

**IN THE SUPREME COURT  
STATE OF MISSOURI**

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**IN RE:** )  
 )  
**THOMAS M. FISHER,** ) **Supreme Court #SC89089**  
 )  
**Respondent.** )

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**INFORMANT'S BRIEF**

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## **STATEMENT OF JURISDICTION**

Jurisdiction over attorney discipline matters exists in the Missouri Supreme Court and 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.

## STATEMENT OF FACTS

### **Background**

In or around December, 1979, Respondent, Thomas Michael Fisher, (“Respondent”), broke into a stranger’s home in the State of Nevada, held a woman at gunpoint, and searched the home. **App. 3.** The victim escaped from the home and Respondent ran out of the home with the victim’s house and car keys. **App. 3.** Respondent later returned to the victim’s home and stole her car. **App. 3.** On or about January 12, 1980, Respondent was arrested in San Bernardino, California and was extradited back to Nevada, where he was charged with Grand Larceny-Auto, Use of a Deadly Weapon, Robbery and Burglary. **App. 3.** Respondent was later released on bond. **App. 3.**

In or around June 1980, while out on bond, Respondent burglarized two cars and three motor homes in or around Vacaville, California. **App. 3.** Respondent also damaged a backhoe and certain other tools and supplies belonging to a construction company. **App. 3.** Respondent was arrested and initially charged with Burglary of a Residence and Receiving Stolen Property. **App. 3.** At the same time, while out on bond, Respondent stole food from his employer and was charged with embezzlement. **App. 4.** When Respondent was later extradited from Nevada in 1981 for the charges of Burglary of a Residence and Receiving Stolen Property in California, the charges were changed to five counts of violating section 459 of the California penal code and one count of violating section 594 of the California penal code, which is willful and malicious injury to property. **App. 3; App. 21 (T. 50).**

On September 3, 1980, pursuant to a plea agreement, Respondent pled guilty to and was convicted of Robbery and Burglary in Nevada. **App. 4.** The Grand Larceny – Auto and Use of Deadly Weapon charges were dismissed as part of the plea agreement. **App. 4.** Respondent was sentenced to ten years in the state penitentiary for Robbery and five years for Burglary, with the sentences to run concurrently. **App. 4.** Respondent served three years and three months in a Nevada state penitentiary on the Robbery and Burglary charges and was released from prison on or around December 14, 1983. **App. 4.** The California charges were dismissed for lack of a speedy trial. **App. 4.**

In 1996, 13 years after being released from prison, Respondent applied for a pardon from the State of Nevada. **App. 4.** Respondent received a pardon from the State of Nevada for his Burglary and Robbery convictions. **App. 4.** The pardon for Respondent’s Robbery and Burglary charges did not seal Respondent’s records for the convictions or arrests. **App. 15 (T. 26-27).** While seeking his pardon, Respondent contends that he was told by a secretary at the Nevada Board that the record of his convictions would be sealed if he received a pardon. **App. 4; App. 39.** Respondent’s charges in Nevada for Grand Larceny-Auto and Use of a Deadly Weapon were never pardoned or sealed. **App. 21 (T. 49-50).** The charges in California resulting from Respondent’s burglary of motor homes and cars and destruction of property were never pardoned or sealed. **App. 21 (T. 50-51).** Respondent’s charge for embezzlement was never pardoned or sealed. **App. 21 (T. 50-51).**

Also in 1996, Respondent requested that the Missouri Governor’s Office grant him executive clemency with respect to the Burglary and Robbery charges in the State of

Nevada. **App. 53-59.** The State of Missouri Board of Probation and Parole generated a six page report recommending that Respondent not receive executive clemency because of the seriousness of his offenses. **App. 53-59.** The report, which Respondent received a copy of in 1996, recites Respondent's arrests, charges and convictions in Nevada and California. **App. 53-56; App. 29 (T. 82-83).** In or around 1997, Respondent independently requested a copy of his FBI criminal history report, which he states did not reveal any of Respondent's previous criminal history, though no copy of the report exists. **App. 22 (T. 54-55); App. 29 (T. 81-82).**

#### **Facts Underlying the Disciplinary Complaint and Disciplinary History**

Respondent graduated from law school in the year 2000 and on or about March 16, 2000, submitted an Application for Character and Fitness to the Missouri Board of Law Examiners. **App. 2, 5.** When asked on the Application, “[h]ave you ever, either as an adult or juvenile, been cited, arrested, charged or convicted for any violation of any law?”, Respondent answered, “No.” **App. 5.** Respondent did not do any legal research in 2000 to determine if he could properly answer “no” to the question on his application. **App. 22 (T. 56).** Respondent did not contact anyone at the Missouri Board of Law Examiners and did not seek advice from members of the law firm where he was working or any other Missouri attorney to determine if he could properly answer “no” to the question on his application. **App. 22 (T. 56).** Respondent's decision to answer “no” was based on the fact that his FBI record did not show any criminal history and because Respondent contends that he was told by a secretary at the Nevada Board of Pardons that

he had a clean record. **App. 22 (T. 54)**. Respondent did disclose on his application two traffic tickets that he had received seven years prior. **App. 24 (T. 61)**.

The independent investigation of the Missouri Board of Law Examiners did not uncover Respondent's arrests, charges and/or convictions in Nevada or California, as none of the arrests, charges or convictions appeared on Respondent's FBI criminal history report at the time. **App. 5**. On or about June 19, 2000, the Missouri Board of Law Examiners informed Respondent that his character and fitness investigation had been completed and his application to take the bar examination had been approved. **App. 5**. Respondent passed the Missouri bar examination and was licensed on or about September 27, 2000. **App. 6**. Respondent holds Missouri Bar License No. 52331 and is currently in good standing. **App. 3**. Respondent has no disciplinary history before this Court. **App. 3**.

In or around July, 2005, Respondent applied for licensure to practice law in the State of North Carolina by comity. **App. 6**. The North Carolina Board of Law Examiners learned of Respondent's arrests, charges, and convictions, during its character and fitness investigation, as Respondent's criminal history then appeared on the FBI's criminal history report. **App. 6**. The North Carolina Board of Law Examiners notified the State of Missouri of Respondent's criminal history and the Office of Chief Disciplinary undertook an investigation into the matter. **App. 6**.

### **Procedural History**

During the course of its investigation, Respondent submitted a letter to the Office of Chief Disciplinary Counsel in which Respondent explained his reason for failing to

disclose his criminal history on his bar application. **App. 25 (T. 66-67)**. Respondent stated in his letter that he “finally decided not to disclose” because he was ashamed and embarrassed. **App. 25 (T. 67)**.

On or about May 23, 2007, Informant filed an Information setting forth its belief that probable cause existed to establish that Respondent violated Rules 4-8.1(a) and 4-8.1(b) in making false statements of material fact on his bar application and/or failing to disclose a fact necessary to correct the misapprehension created when Respondent failed to report his criminal history on his bar application. **App. 60-67**. Informant further charged that Respondent violated Rule 4-8.4(c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and Rule 4-8.4(a) in violating the Rules of Professional Conduct. **App. 60-67**. Simultaneously, the parties submitted a Joint Stipulation of Fact in which the parties agreed to be bound by the stipulations contained therein. **App. 2-7**. The parties were unable to agree on conclusions of law or recommended discipline and therefore left such determinations to the Disciplinary Hearing Panel. **App. 68**.

On May 21, 2007, Informant informed the Advisory Committee, by letter, that according to Respondent’s representations, the Joint Stipulation of Fact was intended to serve as Respondent’s Answer and that a hearing panel would need to be appointed for the purpose of determining the legal conclusions and level of discipline to be recommended, if any. **App. 68**. On July 5, 2007, the Advisory Committee Chair appointed Doreen Dodson, Jennifer Gille Bacon and Richard Priest to hear testimony in Respondent’s case. **App. 69-70**. The Chair for the Disciplinary Hearing Panel, Doreen

Dodson, informed both parties that the Panel was requesting each party submit a Memoranda of Law, addressing the legal issues involved. **App. 71.** At the same time, in or around August, 2007, Respondent obtained an order from the State of Nevada sealing Respondent's arrest and conviction records for the charges that arose in the State of Nevada. **App. 15 (T. 27).**

The disciplinary hearing took place on November 15, 2007. **App. 8.** With respect to Respondent's Burglary and Robbery convictions in Nevada, for which he was later pardoned, Respondent testified at hearing that he had determined that the convictions were not material to the Board of Law Examiners' review and therefore decided not to disclose his criminal activity on his Bar Application. **App. 23 (T. 58-59).** Respondent also testified that he believed the pardon from Nevada sealed his criminal record and he was not required to disclose his Burglary or Robbery conviction. **App. 14 (T. 24).** Respondent acknowledged at the hearing, however, that the pardon did not, in fact, operate to seal Respondent's Nevada convictions. **App. 25 (T. 65-66).**

Respondent testified at hearing that since the FBI report came back clean, he believed the chances of anyone finding out about his criminal conduct were slim so he decided not to disclose his arrests, charges and convictions. **App. 26 (T. 69).** With respect to Respondent's arrests and charges in California, Respondent testified at hearing that he failed to disclose his arrests and charges in California because he had forgotten about the charges. **App. 16.** Respondent also testified that his failure to report Nevada's Grand Larceny-Auto and Use of a Deadly Weapon charges, for which he was not pardoned, was an oversight on his part. **App. 24.**

On December 10, 2007, the Disciplinary Hearing Panel issued its Decision in which it recommended that Respondent's license to practice law in Missouri be suspended for a period of six months. **App. 81.** Specifically, the Disciplinary Hearing Panel found that Respondent violated Rule 4-8.1(a) and (b) by knowingly failing to disclose his criminal history in Nevada and California on his bar application and failing to correct the Board's misapprehension regarding Respondent's past when Respondent failed to disclose his criminal history. **App. 79.** The Disciplinary Hearing Panel did not find Respondent's testimony regarding his reasons for failing to disclose his criminal history to be credible and found that it was unlikely Respondent had forgotten about the California and Nevada charges. **App. 80-81.** Respondent had testified at hearing that he would have sought whatever legal means necessary to keep from having to disclose his criminal past on his bar application and that his goal was to be able to legally cover up his criminal past. **App. 16, 32.**

Following the issuance of the Disciplinary Hearing Panel's Decision, Respondent submitted a letter and motion to the Disciplinary Hearing Panel requesting that Respondent's disciplinary record be sealed. **App. 82-84; App. 85-88.** Respondent thereafter filed a Motion to Seal before this Court, which has been previously ruled on and resolved.

**POINTS RELIED ON**

**I.**

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S  
LICENSE BECAUSE RESPONDENT VIOLATED RULES OF  
PROFESSIONAL CONDUCT 4-8.1(a) and (b) AND 4-8.4 (c) IN  
THAT RESPONDENT KNOWINGLY FAILED TO DISCLOSE  
ARRESTS, CHARGES AND CONVICTIONS FOR VIOLENT  
CRIMES ON HIS APPLICATION FOR CHARACTER AND  
FITNESS BEFORE THE MISSOURI BOARD OF LAW  
EXAMINERS.**

*In re Baska*, 641 S.E.2d 533 (Ga. 2007)

*In the Matter of Moore*, 812 N.E.2d 1197 (Mass., 2004)

*In re Ascher*, 411 N.E.2d 1 (Ill. 1981)

Rule 4-8.1(a)

Rule 4-8.1(b)

Rule 4-8.4(c)

Rule 8.05(c)

Rule 8.06

**POINTS RELIED ON**

**II.**

**THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE FOR A MINIMUM OF SIX MONTHS BECAUSE SUSPENSION IS APPROPRIATE WHEN A LAWYER KNOWINGLY MAKES FALSE STATEMENTS OF MATERIAL FACT OR FAILS TO DISCLOSE A NECESSARY FACT TO CORRECT A KNOWN MISAPPREHENSION CREATED ON AN APPLICATION FOR BAR EXAMINATION.**

*In re Warren*, 888 S.W.2d 334 (Mo. banc 1994)

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

*In re Chandler*, 641 N.E.2d 473 (Ill. 1994)

Standards for Imposing Lawyer Sanctions, American Bar Association, 1991

## ARGUMENT

### I.

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULES OF PROFESSIONAL CONDUCT 4-8.1(a) and (b) AND 4-8.4 (c) IN THAT RESPONDENT KNOWINGLY FAILED TO DISCLOSE ARRESTS, CHARGES AND CONVICTIONS FOR VIOLENT CRIMES ON HIS APPLICATION FOR CHARACTER AND FITNESS BEFORE THE MISSOURI BOARD OF LAW EXAMINERS.**

A disciplinary hearing panel's recommendation is advisory in nature. *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). This Court conducts a de novo review of the evidence and reaches its own conclusions of law. *Id.* Discipline will not be imposed unless professional misconduct is proven by a preponderance of the evidence. *Id.* Where misconduct is proven by a preponderance of the evidence, violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004).

#### **The Application Question Required Respondent to Disclose his Crimes**

In applying to sit for the bar examination, the applicant bears the burden of establishing his fitness to practice law and false or misleading answers given during the application process may be grounds for finding a lack of requisite character and fitness. *In re Baska*, 641 S.E.2d 533, 534-535 (Ga. 2007) (citing *In re Beasley*, 252 S.E.2d 615

(Ga. 1979); *In re Adams*, 540 S.E.2d 609 (Ga. 2001)). At the time of Respondent's application to sit for the Missouri bar examination in 2000, Missouri Rule 8.06, Regulations of Board of Law Examiners (3) provided that "[a]ll applications shall be fully and completely answered without reservation or exception. Complete candor and fully articulated responses to all inquires are a condition precedent to board approval and recommendation." On Respondent's Character and Fitness Application, he was asked, "[h]ave you ever, either as an adult or juvenile, been **cited, arrested, charged or convicted** for any violation of any law?" (emphasis added). Respondent had previously committed multiple crimes against persons and property and was subsequently arrested for his crimes that occurred in Nevada and California, charged for crimes in Nevada and California and convicted only in Nevada of Robbery and Burglary, for which he spent over three years in prison. Respondent did not disclose any of his arrests, charges or convictions and in fact answered "no" to the question posed.

Irrespective of any excuse or explanation for failing to disclose all of his arrests, charges and convictions, the simple language of Respondent's bar application question required Respondent, at the very least, to disclose any previous arrests. Respondent's arrests were events that occurred independent of his subsequent charges and independent of any subsequent pardon for his convictions in Nevada. "Truthfulness and candor are the most important qualifications for bar membership." *Fla. Bd. of Bar Exam'rs re M.B.S.*, 955 So.2d 504, 509 (Fla. 2007) (citing *Fla. Bd. of Bar Exam'rs re R.L.W.*, 793 So.2d 918, 926 (Fla. 2001)). Respondent was charged with answering a simple question

("have you ever been arrested?") and Respondent was patently dishonest when he answered, "no."

In addition, Respondent was required to report that he had been charged with felonies in both Nevada and California. In Nevada, Respondent was charged with Grand Larceny-Auto, Use of a Deadly Weapon, Robbery, and Burglary. Respondent was also charged with Burglary of a Residence, Receiving Stolen Property and Embezzlement in the State of California. The questions, as written on the application for bar examination, do not contemplate legal defenses to the responses of an applicant, nor do they leave room for an applicant to determine, on his own, which questions must be answered and which are not worthy of full disclosure. The Respondent was asked whether or not he had ever been charged with a crime and had he been exercising the level of truthfulness and candor required of a Missouri attorney, Respondent would have answered in the affirmative. Finally, Respondent failed to demonstrate truthfulness and candor in concealing his convictions for Robbery and Burglary in Nevada.

To the extent that Respondent may have felt that the language of the application question did not require full disclosure, at least one court has stated that an applicant's attempt to falsify or withhold information based on the way that a bar application question is written is a "self-serving rationalization that is diametrically opposed to that level of openness and candor which is a necessary prerequisite for admission to a profession that has honesty as its bedrock." *Fla. Bd. of Bar Exam'rs re M.B.S.*, 955 So.2d 504 at 511. The question in this case was simple and straight forward and presumably reflected the Board of Law Examiner's desire to obtain relevant information

about the applicant's criminal past. As such, it was incumbent on Respondent to answer the questions candidly and to fully disclose his crimes.

**Respondent Violated Rules 4-8.1(a) and (b) and 4-8.4(c)**

Rule 4-8.1 governs bar admissions and disciplinary matters and states:

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 4-8.1(a) requires that Respondent's conduct be "knowing" and Rule 4-1.0(f) provides that "knowingly," "known," or "knows" denotes actual knowledge of the fact in question, which can be inferred from the circumstances. In the present action, Respondent's decision not to disclose his criminal past was most certainly a knowing violation of the Rule.

In Respondent's correspondence to the Office of Chief Disciplinary Counsel during its investigation, Respondent stated, "I finally decided not to disclose. . .[.]" Further, Respondent testified at hearing that he considered disclosing the crimes, but ultimately decided not to do so. Respondent admits that he made a knowing decision to

conceal his criminal conduct. Though Respondent does not have a valid reason for failing to disclose his criminal past, whether or not Respondent believed he was required to disclose the crimes is irrelevant to the determination that Respondent's conduct was "knowing" in nature. Respondent knew he had been arrested, charged and convicted of crimes and "finally decided not to disclose." The omission was a purposeful and knowing decision, irrespective of Respondent's reason for making the decision.

Rule 4-8.1(a) also requires that Respondent's misstatement be that of a material fact. The Supreme Court of Illinois previously held that an applicant who misstated her social security number and concealed an investigation into her falsification of a bank loan had made a misstatement of material fact. *In re Chandler*, 641 N.E.2d 473, 480-481 (Ill. 1994). Further, the Supreme Court of Indiana has held that an applicant's failure to disclose his attendance and academic dismissal at two universities was a misstatement of material fact. *In the Matter of Rodriguez*, 753 N.E.2d 1289 (In. 2001). In the present action, Respondent committed violent felonies and spent several years in a state penitentiary. Missouri Rule 8.05(c), in effect at the time of Respondent's 2000 application, provided that any application for character and fitness from a person previously convicted of a crime should affirmatively demonstrate that the cause had abated; that the person injured had received restitution, the claims had been discharged, or the injured party had been notified; that all special conditions had been accomplished; and that the best interest of the public would be served if the applicant received a license. The requirements of Rule 8.05(c) make clear that the Board of Law Examiners, as well as this Court, felt that the conviction of a crime was material to a proper examination of an

applicant's character and fitness. There can be no question that when asked whether Respondent had been arrested, charged or convicted of a crime, Respondent's answer of "no" was a knowing misstatement of material fact and a violation of Rule 4-8.1(a). Respondent also violated Rule 4-8.1(b) when he failed to correct the misapprehension that he had not ever been arrested, charged or convicted of a crime, which was created when Respondent failed to disclose his criminal past.

Missouri Supreme Court Rule 4-8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Deliberate concealment of past incidents with the intent to deceive the Board of Law Examiners and prevent it from obtaining information relevant to moral fitness constitutes conduct involving dishonesty, fraud and deceit. *In the Matter of Moore*, 812 N.E.2d 1197, 1203 (Mass., 2004). Further, the failure of an applicant to truthfully respond to questions on a bar application has been held to be a fraud upon the court. *In re Ascher*, 411 N.E.2d 1 (Ill. 1981). In knowingly concealing his past criminal conduct, Respondent engaged in dishonesty, fraud and misrepresentation.

Respondent has testified that he made the calculated decision not to disclose his arrests, charges and conviction in Nevada, establishing that Respondent violated Rules 4-8.1(a) and (b) and 4-8.4(c). With respect to his arrests and charges in California, Respondent testified at hearing that he failed to disclose his arrests and charges because it slipped his mind. Such testimony is simply not credible. Respondent would have this Court believe that although he remembered to disclose on his application two traffic tickets received some seven years prior, he forgot to disclose his arrests and felony

charges in California for Burglary of a Residence, Receipt of Stolen Property and Embezzlement. Further, Respondent had received the report of the Missouri Board of Probation and Parole in 1996, wherein all of Respondent's arrests and charges, including those in California, were recited and Respondent submitted his application for bar examination only four years after receiving the report. It is simply not reasonable to conclude that after receiving a written recitation of his arrest and charges for violent felonies, Respondent forgot to include them on his bar application, but remembered to disclose two traffic tickets. Respondent's conduct suggests that he made the decision to conceal all of his criminal past, in both Nevada and California, and in doing so, Respondent violated Rules 4-8.1(a) and (b) and 4-8.1(c).

#### **The Nevada Pardon did not Abolish Respondent's Duty to Disclose**

At the inception of the Informant's investigation, Respondent argued that the pardon he received from the State of Nevada for the Robbery and Burglary convictions created a legal fiction such that the conduct was deemed never to have occurred and that the pardon, itself, made it unnecessary for him to disclose his crimes on his bar application. If Respondent's 1996 Nevada pardon bares any relevance in the current proceeding, however, it is only with respect to Respondent's convictions in the State of Nevada (for which he received the pardon) and not his arrests or charges, particularly those that occurred in California.

Respondent's 1996 Nevada pardon could only have abolished Respondent's responsibility to report his arrests, charges and convictions if they had the effect of "erasing" the acts, such that the criminal conduct was considered to never have taken

place. While the 1996 Nevada pardon may have negated the legal effects of the convictions in Nevada, they did not affect or erase the fact that the criminal acts, themselves, took place. There are three views as to the effect of a pardon on a person's convictions and guilt: 1) a pardon obliterates both conviction and guilt, which places the person in a position as if he had not committed the offense in the first place, 2) the conviction is obliterated, but the guilt remains, and 3) neither the conviction nor the guilt is obliterated. *State v. Bachman*, 675 S.W.2d 41, 49 (Mo.App., W.D. 1984). Missouri has adopted the second view and holds that the conviction is obliterated, but the guilt remains. *Id.* If Missouri had a *per se* rule disqualifying all applicants with previous felonies from applying for the bar examination, Respondent's pardon may have "erased" the conviction and removed such disqualification, such that Respondent could apply to sit for the bar examination. However, where character is a necessary requirement to take the bar examination and Respondent's felonies would otherwise disqualify him from taking the bar examination, the pardon does not erase the fact that Respondent committed the crimes.

Whether a previously pardoned conviction can be considered when making a determination as to good character is an issue that is most likely to arise in the case of licensed professionals and Missouri has specifically considered the same. In *Hughes v. State Board of Health*, a Missouri physician and license holder was convicted of the crime of mail fraud. *Hughes v. State Board of Health*, 159 S.W.2d 277, 278 (Mo. 1942). This Court stated that the conviction of a crime, if it can be found to be evidence of bad moral character, may itself be considered a ground for revocation of a license, as a

conviction is an adjudication of the fact that the person charged has violated the law. *Id.* at 279. The Court went on to find that a full, unconditional pardon did not affect the Court's determination, as a pardon "cannot be construed as restoring good character." *Id.* The State of Nevada, from which Respondent received his pardon, states that "a pardon does not erase or obliterate the fact that one was once convicted of a crime"; "does not attest to rehabilitation of a person"; and with regard to occupational licensing, "if the licensing standard is good moral character, the pardon does not erase the moral guilt associated with the commission of a criminal offense and the fact giving rise to that conviction may be considered in determining whether that person is of 'good moral character.'" *Nevada Board of Pardons Commissioners*, June 27, 2006, <http://pardons.state.nv.us/effect> (citing Nevada Attorney General's Office Informal Opinion ).

The conclusion to be drawn from these well-accepted principles of law is that Respondent's conviction in Nevada, as well as the underlying acts that led to his conviction, were unaffected by the 1996 pardon and could properly have been considered in the Missouri Board of Law Examiner's consideration of Respondent's moral fitness, had Respondent exercised candor in disclosing such information to the Board. The pardon, itself, did not provide a basis for Respondent's failure to disclose his arrests, charges and convictions on his Missouri application.

#### **The Nevada Pardon did not Seal Respondent's Criminal Records**

Again, Respondent should have understood that the pardon for Robbery and Burglary in Nevada did not affect the arrests and charges in California, or the arrests and

charges in Nevada, for which Respondent received no pardon. Respondent should have disclosed the same. To the extent that Respondent has contended that his pardon sealed the records of his Nevada conviction, Respondent is incorrect. A pardon does not result in the sealing of criminal records. *Op. Att’y Gen.* (NV, 2003) (citing *Lettsome v. Waggoner*, 672 F. Supp. 858, 863 (D.V.I. 1987)). “Sealing” records deprives the general public of the right to gain access to a convicted individuals criminal records relating to a conviction. *See* Nevada Revised Statutes, Chapter 179. In order for records to be sealed in Nevada, the convicted individual must apply to have the records sealed. *Id.* Prior to the inception of this disciplinary matter, Respondent never petitioned the court to have his criminal records sealed. Because Respondent did not petition the court to have his records sealed and because a pardon does not result in the sealing of criminal records, Respondent’s criminal records were not sealed in the year 2000, and Respondent was obligated to disclose his Nevada convictions on his bar application.

In his Memorandum of Law, previously submitted to the Disciplinary Hearing Panel, Respondent spent considerable time discussing the sealing of records and the “legal fiction” that he contends is created when records are sealed. At the same time, Respondent submitted a petition to Nevada in 2007 to have his criminal records sealed, thereby implicitly acknowledging that there was no merit to his previous contention that the records had been sealed or that a legal fiction had been created. Therefore, the Board of Law Examiners was entitled to full disclosure by Respondent of his past criminal conduct.

### **Respondent's Belief that he could Properly Conceal his Crimes was not Reasonable**

Respondent has asserted that in 1996, a staff member at the Nevada Board of Pardons told him that the pardon rendered his criminal conviction for Robbery and Burglary "as if it had never happened." (Note that this is not the same as saying that the records had been sealed). Such a contention does nothing to explain Respondent's reason for failing to disclose his arrests and charges in Nevada and arrests and charges in California. If, however, Respondent is going to assert that he believed his Nevada conviction records had been sealed, such that it was not necessary to disclose his criminal past to the Missouri Board of Law Examiners, it is important to evaluate the reasonableness of Respondent's belief.

In 2000, when filling out his application for the Missouri bar examination and after having completed three years of legal training, Respondent did not contact anyone in Nevada to see if his records had actually been sealed. Respondent did not look at the Nevada statutes, which clearly define the necessary procedure for sealing records. Respondent asserts only that he relied on the off-hand comment of a staff member in Nevada some four years prior. Further, Respondent was applying to sit for the bar examination in the State of Missouri. It would have been appropriate for Respondent to inquire about the necessity for disclosure from the Missouri Board of Law Examiners, or at the very least, other Missouri attorneys. If Respondent truly believed that it was unnecessary for him to disclose his past, then there would have been no harm in confirming that understanding with officials in Missouri. Instead, Respondent ran an independent FBI criminal background check, realized that his crimes in Nevada and

California were not reflected on the report, and decided not to disclose his crimes, hoping that no one would learn of his past. Respondent testified at hearing that he lied on his bar application because he was ashamed of his past. While it is certainly understandable that Respondent would be ashamed of his crimes, it is neither understandable nor excusable that Respondent would engage in dishonesty and deceit to conceal his criminal past in the year 2000. Respondent understood that the Missouri Board of Law Examiners did not know of his criminal past, Respondent did not want to disclose his crimes and only now does Respondent assert that he believed he did not have to disclose his crimes, based on the comment of the Nevada staff member. Even if Respondent did rely on a comment by a Nevada staff member, Respondent's reliance on the statement was not reasonable. If Respondent was going to withhold his criminal past from the Board of Law Examiners then it was incumbent on Respondent to ensure that he had a proper basis for doing so.

Respondent's only articulated reason for failing to disclose his arrests and convictions in California is that he forgot. Respondent's only articulated reason for failing to disclose his arrests and charges in Nevada for Grand Larceny-Auto and Use of a Deadly Weapon was that it slipped his mind. Respondent's only articulated reason for failing to disclose his convictions for Robbery and Burglary in Nevada, for which there is no corroborating evidence, is that a staff member at the Nevada Board of Pardons told him that the pardon rendered his convictions as if they had never happened. Not one of Respondent's articulated reasons is reasonable or believable. Respondent knowingly withheld material information from the Missouri Board of Law Examiners and Respondent violated Rules of Professional Conduct 4-8.1(a) and (b) and 4-8.4(c).

## ARGUMENT

### II.

**THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE FOR A MINIMUM OF SIX MONTHS BECAUSE SUSPENSION IS APPROPRIATE WHEN A LAWYER KNOWINGLY MAKES FALSE STATEMENTS OF MATERIAL FACT OR FAILS TO DISCLOSE A NECESSARY FACT TO CORRECT A KNOWN MISAPPREHENSION CREATED ON AN APPLICATION FOR BAR EXAMINATION.**

When considering the level of discipline to impose for violation of the Rules of Professional Conduct, this Court has considered the propriety of the sanctions under the American Bar Association model rules for attorney discipline ("ABA Standards"). *In re Crews*, 159 S.W.3d 355, 360 (Mo. banc 2005). The ABA Standards divide rule violations into four categories: 1) violations of duties owed to the clients, 2) violations of duties owed to the public, 3) violations of duties owed to the legal system and 4) violations of duties owed to the profession. See Standards for Imposing Lawyer Sanctions, American Bar Association, 1991. This Court has also considered the gravity of the conduct, as well as aggravating and mitigating circumstances, when determining appropriate attorney sanctions. *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). Factors considered in aggravation include dishonest or selfish motive and refusal to acknowledge the wrongfulness of the conduct. *In re Cupples*, 979 S.W.2d 932, 937 (Mo. banc 1998).

The absence of candor in completing a bar application exemplifies a lack of concern for the truth. *In re Chandler*, 641 N.E.2d 473, 474 (Ill. 1994) (citing *In re DeBartolo*, 488 N.E.2d 947 (Ill. 1986) and *In re Connor*, M.R. 8711 (Ill. unpublished order 1993)). This Court has held that attorneys owe the public, the courts and their clients a duty of honesty and that failure to act honestly warrants severe discipline. *In re Carey and Danis*, 89 S.W.3d 477, 498 (Mo. banc 2002) (quoting *In re Caranchini*, 956 S.W.2d 910, 919-920 (Mo. banc 1997)). In the present action, Respondent knowingly and purposefully concealed his crimes. It is important to remember that the Informant is not pursuing disciplinary action against Respondent's license for crimes that happened over 20 years ago. Informant is pursuing disciplinary action against Respondent's license for the fraud and misrepresentation that took place in the year 2000 when Respondent failed to disclose his criminal history to the Board of Law Examiners, and such dishonesty warrants severe discipline.

Because the failure to exercise candor in filling out a bar application evidences a lack of concern for the truth, an applicant can be suspended or disbarred for false statements made on a bar application even though no further unethical conduct occurred after admittance to the bar. *In re Chandler*, 641 N.E.2d 473, 474 (Ill. 1994) (citing *In re DeBartolo*, 488 N.E.2d 947 (Ill. 1986) and *In re Connor*, M.R. 8711 (Ill. unpublished order 1993)). Though it is not clear how long Respondent has actually been practicing in the State of Missouri, Respondent does not have a disciplinary history before the Court. However, the fact that Respondent has not incurred discipline in his past 8 years of practice is of no consequence and does not serve to mitigate his violations.

Violations of Rule 4-8.1(a) and 4-8.1(b) are addressed by ABA Standard 7.0, pertaining to violations of duties owed to the profession. Standard 7.2 specifically states that suspension is appropriate where an attorney knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to the public or legal profession. This Court has found that suspension is appropriate when a lawyer makes false statements on a bar application. *In re Warren*, 888 S.W.2d 334, 337 (Mo. banc 1994).

As previously established, Respondent knowingly withheld information on his bar application and in doing so, Respondent caused injury or potential injury to the public or legal profession. Missouri has procedures like the character and fitness investigation to ensure the integrity of individuals entering the profession and the public has the right to put its faith in policies and procedures of the Missouri Bar. When an individual who has a history of committing violent criminal acts lies on a bar application and “sneaks” into the profession, the integrity of the system is compromised and the public is harmed. In the case of Respondent, he made the calculated decision to withhold relevant information and deprived the Board of Law Examiners of the opportunity to reach an informed conclusion concerning Respondent’s moral fitness. While it is possible that the Board may have deemed Respondent fit to enter the profession, it is also possible that the Board would have found Respondent unfit to enter the profession and that Respondent is at this moment practicing law, where he would have otherwise been deemed unqualified. As such, a minimum sanction of six months suspension is required.

Respondent's violation of Rule 4-8.4(c) is addressed by ABA Standard 4.6, pertaining to lack of candor. Standard 4.6 establishes that suspension is appropriate when an attorney knowingly deceives with resulting injury or potential injury. Again, Respondent owed a duty of candor to the Board of Law Examiners and his failure to disclose information pertaining to his arrests, charges and convictions constitutes a knowing deception on the part of Respondent.

In determining the level of discipline to be imposed, a tribunal must consider aggravating and mitigating circumstances. *In re Kazanas*, 96 S.W.3d 803, 808 (Mo. banc 2003). Aggravating factors that may be considered in the present action include Respondent's dishonest or selfish motive, as well as his refusal to acknowledge the wrongful nature of his conduct. Respondent testified at hearing that he is more afraid of his criminal past becoming public knowledge than he is of losing his license to practice law, which establishes Respondent's selfish motive in concealing his past. Further, in asserting that Respondent has a "legal defense" to his failure to disclose his previous criminal history on his bar application, Respondent simultaneously refuses to acknowledge that complete candor and truthfulness are cornerstones cherished by the profession and expected of bar applicants.

The remoteness of prior offenses may not be considered a mitigating factor in the case at bar, as the remoteness of Respondent's 1980 criminal arrests, charges and convictions are not at issue. At issue is Respondent's dishonesty before the Board, which occurred in the year 2000. It is not for Informant or Respondent to determine that Respondent is reformed or that he deserved a chance to practice law; that determination

was for the Board of Law Examiners to make and Respondent's lack of candor robbed them of the ability to do their jobs. In a case somewhat similar to the one at hand, a Kentucky teacher entered an *Alford* plea to a misdemeanor charge of endangering the welfare of a minor before becoming an attorney several years later. *Kentucky Bar Association v. Guidugli*, 967 S.W. 2d 587 (Ky. 1998). The juvenile court had ordered the record in the case to be closed. *Id.* at 588. It came to light that Respondent had failed to disclose his *Alford* plea in response to the bar application question, "have you ever been charged with or convicted of or plead guilty or no contest to a felony charge, or to a misdemeanor charge, excluding traffic?" *Id.* Respondent had sought advice about whether to disclose the plea on his bar examination from both the lawyer who represented him in the plea and his brother, who was a district judge. *Kentucky Bar Association v. Guidugli*, 967 S.W. 2d at 589 (Ky. 1998). Even though the Court found that the Respondent acted in good faith in seeking advice about whether or not to disclose the plea on his bar application, the Court ordered that Respondent be suspended and that his reinstatement be contingent upon approval of the Character and Fitness Committee. *Id.* In the present case, Respondent's testimony and actions would indicate that the only reason he did not disclose his criminal past was because he did not believe the Missouri Board of Law Examiners would ever learn of his crimes. Respondent failed to disclose his arrests and charges in Nevada and California, out right, and made no good faith effort to determine whether he needed to disclose his Robbery and Burglary convictions in Nevada. Respondent contends that he was told by a Nevada staff member that the records were sealed, but such alleged conversation took place several years prior to

Respondent applying to the Missouri Bar. Respondent sought no advice from anyone about whether or not to disclose his crimes and is entitled to no mitigating inferences for his refusal to disclose his crimes. As established by the ABA Standards and this Court's opinion in *Warren*, Respondent's violations of the Rules of Professional Conduct warrant a minimum sanction of suspension.

**CONCLUSION**

For the reasons set forth above, the Chief Disciplinary Counsel respectfully requests this Court:

- (a) find that Respondent violated Rules 4-8.1 (a) and (b), and 4-8.4 (c);
- (b) suspend Respondent’s license to practice law for a minimum of six months;  
and
- (c) tax all costs in this matter to Respondent, including the \$1,000.00 fee for suspension, pursuant to Rule 5.19(h).

Respectfully submitted,

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ATTORNEYS FOR INFORMANT

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of May, 2008, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First

Class mail to:

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Attorney for Respondent

\_\_\_\_\_  
Shannon L. Briesacher

**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 7,461 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.

\_\_\_\_\_  
Shannon L. Briesacher

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