**IN THE SUPREME COURT**
**STATE OF MISSOURI**

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| **IN RE:** | **)** | |
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| **WILLIAM STANLEY DANIEL,** | **)** | **Supreme Court No. SC91656** |
| | **)** | |
| **Respondent.** | **)** | |

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# INFORMANT'S BRIEF

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## STATEMENT OF JURISDICTION

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

## STATEMENT OF FACTS

### Background and Disciplinary History

In April 1976, Respondent William Stanley Daniel was licensed to practice law in Missouri. (App. A203, ¶ 3.) Respondent's bar number is 24707. (App. A203, ¶ 3.) Respondent has received four prior admonitions for violations of the Rules of Professional Conduct. His first admonition in 2003 was for failing to comply with continuing legal education reporting requirements and for the unauthorized practice of law while he was suspended for such failure in violation of Rule 4-5.5. (App. A465-466.) Respondent received three admonitions (in one letter) in 2010 for failing to obtain a signed representation agreement in a contingent fee personal injury case in violation of Rule 4-1.5(c), for failing to obtain his client's permissions to include Respondent as a payee on a settlement check and then endorsing that check without the client's knowledge or consent in violation of Rule 4-1.15(f), and for endorsing a check of a non-client in violation of Rule 4-8.4(c). (App. A467-471.) Respondent accepted all of the above admonitions. (App. A403.)

### Notice Provided by MDOR to Respondent Regarding His Tax Status

Respondent failed to file Missouri State tax returns for the tax years 2003 and 2004. (App. A461, ¶ 3).) On or about September 21, 2006, the Missouri Department of Revenue ("MDOR") sent Respondent two Requests for Tax Returns, one for 2003 and one for 2004, by regular, first class mail. (App. A462, ¶ 7; A463 ¶ 12; A379; A391.) Those notices were addressed to the last address Respondent had on file with the MDOR,

7012 W. Main St. #1, Belleville, IL 62223-3031. (App. A461.) That Belleville address was included on the letterhead of Respondent's correspondence to the Presiding Officer of the Disciplinary Hearing Panel as late as August 16, 2011. (App. A73.) It also is the address Respondent had on file with the Illinois state bar until January 2011. (App. A402.)

The September 21, 2006 notices informed Respondent that MDOR had not received his tax returns for 2003 and 2004 and gave him instructions as to "WHAT [RESPONDENT] SHOULD [] DO TO RESPOND TO THIS NOTICE." (App. A379; A391.) The MDOR keeps track of returned notices. (App. A462, ¶ 6.) These notices, sent to Respondent on or about September 21, 2006, were not returned. (App. A462, ¶ 7; A463, ¶ 12.)

On or about January 17, 2007, the MDOR sent Respondent two Notices of Deficiency, one for 2003 and one for 2004, to his Belleville, Illinois address. (App. A462, ¶ 8; A463, ¶ 13; A376-378; A388-390.) Those notices also instructed Respondent as to how to respond to the notices and stated, *inter alia*:

> Failure to pay or file a protest of these amounts within 60 days will result in a collection action against you and suspension of your professional license held in Missouri pursuant to Section 324.010 and 484.053, RSMo.

(App. A376-378; A388-390.) Those notices were sent by certified mail. (App. A462, ¶ 8; A463, ¶ 13.) They were not claimed by Respondent and were returned to the MDOR.

(App. A462, ¶ 8; A463, ¶ 13.) The records of the MDOR do not reflect that those notices were re-sent by regular mail.

On or about April 11, 2007, the MDOR sent Respondent two Notices of 10 Day Demand, one for 2003 and one for 2004, to his Belleville, Illinois address. (A462, ¶ 9; A463, ¶ 14; A375; A387.) Those notices provided that his "right of appeal ha[d] expired and [his] liability [was] fixed and final." (App. A375; A387.) Those notices also stated: "If you have any questions, call or forward any correspondence to the address or email listed above." (App. A375; A387.) Those notices were sent by regular mail. (App. A462, ¶ 9; A463, ¶ 14.) They were not returned to the MDOR. (App. A462, ¶ 9; A463, ¶ 14.)

On or about May 23, 2007, the MDOR sent Respondent two Notices of Intent to Offset, one for 2003 and one for 2004, to his Belleville, Illinois address. (App. A462, ¶ 10; A463-464, ¶ 15; A374; A386.) Those notices were sent by certified mail. (App. A462, ¶ 10; A463-464, ¶ 15.) Those notices provided that MDOR was submitting Respondent's debt to the Treasury Offset Program and that his federal income tax refunds would be reduced or withheld by the amount of his debt. The notices further provided:

> REQUEST A REVIEW: If you believe that all or part of the debt is not past due or legally enforceable, you must send documentation to support your position to the address or fax number listed above.

(App. A374; A386.) Those notices were not claimed by Respondent and were returned to the MDOR. (App. A462, ¶ 10; A463-464, ¶ 15.) The records of the MDOR do not reflect that those notices were re-sent by regular mail.

On or about August 13, 2008, the MDOR sent Respondent two Notices of Balance Due – Individual Income, one for 2003 and one for 2004, to his Belleville, Illinois address. (App. A463, ¶ 11; A464, ¶ 16; A373; A385.) That notice provided:

> The Missouri Department of Revenue (department) received information from your licensing entity that you have a Missouri professional license. Based on the provisions in Section 484.053, RSMo, failure to file and/or pay state income taxes could result in notification to the Clerk of the Supreme Court. … You must pay the balance in full, make satisfactory arrangements with the department for payment of the balance due, pay the amount in protest, *or inform the department that you contest the amount due*. Failure to comply will result in notification to the Clerk of the Supreme Court (Section 484.053, RSMo).

(App. A373; A385 (emphasis added).) Those notices were sent by regular mail. (App. App. A463, ¶11; A464, ¶ 16.) They were not returned to the MDOR. (App. App. A463, ¶ 11; A464, ¶ 16.)

Notice Provided to Respondent by the Clerk of the Supreme Court
Regarding the Imminent Suspension of His License to Practice Law

On or about September 15, 2008, the MDOR sent the Clerk of the Supreme Court of Missouri a list of Missouri attorneys who were delinquent as to their Missouri state taxes. (App. A203, ¶ 4.) Respondent was on that list. (App. A203, ¶ 4.) The Bar Enrollment Director prepared a notice for the signature of the Clerk of the Supreme Court

of Missouri that was addressed to Respondent at 1116 Culverhill Dr., St. Louis, MO 63119, the registered address he provided to The Missouri Bar. (App. A396, ¶ 4; A397 - 398.) Respondent stipulated that he was living at that address in 2008, and still lives there. (App. A165.)

The Bar Enrollment Director sent the referenced notice to Respondent by regular, first class mail *via* the United States Postal Service. (App. A396, ¶¶ 4, 6; A397 - 398.) The Bar Enrollment Director keeps mailed notices that are returned to the Clerk's office and she attempts to deliver that notice to lawyers in another manner. (App. A396, ¶ 7.) The October 7, 2008 notice the Bar Enrollment Director sent to Respondent was not returned to the Clerk. (App. A396, ¶ 8.)

The notice provided Respondent 30 days to resolve the matter with the MDOR and informed him that "under the Missouri statutes and Rules of this Court we will have no discretion whatsoever to delay or otherwise avoid the penalty provided for non-compliance." (App. A397 - 398.) Respondent did not resolve his tax situation and, pursuant to Rule 5.245, this Court issued its Order suspending Respondent on February 2, 2009. (App. A4 - 7.)

Respondent's Unauthorized Practice of Law

On January 8, 2010, Respondent appeared in the courtroom of Judge David Vincent in the Circuit Court of St. Louis County and argued a motion to dismiss. (App. A8 - 14.) Because Respondent had been suspended for failing to pay taxes, Judge Vincent reported Respondent's practice of law to Informant's office. (App. A8 - 14.) Respondent admitted that he did appear in Judge Vincent's courtroom and that he was

representing the defendant in a matter before Judge Vincent. (App. A68, ¶ 6; A173 - 174.)

Respondent also admitted he filed another motion to dismiss in the St. Louis County Circuit Court on July 8, 2010. (App. A277, ¶ E.) During the Panel hearing, Respondent also stipulated that he engaged in the practice of law in St. Louis County on July 28, 2010, when he filed a motion to dismiss in the Circuit Court. (App. A181; A277 – 278, ¶¶ E, F.)

Disciplinary Proceeding

On or about February 5, 2010, Alan D. Pratzel, Chief Disciplinary Counsel, wrote Respondent and informed him that Judge Vincent had reported Respondent's practice of law in his courtroom despite having his license to practice law suspended. (App. A15 - 16.) In a letter dated February 18, 2010, Respondent wrote back to the Chief Disciplinary Counsel stating, *inter alia*:

> At no time have I received any written notification of any bar or law license suspension, which, whether the Missouri Supreme Court or Missouri Department of Revenue, should provide written notice as due process. When I called the Missouri Supreme court to find out where my Bar Card for 2010 was, I was told over the telephone that "your law license is suspended". I asked why and was told something about "back taxes" and was very courteously verbally given the (314) 751.3943 telephone number for the Missouri Department of Revenue, which advised me over the phone, when I

> identified myself, that there were some "back taxes" from 2003-2004, 6 and 7 years ago, for which no notice had been provided to me prior thereto.

(App. A17 – 19.)

An Information was served on Respondent on or about July 9, 2010, setting forth Informant's belief that probable cause existed to establish that Respondent violated Rule 4-5.5 (unauthorized practice of law). (App. A20 – A44; 459, ¶ 4.) Respondent answered the Information on or about July 12, 2010. (App. A67 – 72.)

A hearing panel was appointed and a hearing was held on September 10, 2010, and November 5, 2010, wherein Informant was represented by Maia Brodie and Respondent appeared *pro se*. (App. A124 – A138.) At the September 10, 2010 hearing, Respondent and Informant stipulated on the record that the matter would be continued until November 5, 2010, and that, in the interim, Respondent would satisfy his tax liability to the MDOR and obtain readmission to the Bar pursuant to Rule 5.245. (App. A128 – 131; A162 – 163.) Respondent did not resolve his tax situation before the November 5, 2010 continuation of the hearing. (A163; A153 – 157.)

At the Panel hearing, Respondent testified that he did not receive the October 7, 2008 notice from the Supreme Court of Missouri that his license would be suspended for failure to pay taxes. (App. A134.) He also maintains that he did not receive the notices from the MDOR. (App. A 17, A182, A269.) Further, Respondent states that he did not know that his license had been suspended until he received correspondence in February 2010 from Chief Disciplinary Counsel, Alan D. Pratzel, regarding his unauthorized

practice of law. (App. A134 – 135; A271.) Respondent argues that because he had no notice that his license to practice law was at stake, his due process rights have been violated. (App. A67 - 72.)

Respondent admits he failed to file tax returns and that he has paid no Missouri state income taxes for 2003 and 2004, but states that he does not know how much because he has not been able to afford to pay his accountant to prepare his 2003 and 2004 tax returns. (App. A153 - 157.) Respondent stipulated that he filed a motion to dismiss in St. Louis County on July 28, 2010. (App. A181.) He also did not object to the admission into evidence before the Panel of Case.Net printouts showing other instances where he practiced law in Missouri after he was suspended. (App. A182, A207 – 225.)

The Disciplinary Hearing Panel found, *inter alia*, that Respondent had received the October 7, 2008 Notice from the Clerk of the Supreme Court of Missouri. (App. A365.) It found: "Respondent received no prior notice that his license would be suspended on February 7, 2009. Nor did the Supreme Court conduct a hearing prior to the entry of its February 7, 2009." [1] (App. A366.) It also found: "Nor did the Supreme Court (or anyone else for that matter) subsequently notify Respondent that his license to practice law (a valuable property right) had been suspended (taken.)" (App. A366.) The Panel ultimately "conclude[d] as a matter of law" that this Court's Order suspending Respondent was "null and void and of no effect whatsoever" because the Court, in

[1] The date of this Court's Order actually was February 2, 2009, not February 7, 2009. (App. A4.)

suspending Respondent, had violated Respondent's rights to due process. (App. A367.) The Disciplinary Hearing Panel recommended that the Information be dismissed. (App. A367.)

The initial Decision of the Disciplinary Hearing Panel was signed on December 21, 2010. (App. A367-368.) The decision was not filed, however, until January 26, 2010 pending the panel's review of briefing provided by the parties. (App. A360.) Respondent accepted the Disciplinary Hearing Panel's Decision. (App. A370.) Informant rejected the Panel's Decision. (App. A371.)

Certified Mail Sent to Respondent

Informant has on two prior occasions sent correspondence or notices to Respondent by certified mail, only to have the mail returned "unclaimed." (App. A459 – 460; A405 – 409.) One of those items was an Admonition issued to Respondent in June 2010. (App. A459 – 460, ¶¶ 5, 6; A405 - 409.) It initially was sent by certified mail on May 28, 2010, but it was returned unclaimed. (App. A459 – 460, ¶ 5; A405 - 409.) Informant then re-sent the Admonition by regular mail on July 8, 2010. (App. A460, ¶ 6; A405 – 409.) Respondent, thereafter, wrote to accept that Admonition, while protesting that he had not received it close in time to the date on the letter. (App. A410 - 415.) The certified mail was sent to the same address as the regular mail Respondent admitted receiving. (App. A459 – 460, ¶¶ 5, 6.)

Additionally, the Information in this case first was sent to Respondent by certified mail. (App. A459, ¶¶ 3, 4; A420 - 445.) It was returned unclaimed. (App. A459, ¶ 3; A420 - 445.) Informant re-sent it by regular mail, and Respondent answered the

Information thereafter. (App. A459, ¶ 4; A420 - 445.) The certified mail was sent to the same address as the regular mail Respondent admitted receiving. (App. A459, ¶¶ 3, 4;.)

## POINTS RELIED ON

I.

**RESPONDENT SHOULD BE DISCIPLINED BECAUSE HE VIOLATED RULE 4-5.5 IN THAT HE ENGAGED IN THE PRACTICE OF LAW IN THE STATE OF MISSOURI AFTER HIS LICENSE TO PRACTICE LAW HAD BEEN SUSPENDED.**

Rule 4-5.5

Rule 5.245

II.

**RESPONDENT RECEIVED ALL THE PROCESS HE WAS DUE BECAUSE HE WAS SENT NOTICE REGARDING THE IMMINENT SUSPENSION OF HIS LICENSE TO PRACTICE LAW, THE NOTICE WAS NOT RETURNED, AND THE COURT HAD NO REASON TO BELIEVE RESPONDENT HAD NOT RECEIVED THAT NOTICE.**

*Crum v. Vincent*, 493 F.3d 988 (8th Cir. 2007)

*In re Foreclosures of Liens for Delinquent Land Taxes by Action in Rem Collector of Revenue v. Bhatti*, No. SC90732, slip op. (Mo. banc, March 1, 2011)

*Jones v. Flowers*, 547 U.S. 220, 226, 126 S.Ct. 1708, 1713, 164 L.Ed.2d 415 (2006)

*Schlereth v. Hardy*, 280 S.W.3d 47, 51 (Mo. banc 2009)

U.S. Const. amend. XIV

Mo. Const. art. I, sec. 10

§ 324.010 RSMo (2003)

§ 484.053 RSMo (2003)

Rule 5.245

III.

**THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE LAW WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR ONE YEAR AFTER HE FILES WITH THIS COURT A CERTIFICATE OF TAX COMPLIANCE ISSUED TO HIM BY THE MDOR BECAUSE RESPONDENT KNOWINGLY ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW.**

In *In re Reza*, 743 S.W.2d 411 (Mo. banc 1988)

*In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004)

ABA *Standards for Imposing Lawyer Sanctions* (1991 ed.)

## ARGUMENT

### I.

**RESPONDENT SHOULD BE DISCIPLINED BECAUSE HE VIOLATED RULE 4-5.5 IN THAT HE ENGAGED IN THE PRACTICE OF LAW IN THE STATE OF MISSOURI AFTER HIS LICENSE TO PRACTICE LAW HAD BEEN SUSPENDED.**

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*. This Court independently determines all issues respecting witnesses' credibility. *In re Snyder*, 35 S.W.3d 380, 382 (Mo. banc 2000). Discipline will not be imposed unless professional misconduct is proven by a preponderance of the evidence. *Crews*, 159 S.W.3d at 358. 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).

Respondent engaged in the unauthorized practice of law after he was suspended by this Court. On or about September 15, 2008, the MDOR sent the Supreme Court of Missouri a list of Missouri attorneys who were delinquent as to their Missouri state taxes. (App. A203, ¶ 4.) Respondent was on that list. (App. A203, ¶ 4.) The Bar Enrollment Director prepared a notice for the signature of the Clerk of the Supreme Court of Missouri that was addressed to Respondent at 1116 Culverhill Dr., St. Louis, MO 63119,

the registered address he provided to The Missouri Bar. (App. A396, ¶ 4; A397 - 398.) Respondent stipulated that he was living at that address in 2008, and still lives there. (App. A165.) The Bar Enrollment Director sent that letter to Respondent by regular, first class mail *via* the United States Postal Service on October 7, 2008. (App. A396, ¶¶ 4, 6; A397 - 398.) That letter informed Respondent that if he did not resolve his tax issues with the MDOR within 30 days, his license to practice law was subject to suspension, and that pursuant to the laws and court rules, the imposition of the suspension by the Court was not discretionary. (App. A397 - 398.)

The notice sent October 7, 2008 was not returned to the Court. (App. A396, ¶ 8.) Respondent denies receiving that notice and did not take action pursuant to it. This Court issued its Order suspending Respondent on February 2, 2009, pursuant to Rule 5.245, for failing to file a tax return or to pay his Missouri State taxes in 2003 and 2004. (App. A4 – 7.)

On January 8, 2010, Respondent appeared in the courtroom of Judge David Vincent in the Circuit Court of St. Louis County to argue a motion to dismiss. (App. A8 - 14.) Because Respondent had been suspended for failing to pay taxes, Judge Vincent reported Respondent's practice of law to Informant's office. (App. A8 - 14.)

On or about February 5, 2010, Alan D. Pratzel, Chief Disciplinary Counsel, wrote Respondent and informed him that Judge Vincent had reported that Respondent had practiced law in his courtroom despite his suspension. (App. A15 - 16.) In a responsive letter to Mr. Pratzel dated February 18, 2010, Respondent also admitted that he had filed a motion on January 8, 2010 in a case pending before Judge Vincent. (App. A17.)

Respondent protested, however, that he had no "written notice" of his suspension, but then admitted, in his letter dated February 18, 2010, that he had:

> …called the The Missouri Supreme Court to find out where [his] Bar Card for 2010 was, [and] was told over the telephone that '[his] law license [was] suspended'. [He] asked why and was told something about 'back taxes' and was very courteously verbally given the (314) 751.3943 telephone number for the Missouri Department of Revenue, which advised [him] over the phone, when [he] identified [him]self, that there were some 'back taxes' from the 2003-2004, 6 and 7 years ago, for which no notice had been provided to me prior thereto.

(App. A17 – 18.) So, by early February 2010, Respondent admits he had actual knowledge that he had been suspended by the Court.

Further, Respondent was served with the Information in this case on or about July 9, 2010, setting forth Informant's belief that probable cause existed to establish that Respondent violated Rule 4-5.5 (unauthorized practice of law). (App. A20 – 44; A459, ¶ 4.) Respondent answered the Information on or about July 12, 2010. (App. A67 – 72.) In his Answer, Respondent admitted "represent[ing] a party in the Circuit Court of St. Louis County in Judge David Lee Vincent's court on or about January 8, 2010." (App. A68, ¶ 6). He carefully states in his Answer that he has received no "written notice of law license suspension." (App. A67 – 70, ¶¶ 3, 5, 6, 7, 8 and 9.)

Despite this abundant actual, admitted knowledge that his license to practice law had

been suspended, Respondent continued to practice law in Missouri. (App. A207 - 225.) In his Brief on Due Process Issues, Respondent admits he filed a Motion to Dismiss on July 8, 2010, in St. Louis County Circuit Court, after he had actual knowledge of his suspension and tax situation from the Court, the MDOR, and the Chief Disciplinary Counsel. (App. A276 - 278.) At the Panel hearing, he stipulated that he filed another Motion to Dismiss in Missouri on July 28, 2010, which was after he was served with the Information regarding this case. (App. A181; A276 – 278; A207 - 225, ¶ 16.F.) Respondent, therefore, knowingly and willfully continued to practice law in violation of Rule 4-5.5 after receiving multiple layers of notice that this Court had suspended his license to practice law.

The Preamble to the Missouri Rules of Professional Conduct provides: "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs." Rule 4 Preamble at [5]. Whether or not Respondent believed his suspension was correct or just, it is Informant's position that Respondent must acknowledge and comply with this Court's Order, and not just ignore it and continue to practice law.

II.

**RESPONDENT RECEIVED ALL THE PROCESS HE WAS DUE BECAUSE HE WAS SENT NOTICE REGARDING THE IMMINENT SUSPENSION OF HIS LICENSE TO PRACTICE LAW, THE NOTICE WAS NOT RETURNED, AND THE COURT HAD NO REASON TO BELIEVE RESPONDENT HAD NOT RECEIVED THAT NOTICE.**

The sole issue before the Disciplinary Hearing Panel was whether Respondent had engaged in the unauthorized practice of law since his license to practice law was suspended by this Court on February 2, 2009. Respondent's suspension for failure to file his Missouri tax returns or to pay his Missouri income taxes was not before the Panel. This Court already had addressed Respondent's failure in that regard. (App. A4 - 7.) Neither had Respondent filed a challenge to this Court's February 2, 2009 order. Instead, in the context of the disciplinary proceedings related to his unauthorized practice of law, Respondent sought to attack the underlying suspension. The Panel, improperly, addressed Respondent's complaint regarding the underlying suspension and concluded that it "was null and void and of no effect whatsoever." (App. A367.)

No person may be deprived of property without due process of law. U.S. Const. amend. XIV; Mo. Const. art. I, sec. 10. Informant agrees that Respondent's license to practice law constitutes a property interest which cannot be taken away without due process of law. *See Cleveland v. United States,* 531, U.S. 12, 15, 26 n.4, 121 S.Ct. 365, 368, 374 n. 4, 148 L.Ed.2d 221 (2000) (finding property interest requiring due process in

video poker license and stating that "[t]he question whether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law," and "[i]n some contexts, ... individuals have constitutionally protected property interests in state-issued licenses essential to pursuing an occupation or likelihood"); *Barry v. Barchi*, 443 U.S. 55, 64, 99 S.Ct. 2642, 2649, 61 L.Ed.2d 365 (1979) (harness racing trainer license); *Gershenfeld v. Justices of the Supreme Court of Pennsylvania*, 641 F.Supp. 1419, 1423 (E.D.Pa.1986) (law license); *Statewide Grievance Comm. v. Johnson*, 946 A.2d 1256, 1261, 108 Conn.App. 74, 81 (Conn.App. 2008) (law license).

**Notice Provided to Respondent by the Clerk of the Court**

The notice provided to Respondent in this case was constitutionally sufficient. In this Court's most recent case about notice sufficient to meet due process standards, it focused on the knowledge of the government. *In re Foreclosures of Liens for Delinquent Land Taxes by Action in Rem Collector of Revenue v. Bhatti*, No. SC90732, slip op. (Mo. banc, March 1, 2011). In *Bhatti*, notice was sent by regular mail to the owner of a house who had failed to pay real estate taxes on that house for three years. *Bhatti*, at 2 - 3. The notice was sent to the address provided by the owner, which also happened to be the address of the house which was the subject of the tax delinquency. *Id*. The house was being remodeled and was vacant, and the owner testified that he did not receive notice of the tax sale or sale confirmation hearing. *Id*. at 3. The owner moved to set aside the tax sale claiming that because he had not received notice of the sale and hearing, his constitutional right to due process had been violated. *Id*. at 1 - 2. The owner, however,

presented no evidence as to whether the sheriff, who had mailed the notice, knew or had reason to know that the owner had not received notice. *Id.* at 8. This Court found that the notice sent by regular mail was reasonably calculated, under the circumstances, to provide constitutionally sufficient notice to the owner. *Id.* at 6 - 7. Further, citing *Jones v. Flowers*, 547 U.S. 220, 226 – 231, 126 S.Ct. 1708, 1713 - 1718, 164 L.Ed.2d 415 (2006)[2], this Court held that, because there was no evidence that the sheriff knew the notice was ineffective, the sheriff did not have to take further steps to notify the owner. *Bhatti*, SC97032 at 7 - 10.

This case is even clearer than *Bhatti*. Respondent admits that the address on the notice the Court sent to him is correct, and that he still occupies that address. (App. A165.) Additionally, not only has Respondent presented no evidence that the Court had knowledge that he allegedly did not receive that notice, Informant has presented evidence that the notice was not returned to the Court. (App. A396, ¶ 8.)

Rule 5.245 sets out the notice attorneys receive before they are suspended for failing to pay their taxes. Pursuant to Rules 5.245(b) and 5.18, the notice is sent by first class mail to the respondent "at the address designated by respondent in the most recent registration with, or change address notification to, The Missouri Bar…." If that mailed

[2] "Due process does not require that a property owner receive actual notice before the government may take his property." *Jones v. Flowers*, 547 U.S. 220, 226, 126 S.Ct. 1708, 1713, 164 L.Ed.2d 415 (2006). Notice reasonably calculated, under all the circumstances, to apprise interested parties of the potential taking is sufficient. *Id.*

notice is returned, "notice shall be given by any other method reasonable calculated under all the circumstances to apprise the lawyer of the pending suspension." Rule 5.245(b).

The Bar Enrollment Director sent Respondent notice as outlined in Rule 5.245(b). She mailed the notice to the address Respondent provided to The Missouri Bar, 1116 Culverhill Dr., St. Louis, MO 63110. (App. A396, ¶ 4; A397 - 398.) Respondent admits that address was correct. (App. A165.) The Bar Enrollment Director keeps mailed notices that are returned, and she attempts to deliver that notice to lawyers in another manner. (App. A396, ¶ 7.) The notice sent to Respondent was not returned. (App. A396, ¶ 8.) There was no reason for anyone at the Court to believe that the notice was not properly delivered to Respondent. *Bhatti*, SC97032 at 7 - 10.

In *Schlereth v. Hardy*, 280 S.W.3d 47, 51 (Mo. banc 2009), this Court, when discussing a second notice attempt by regular mail, stated: "if not returned, the sender could presume that it was received where there is no question about the correctness of the address." In *Schlereth*, property owner Hardy was sent notice by certified mail. She did not pick up the mail and it was returned to Schlereth unclaimed. Schlereth did not attempt service in another manner. This Court in *Schlereth* held that, per *Jones v. Flowers*, due process required Schlereth to make another attempt because he knew the notice he sent by certified mail was not received. *Id*. at 52 – 53. Instructive to this case is the Court's discussion of the follow-up method of sending the notice by regular mail.

> If Schlereth had sent the notice by regular mail as follow-up to the unclaimed certified letter, Hardy would be hard-pressed to rebut the

> presumption that she received the notice if the letter was not returned as undeliverable – the outcome of this case would be different.

*Id.* at 51-52.

Respondent admits that the address to which the October 7, 2008 notice was sent was correct. (App. A165.) Further, Respondent does not describe any unusual circumstances that make the notification by regular mail inadequate, *i.e.*, no facts that the Clerk of the Supreme Court of Missouri knew or should have known that mail to that address would not reach Respondent. *See Bhatti,* SC97032 at 6, *Schlereth,* 280 S.W.3d at 51. Respondent received the process that was his due.

Respondent argues that he testified he didn't receive the notice, and, therefore, he must not have received due process and his suspension was improper. Respondent's assertion does not lead to his desired result. First, to receive due process, Respondent does not have to receive actual notice. *Jones v. Flowers*, 547 U.S. at 226, 126 S.Ct. at 1713. Second, as discussed above, there is no evidence that anyone at the Court had reason to know he allegedly did not receive the notice. Additionally, however, there is a presumption that a letter duly mailed has been received by the addressee. *Insurance Placements, Inc. v. Utica Mut. Ins. Co.*, 917 S.W.2d 592, 595 (Mo.App. 1996), *citing Shelter Mut. Ins. Co. v. Flint*, 837 S.W.2d 524, 528 (Mo. App. 1992). The presumption is rebuttable by evidence the mail was not, in fact, received. *Id.*, citing *Williams v. Northeast Mut. Ins. Ass'n*, 72 S.W.2d 166, 167 (Mo. App. 1934). "Evidence of non-receipt, however, does not nullify the presumption but leaves the question for the determination of the [fact-finder] under all the facts and circumstances of the case." *Id.*

In addition to the Bar Enrollment Director's sworn statement that the notice she mailed was not returned to her (App. A396, ¶ 8), Respondent's past history regarding his receipt of mail also militates against disregarding the mail presumption. Informant has on two prior occasions sent correspondence or notices to Respondent by certified mail, only to have the mail returned "unclaimed." (App. A459 – 460; A405 – 409.) One of those items was an Admonition issued to Respondent in June 2010. (App. A459 – 460, ¶¶ 5, 6; A405 - 409.) It initially was sent by certified mail on May 28, 2010, but it was returned unclaimed. (App. A459 – 460, ¶5; A405 – 409.) Informant then re-sent the Admonition by regular mail on July 8, 2010. (App. A460, ¶ 6; A405 – 409.) Respondent thereafter wrote to accept that Admonition while protesting that he had not received it close in time to the date on the letter. (App. A410 - 415.) The certified mail was sent to the same address as the regular mail Respondent admitted receiving. (App. App. A459 – 460, ¶¶ 5, 6.)

Additionally, the Information in this case first was sent to Respondent by certified mail. (App. A459, ¶¶ 3, 4; A420 – 445.) It was returned unclaimed. (App. A459, ¶¶ 3; A420 – 445.) Informant re-sent it by regular mail, and Respondent answered the Information thereafter. (App. A459, ¶ 4; A420 – 445.) The certified mail was sent to the same address as the regular mail Respondent admitted receiving. (App. A459, ¶¶ 3, 4.) Finally, Respondent denies receiving ten notices sent by the MDOR, on four of which were returned to the MDOR. (A461 – 446; A17.) This Court certainly could reasonably conclude that Respondent ignores certified mail notices; in that event, the presumption that he received the notice by regular mail remains intact.

Further, the notice provided Respondent 30 days to resolve the matter with the MDOR and informed him that "under the Missouri statutes and Rules of this Court we will have no discretion whatsoever to delay or otherwise avoid the penalty provided for non-compliance." (App. A397 - 398) The notice provided by the Clerk of the Missouri Supreme Court afforded Respondent an opportunity to be heard.[3] Respondent received the process he was due.

**Rule 5.245 "Subject To" Language**

Respondent also argues that he did not receive the process he was due because of the "subject to" language in Rule 5.245. Informant could find no case law discussing the 2008 change in the language of Rule 5.245 from "will be automatically suspended" to "is subject to automatic suspension." Respondent argues that he did not receive notice that the Order suspending his license had been entered, so his due process rights were violated. His argument is misplaced.

When viewing the circumstances attendant to tax suspensions under Rule 5.245, Informant proffers that "is subject to automatic suspension" means "without further notice." Informant further proffers that the "will be" language was changed because the suspension order may or may not be issued on the 31st day; rather, as in this case, the Court might not issue the order until later, allowing attorneys some time in excess of the 30 days provided in Rule 5.245 to get their houses in order.

[3] Additionally, the six notices sent by the MDOR, and not returned, provided Respondent an opportunity to be heard regarding his underlying tax issues.

Here, Respondent was given approximately four months either to work out any tax dispute with the MDOR, or simply to pay up. Also, during those four months, he could have protested his alleged lack of notice to the Supreme Court of Missouri. Respondent did neither. As of November 5, 2010, Respondent admitted that he still had not satisfied his delinquency or otherwise reached an agreement with the MDOR. (App. A163; A153 - 157.) The MDOR reports, further, that as of March 29, 2011, Respondent had yet to resolve his tax situation. (App. A461, ¶ 4.) Although there is not a date certain for suspension, the statute is clear that if attorneys do not put their tax-filing and tax-paying houses in order, they will be suspended. The notice provided specifically: "under the Missouri statutes and Rules of this Court we will have no discretion whatsoever to delay or otherwise avoid the penalty provided for non-compliance." (App. A397 - 398.) Respondent cannot feign surprise.

Further Respondent was provided an opportunity for a review of his tax situation with the MDOR. In *Crum v. Vincent*, 493 F.3d 988 (8th Cir. 2007), the doctors made arguments similar to Respondent's herein. Drs. Crum and Richards sued the MDOR and the Missouri State Board of Registration for the Hearing Arts (the "Board") after having their medical licenses revoked pursuant to § 324.010 RSMo (2003) for failing to pay taxes or file tax returns.[4] Although their licenses were reinstated after they filed and paid,

[4] Section 324.010 RSMo (2003) provides for the suspension of the licenses of physicians, among other professionals, who are tax delinquent or who have failed to file Missouri tax returns.

the doctors filed suit seeking a declaration that § 324.010 R.S.Mo. (Supp. 2003) violated his rights under federal and Missouri state law, including his rights to due process and equal protection, and that the revocation of their licenses was void. They also sought damages and the expungement of any records of their revocations. *Id*. The district court granted the MDOR's and the Board's motions for summary judgment and dismissed the case. *Crum v. Missouri Director of Revenue*, 455 F.Supp. 2d 978 (W.D. Mo. 2006). Only Dr. Crum appealed to the 8th Circuit.

The Eighth Circuit rejected Dr. Crum's complaint that his license could not be revoked until he had a hearing.

> The State satisfied the requirements of due process, however, by giving Crum an *opportunity* for a hearing at a meaningful time and in a meaningful manner. *See Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). The tax deficiency notices mailed to Crum in April explained how he could request a hearing to challenge the Department's assessment. Crum never received such a hearing simply because he never requested one.

*Id*. at 993 (emphasis original). The Eighth Circuit further rejected Crum's argument that he was entitled to two hearings, one regarding his tax deficiency and one regarding the suspension of his license. *Id*.

> Both the Director's finding of a tax deficiency and the subsequent license revocation had the same factual predicate – Crum's failure to file his tax returns. A license revocation hearing could add nothing

> to a tax deficiency hearing in this case, because the outcome of the tax hearing would necessarily determine the outcome of the revocation hearing. Crum had notice that he could lose his license if he failed to file his returns, and he was thus apprised of the matters that would be at stake in a tax deficiency hearing. Because Crum received both notice and an opportunity for a hearing, he was not deprived of property without due process of law.

*Id*. Such is the case here.

Respondent was sent notices from the MDOR that provided him with the opportunity for a hearing with the MDOR regarding its determination that he had failed to file tax returns and/or was tax delinquent for 2003 and 2004. (App. A461 – 464; A372 - 395.) Although Respondent denies receiving any notices from the MDOR, six of the ten notices sent were not returned to the MDOR. (App. A462, ¶¶ 7, 9; A463, ¶ 11, 12, 14; A464, ¶ 16.) Only those sent by Certified Mail went "unclaimed," and notices sent before and after those "unclaimed" notices were not returned. (App. A462, ¶¶ 7, 9; A463, ¶ 11, 12, 14; A464, ¶ 16.) All of those notices were sent to Respondent's Belleville, Illinois address, the address he had on file with the MDOR and with the Illinois Bar. (App. A461 – A464.) Further, as late as August 2010, Respondent's letterhead included that Belleville, Illinois address. (App. A73.) Consistent with this Court's analysis in *Schlereth*, the regular mail notices, sent both before and after unclaimed certified mail, were sufficient to provide Respondent the notice he was due. *Schlereth*, 280 S.W.3d at 51-52.

The notice provided by the MDOR was reasonably calculated to notify Respondent that he had tax issues that required his attention, that consequences would result from his failure to so attend, and that he could protest the tax assessment to the MDOR. The notice provided by the Clerk of the Supreme Court of Missouri provided Respondent with notice that his license would be suspended after 30 days if he did not resolve his tax issues with the MDOR. No further notice is contemplated or required. Respondent received all the process he was due.

**Respondent's Failures Fall Within § 484.053 RSMo and Rule 5.245**

Respondent's protest that he could not be "delinquent" because MDOR has set his liability with "estimated" taxes versus "actual" taxes is without merit.

> The director of revenue is hereby authorized, pursuant to a cooperative agreement with the supreme court, to develop procedures which shall permit the clerk of the supreme court to furnish the director, at least once each year, with a list of persons currently licensed to practice law in this state. If any such person is delinquent on any state taxes or has failed to file state income tax returns in the last three years and such person has not paid in protest or commenced a reasonably founded dispute with such liability, the director shall notify the clerk of the supreme court that such person has such delinquency or failure to file.

§ 484.053 RSMo (2003).[5] Neither Informant nor the Court, in an instance such as this, makes a "delinquency" determination. For purposes of this statute, rather, such a determination was made by the MDOR. Further, Respondent does not controvert that he has not filed the required tax returns or paid for 2003 and 2004; he controverts the amount, claiming the delinquency assessed by the MDOR is excessive. (App. A139 – 143; A145, ¶¶ 5, 8, 9.) These circumstances fall squarely within the language of Rule 5.245.

> If the director of revenue reports to the clerk of this Court under section 484.053, RSMo, that a lawyer is delinquent on a tax or failed to file tax returns, the clerk shall notify the lawyer that the lawyer's license to practice is subject to automatic suspension unless the matter is satisfactorily resolved within 30 days of the date of the last notice sent by the clerk.

Rule 5.245(a).

Further, that issue was one Respondent could have taken up with the MDOR. To Informant's knowledge, Respondent did not, and has not, requested review by the MDOR despite the four plus months he was afforded after the Clerk of the Supreme Court of

[5] With regard to the cooperative agreement between the MDOR and this Court, to the extent necessary, the Court "may of course take judicial notice of [its] own records for proper purposes." *In re Murphy*, 732 S.W.2d 895, 902 (Mo. banc 1987), *citing McIlvain v. Kavorinos*, 236 S.W.2d 322, 326 (Mo. banc 1951).

Missouri sent him notice on October 7, 2008 (App. A397 – 398), and before his license was suspended on February 2, 2009 (App. A4 – 7), the lapse of two-plus years since that suspension, and, at the outside, the lapse of over one year since February 2010 when he spoke to the Court and the MDOR about his suspension and received the correspondence from the Chief Disciplinary Officer (App. A17 - 19).

III.

**THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE LAW WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR ONE YEAR AFTER HE FILES WITH THIS COURT A CERTIFICATE OF TAX COMPLIANCE ISSUED TO HIM BY THE MDOR BECAUSE RESPONDENT KNOWINGLY ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW.**

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 for Imposing Lawyer Sanctions (1991), consider the following primary questions:

(1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)

(2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?)

(3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?) and

(4) Are there any aggravating or mitigating circumstances?

ABA Standards: Theoretical Framework (p. 5). 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* ABA Standard 3.0. This Court also has 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 prior disciplinary offenses, dishonest or selfish motive, pattern of misconduct, multiple offenses, refusal to acknowledge the wrongfulness of the conduct, and experience in the law. *In re Cupples*, 979 S.W.2d 932, 937 (Mo. banc 1998).

Per the ABA Standards, the unauthorized practice of law is a violation of duties owed to the profession and the discipline appropriate for that violation is discussed in Standard 7.0, *et seq*. "Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving … unauthorized practice of law…." Those black letter rules are set forth below:

> 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.
>
> 7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a

> professional, and causes injury or potential injury to a client, the public, or the legal system.

Commentary to the Standards states: "Reprimand is the appropriate sanction in most cases of a violation of a duty owed as a professional." ABA Standard 7.3, commentary. Informant proffers, however, that because Respondent already is suspended, and because his continued practice in Missouri was knowing, the sanction appropriate for Respondent's conduct is a disciplinary suspension in excess of his current suspension.

Additionally, aggravating circumstances support the imposition of a suspension instead of a reprimand. Respondent has substantial experience in the practice of law. ABA Standard 9.22(i). He has been a Missouri lawyer for 35 years. (App. A203, ¶ 3.)

Respondent's prior disciplinary history also supports imposition of a disciplinary suspension. ABA Standard 9.22(a). Respondent has received four prior admonitions for violations of the Rules of Professional Conduct. His first admonition in 2003 was for failing to comply with continuing legal education reporting requirements and for the unauthorized practice of law while he was suspended for such failure in violation of Rule 4-5.5. (App. A465 - 466.) Respondent received three admonitions (in one letter) in 2010 for failure to obtain a signed representation agreement in a contingent fee personal injury case in violation of Rule4-1.5(c), for failure to obtain his client's permissions to include Respondent as a payee on a settlement check and then endorsing that check without the client's knowledge or consent in violation of Rule 4-1.15(f), and for endorsing a check of

a non-client in violation of Rule 4-8.4(c). (App. A467 – 471.) Respondent accepted all of the above admonitions. (App. A403.)

Further, Respondent has refused to take any responsibility for his actions. ABA Standard 9.22(g). Throughout this proceeding, Respondent has deflected and danced around his obligations and responsibilities. The law requires Respondent to pay taxes to the State of Missouri on Missouri income.[6] The Rules of this Court provide that if Respondent does not comply with that law, his license to practice law will be suspended. Rule 5.245. Respondent denies all notice sent to him regarding his tax situation, a total of eleven notices. It strains credulity that the US Postal Service somehow failed to properly deliver eleven pieces of mail to Respondent. And, further, that the Post Office, in less than three months, additionally mis-delivered Respondent's 2010 admonitions and then the Information in this case. (App. A459 - 460.) The facts presented in this case support the presumption that Respondent received the notice sent by regular mail informing him that his license would be suspended after 30 days passed if he did not resolve his tax situation. *Insurance Placements*, 917 S.W.2d at 595.

[6] Informant does not have information as to whether Respondent's tax liability was pursuant to §143.011 RSMo (1972) (for Missouri residents) or §143.181 RSMo (2003) (non-resident income from Missouri sources). In any event, he admits he had Missouri income (App. A145, ¶ 5) and, pursuant to §143.481 RSMo (2003) and §143.511 RSMo (1994), he was to have filed his returns and paid his taxes by April 15 of 2004 and 2005 for the tax years 2003 and 2004, respectively.

Respondent also admits he had notice regarding the MDOR's position that he had failed to file tax returns and was tax delinquent for the years 2003 and 2004 as early as February 2010. (App. A17 - 19.) Yet, he filed two more motions to dismiss in July 2010. (App. A276 – 278; A207 - 225.) That conduct was not "negligent;" it was "knowing."

Further, to Informant's knowledge, more than a year after even he admits knowledge of his tax suspension, he has neither cured his delinquency nor even filed those tax returns. (App. A461, ¶ 4.) Without explaining why he is unable to prepare his own tax return, Respondent, during this proceeding, has claimed that he is unable to file his Missouri tax returns because he cannot afford to pay his accountant to prepare them. (App. A139.)

Mitigating factors include Respondent's personal problems which include health issues in 2003 and 2004, the years that are the subject of the tax suspension, and financial difficulties. ABA Standard 9.32(c); App. A139 – 143; A148 – 149, ¶¶ 21.A – M; A274 - 275, ¶ 11. Respondent has indicated that he was ill for much of 2003, that he had surgery for cancer on August 9, 2004, and that he had required "extended convalescence" thereafter. (App. A111.) He further indicated that his illness lead to him "earning lower income," and that, currently, he is experience "the worst financial drought [he] has been through." (App. A111; A140.)

Informant has found no published opinions by this Court addressing the professional misconduct that a lawyer commits by continuing to practice law when he or she has been suspended pursuant to Rule 5.245. The Court has, however, imposed

sanctions in a case where an attorney failed to comply with Rule 15 (MCLE), and in a case where an attorney continued to practice law despite being automatically suspended for failure to pay bar dues.

In *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004), this Court issued a public reprimand to an attorney who failed to comply with the Rule 15 continuing legal education reporting requirement and to respond to inquiries by disciplinary authorities.[7] In assessing that sanction, the Court noted that the attorney had no prior disciplinary history and that his conduct "was not shown to have directly harmed a client or the public." *Id*. "Any subsequent failure to comply with continuing legal education requirements or to respond to inquiries by disciplinary authorities will result in a more severe sanction." *Id*. Respondent herein does have a disciplinary history, and even a history of unauthorized practice of law.

In *In re Reza*, 743 S.W.2d 411 (Mo. banc 1988), the Court stated: "The failure to pay an annual enrollment fee for several years running, and his continuing to practice law even though the Bar Committee warned him of his automatic suspension, are also serious matters." Attorney Reza had issues in addition to his unauthorized practice of law[8], but by the time of the argument before the Court, he had paid his delinquent bar dues. *Id*.

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[7] Rule 15(f) was amended effective July 1, 2005, to provide for the automatic suspension of non-compliant attorneys.

[8] Neglect of matter entrusted to him, misleading statements to a client about progress of case, and his failure to respond to correspondence from Bar Committee. *Id*.

The Court suspended Reza indefinitely, with leave to apply for readmission no earlier than six months following the publication of its opinion. *Id*. at 412. "In fixing the time we have considered the nine months in which he has not practiced." *Id*.

Informant's position is that the proceedings it initiates must "mean something." Unless Respondent is disciplined in excess of the suspension already imposed, this action would be for naught. Considering the aggravating circumstances and the knowing violation of this Court's Order, Informant requests this Court to discipline Respondent and to suspend his license to practice law for at least one year after he obtains and files with the Court a Certificate of Tax Compliance issued to him by the MDOR.

## CONCLUSION

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

(a) find that the notice provided to Respondent satisfied his due process rights;

(b) find that Respondent violated Rule 4-5.5;

(c) suspend Respondent indefinitely, with leave to apply for readmission one year after he files a Certificate of Tax Compliance with this Court; and

(d) tax all costs in this matter to Respondent, and, pursuant to Rule 5.19(h) assess Respondent $1,000.00 fee for suspension.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2011, 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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_____
Melody Nashan

## 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 9,171 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.

_____
Melody Nashan

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