Bar #44544	Probation 5/2/07
Charles McKeon	Bar #31316	Probation 11/20/07*
Thomas Noonan	Bar #30210	Probation 5/1/07*
Lee Platke	Bar #19632	Probation 8/30/05
Dan Purdy	Bar #18694	Probation 11/24/08
Joseph Robbins	Bar #35319	Probation 4/29/03*
Howard Shaver	Bar #30211	Probation 12/18/07*
Isabel Siedband	Bar #53975	Probation 11/1/05*
Thomas Watkins	Bar #21518	Probation 4/11/06*

* **Indicates successful completion of probation.**

Most of the foregoing attorneys have continued to practice law without interruption and have, or will soon have, successfully completed their probation, indicating that probation without suspension or stayed suspension is an effective remedy.

CONCLUSION

As the Court exercises its discretion in this case pursuant to **In re Crews**, **supra**, Respondent respectfully requests that the committee's recommendation, as accepted by Respondent be considered the outermost sanction to be ordered by this Court.

Mary Kathleen Justin

Mary Kathleen Justin, #47903

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(314) 308-2108

Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2011, two copies of Respondents Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

Alan D. Pratzel
Cheryl Walker
OCDC
3335 American Avenue
Jefferson City, MO 65109



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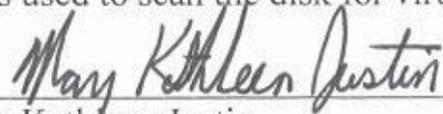
CERTIFICATION – RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 1,946 words, according to Microsoft Word, which is the

word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.



Mary Kathleen Justin

APPENDIX – EXHIBIT A

HERZOG ♦ CREBS

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April 10, 2009

Ms. Cheryl D. S. Walker
Special Representative
Bryan Cave LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, MO 63102

HAND DELIVERED/CONFIDENTIAL

Re: Robert Goerger – No. 09-0089- XI
Charles Rogers – No. 09-0057- XI

Dear Ms. Walker:

Enclosed is my response to the Robert Goerger matter with a number of exhibits attached. If there is anything else you need from me, please let me know, but **please note that I will be out of town during the two week period May 26 through June 7, 2009, and will not have access to any confidential correspondence, nor available for any conferences.**

I have deferred responding to the Charles Roger matter since Mr. Rogers has indicated to me that he did not write the letter you have enclosed. He believes that his former girlfriend may have written it and signed his name since she had been quite anxious about getting some money from Bank of America before they parted ways.

I tend to believe Mr. Rogers in this regard because the signature on the letter does not, in my opinion, match his signature on copies of checks which I have in my file, although it is a close copy. (See attachment 1) Additionally, the first notice I had that such a letter had been written was when I received it in an envelope postmarked February 2, 2009, with a handwritten address and no return address. The meter stamp indicates that this envelope was mailed from zip code 33015, which, of course, is not St. Louis or Jefferson City. Inside the envelope was also my Martindale Hubble profile dated January 30, 2009. I am enclosing a copy of the envelope and its enclosures. (See attachment 2) I don't mean to be overly suspicious, but I don't know what to make of that.

I expect to see Mr. Rogers next week and, if he contradicts his prior statement and acknowledges writing the letter, I will promptly respond. However, I am reluctant to do so unless and until he has personally taken action to waive any attorney-client privilege. I am sure you understand this.

I will certainly let you know what I determine.

HERZOG ♦ CREBS

HERZOG CREBS LLP
ATTORNEYS AT LAW

Ms. Cheryl D. S. Walker
April 10, 2009
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Thank you for your patience and particularly for allowing me the extra ten days to file the Goerger response.

Sincerely,

A handwritten signature in black ink, appearing to read "Lawrence J. Fleming". The signature is fluid and cursive, with a large initial "L" and "F".

Lawrence J. Fleming
Of Counsel

LJF/dmd
Enclosures

CHARLES F ROGERS
 162514-9000
 1041 RESERVE WALK WAY
 BELLEVILLE, IL 62220

Date 5/25/06 245

Pay to the order of Department of Economic (Mortgage) \$ 108.00
One hundred and eight dollars 00/100 Dollars

Bank of America
 Military Bank
 112 860506 N

For Acct # 10697000708005
 \$ 11400065340245 7476556208 /0000010800/

CHECK NUMBER 245 CHECK AMT \$108.00

CHARLES F ROGERS
 162514-9000
 1041 RESERVE WALK WAY
 BELLEVILLE, IL 62220

Date 5/26/06 246

Pay to the order of Citi Cards \$ 108.00
One hundred and eight dollars 00/100 Dollars

Bank of America
 Military Bank
 112 860506 N

For Acct # 10697000708005
 \$ 11400065340246 7476556208 /0000010800/

CHECK NUMBER 246 CHECK AMT \$108.00

CHARLES F ROGERS
 162514-9000
 1041 RESERVE WALK WAY
 BELLEVILLE, IL 62220

Date 6/1/06 247

Pay to the order of Bank of America \$ 52.42
Fifty two and 42/100 dollars 00/100 Dollars

Bank of America
 Military Bank
 112 860506 N

For Acct # 0917-254-S
 \$ 11400065340247 7476556208 /0000005242/

CHECK NUMBER 247 CHECK AMT \$52.42

CHARLES F ROGERS
 162514-9000
 1041 RESERVE WALK WAY
 BELLEVILLE, IL 62220

Date 5/26/06 248

Pay to the order of Chase Credit Services \$ 60.00
sixty dollars 00/100 Dollars

Bank of America
 Military Bank
 112 860506 N

For Acct # 6162201785621
 \$ 11400065340248 7476556208 /0000006000/

CHECK NUMBER 248 CHECK AMT \$60.00

CHARLES F ROGERS
 162514-9000
 1041 RESERVE WALK WAY
 BELLEVILLE, IL 62220

Date 5/26/06 249

Pay to the order of AT & T Bill Payment Center \$ 175.00
One hundred and seventy five dollars 00/100 Dollars

Bank of America
 Military Bank
 112 860506 N

For Acct # 618222231626-3
 \$ 11400065340249 7476556208 /0000017500/

CHECK NUMBER 249 CHECK AMT \$175.00

ATTACHMENT 1

UNITED STATES POSTAGE
EAGLE
RITNEY BOWLES
02 1A \$00.420
0004315291 FEB 02 2009
MAILED FROM ZIP CODE 33015



FIRST CLASS

ATTN: Lawrence Fleming
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