

**IN THE SUPREME COURT  
STATE OF MISSOURI**

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**IN RE:**

**BRIAN ZINK,**

**Respondent.**

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**Supreme Court #SC89623**

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**RESPONDENT'S BRIEF**

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**LAW OFFICES OF  
WOLFF & D'AGROSA**

**PAUL J. D'AGROSA  
MBE #36966  
8019 Forsyth  
Clayton, Mo. 63105  
(314) 725-8019  
(314) 725-8443 FAX  
[Paul@Wolffdagrosa.com](mailto:Paul@Wolffdagrosa.com)**

**ATTORNEY FOR  
RESPONDENT**

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## STATEMENT OF FACTS<sup>1</sup>

Brian Zink (Respondent) began working for the law firm of Coyne, Cundiff & Hilleman sometime in 2001. (T14, A6) Respondent was an associate with the firm and worked for the partners, including attorney David Dalton (Dalton). (T67, A19) He has been licensed to practice law in Missouri since 1993 and has practiced primarily in the area of criminal defense. (T13, A5; T60, A17) In June of 2006 Respondent was instructed by Dalton to take on the case of State of Missouri v. Mary Hart in the Circuit Court of St. Charles County, where Ms. Hart (Hart) was charged with three (3) felony counts of forgery. (T14, A6; A35; A39) Hart was an existing client of the firm and had been for a long time. At the time of her arrest on the forgery charges in June of 2006, Dalton was handling a civil matter for Hart. (T37, A11; T68, A19; A39) Hart was an important client to the firm. (T37, A11) The assistant prosecuting attorney handling the case against Hart was Matthew Thornhill (Thornhill) (T14, A6; A35) Respondent had known Thornhill for a long time, and their relationship was friendly. (T14-15, A6; T35, A11)

In the course of his representation of Hart, Respondent received a recommendation from Thornhill that if Hart pleaded guilty to the felony charges, Thornhill would recommend to the court that she serve six (6) years in prison.

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<sup>1</sup> Transcript (T); Appendix (A)

Thornhill was opposed to Hart receiving probation **(T15, A6; T48-49, A14; A35)**

In an effort to negotiate a more favorable disposition, Respondent told Thornhill that Terry Bradshaw (a retired professional football player) was Hart's godfather.

**(T15, A6; T49, A14; T62, A18; A35)** This fact was told to Respondent by Hart.

**(T15, A6)** In an effort to negotiate a better disposition and convince Thornhill that

Hart should not go to prison, Respondent told Thornhill that Hart was a good person, from a good family and Respondent felt like he had to throw everything into

the negotiations. **(T17, A6; T37, A11)** Respondent mentioned Hart's family

relationship with Bradshaw intending to highlight Hart's good family connections.

**(T38, A12)** As a criminal defense attorney, Respondent was trying to stand behind

Hart and put her in a more favorable light to Thornhill. **(T38, A12)** Further,

Respondent emphasized that Hart had cooperated with law enforcement and

assisted drug task force officers **(T16-17, A6; T21, A7; T62, A18; A35)** Finally,

Respondent offered that Hart would pay full restitution (up front) to the victim of her forgeries. **(T53, A15)**

Thornhill did not believe Hart's claim that she was the goddaughter of Terry Bradshaw. **(T15-16, A6; T50, A15; A36)** In fact, Hart's credibility was an issue for

Thornhill. He let Respondent know that Hart had a reputation for being a liar, was

not to be trusted and that his prosecutor's file contained a note from law

enforcement to the effect that Hart should not get any favorable treatment.

Thornhill told Respondent that he would not believe a word she said. **(T16, A6; T50, A15; T51, A15; T52, A15; A36)** It was in the course of these discussions that Thornhill told Respondent that if Hart could obtain an autographed baseball from her purported godfather Terry Bradshaw, Thornhill would reconsider his opinion that Hart was a liar. **(A2, T17, A6)** The baseball with Bradshaw's signature would help establish, in Thornhill's mind, that Hart was telling the truth (about her family relationship). **(T39-40, A12; T64, A18)** The baseball was never to be exchanged as a *quid pro quo* for a better deal. Showing Thornhill the baseball was only one part of obtaining a more favorable disposition. **(T17, A6; T54, A16; A36)** In the context of Respondent's knowledge of and relationship with Thornhill, the request for an autographed baseball did not seem strange. **(T35-36, A11; T40, A12; T47, A14)** In the end, Thornhill never asked for the baseball, it was never shown to him and remained in Respondent's possession. **(T41, A12; T44, A13; T54, A16; A36)**

It was during the course of the negotiations between Respondent and Thornhill that Hart's cooperation with law enforcement became an issue of discussion. **(T51-52, A15; A35)** Respondent had learned of Hart's cooperation with law enforcement, shared this with Thornhill and asked for consideration or a benefit on her behalf.

(T51-53, A15) The issue of Hart's cooperation with law enforcement played a significantly larger role in the negotiations to get charges reduced. (T21, A7) Until Thornhill could verify Hart's claims of cooperation with narcotics detectives, she would not get any consideration. (T52, A15)

Eventually, Respondent conveyed Thornhill's request for the autographed baseball to Dalton, who in turn advised Hart. (T18, A7) Respondent let Dalton know that Thornhill did not believe Hart and “We need to find out if she can get a baseball with Bradshaw's signature on it.” (T18, A7) Respondent's contact with Hart was limited (T19, A7; T69, A19), although Dalton continued to have conversations with Hart throughout the prosecution of the forgery case. (T68, A19) Respondent consistently told Dalton that Thornhill did not want possession of the ball (T70, A20) but Respondent did not know what Dalton was telling Hart. (T68, A19) At some point, Hart had the impression that if she could obtain a baseball autographed by Terry Bradshaw, the ball would be given to Thornhill and her felony charges would be reduced or dismissed. (T20-21, A7) Dalton may have left Hart with that impression (T69, A19), but Respondent acknowledged that he was responsible for clearing up that impression.(T20-21, A7; T72-73, A20)

In early July of 2006, the FBI received information and allegations that

Respondent and Dalton had advised Hart that Thornhill had agreed to accept sports

memorabilia in exchange for reducing Hart's felony charges to misdemeanors. (A39-40) As a result of the bribery allegation, an investigation by the federal authorities was initiated. (A37; A40) Hart recorded a phone call with Respondent in which he told her that the autographed baseball would take care of the felonies. (T18-19, A7; T28, A9; A38) Hart was cooperating with the authorities and had recorded the phone call in which she told Respondent that she had obtained the autographed ball. (T45-46, A13-14) Respondent believed at the time that Hart was under the impression that the ball would be delivered to Thornhill. (T66, A19) Other than the recorded telephone call with Hart, Respondent never told Hart that getting Thornhill the baseball would result in reduction or dismissal of her criminal charges. (T69-70, A19-20; T71, A20)

Respondent contacted Thornhill and told him that Hart had obtained the autographed ball. (T42, A13; T46, A14) The ball was never given to Thornhill, nor was it ever shown to Thornhill. (T34-35, A11; T41, A12) Thornhill was surprised when Respondent told him that Hart had actually obtained an autographed baseball. (T46-47, A14; A36) Thornhill told Respondent that he would speak with the police officers that Hart had purportedly assisted in prior investigations and if Thornhill

received a good report, he would consider changing his recommendation. (A36)

Thornhill did not ask for the baseball. (T41, A12; A36) After Respondent told Thornhill that Hart had obtained the autographed baseball, Thornhill did not change his recommendation or reduce the felony charges. (T21-22, A7-8)

Respondent was contacted by the FBI in the course of their investigation and he submitted to an interview with special agents on August 31, 2006. ( T22, A8; T24, A8; A40) Respondent's interview with the FBI related to their investigation of a bribery allegation and Respondent's knowledge of the baseball. (T24, A8; A40) The interview related to a criminal investigation. (T27, A9) During the interview with the FBI, Respondent made false statements. (T22, A8; A40) Respondent acknowledged his false statements in a later interview with Assistant U.S. Attorney Hal Goldsmith (Goldsmith), after retaining counsel. (T29, A9; A40) In the second meeting, Respondent again made false statements. (T25, A8; T26, A9) There was no agreement between Respondent and the government that Respondent would not be prosecuted, before the second meeting. (T56, A16) Respondent through counsel ultimately entered into a pretrial diversion agreement, in which he stipulated and acknowledged his false statements. (A39-44)

Consistent with the pretrial diversion agreement, Respondent agreed to

various conditions, including a condition that he voluntarily abstain from the practice of law for twelve (12) months and fully cooperate with the Supreme Court

and the “Missouri Disciplinary Commission.” (T57, A16; A44) Respondent fully complied with the terms of his pretrial diversion agreement and was successfully discharged. (T57, A17)

Respondent had never been disciplined prior to the filing of an Information in the instant case. (T60, A17) Respondent remains in good standing. A hearing was held before a disciplinary panel on June 26, 2008. The Panel found that Respondent violated Rule 4-1.4, Rule 4-8.4(c) and Rule 4-8.4(e). The Panel did not find that Respondent had violated Rule 4-8.4(d), Rule 4-4.1 and Rule 4-3.5. (A49-52) The Panel recommended that the appropriate sanction be a twelve (12) month suspension from the practice of law, commencing June 25, 2007 and ending June 26, 2008. (A53) The period of time for the suspension coincided with Respondent's voluntary abstention from the practice of law. (T58, A17)

Respondent accepted the Panel's recommendations. Informant rejected the Panel's recommendation. This matter is now before this Court.

**POINTS RELIED ON**

**I.**

**THE SUPREME COURT'S DISCIPLINE OF RESPONDENT'S  
LICENSE SHOULD NOT BE BASED UPON THE ALLEGED VIOLATIONS  
WHICH THE DISCIPLINARY HEARING PANEL FOUND HAD NOT BEEN  
PROVEN BY A PREPONDERANCE OF THE EVIDENCE:**

**a. 4-4.1 (TRUTHFULNESS IN STATEMENTS TO OTHERS) IN THAT  
RESPONDENT'S FALSE STATEMENTS TO THE FBI AND UNITED  
STATES ATTORNEY'S OFFICE WERE NOT MADE IN THE COURSE OF  
REPRESENTING A CLIENT;**

**d. 4-3.5 (SEEKING TO INFLUENCE AN OFFICIAL BY MEANS  
PROHIBITED BY LAW) IN THAT INFORMANT FAILED TO PROVE BY A  
PREPONDERANCE OF THE EVIDENCE THAT RESPONDENT  
ATTEMPTED TO OBTAIN A REDUCTION IN FELONY CHARGES AS A  
QUID PRO QUO FOR SPORTS MEMORABILIA; and**

**f. 4-8.4(d) (CONDUCT PREJUDICIAL TO THE ADMINISTRATION  
OF JUSTICE) IN THAT INFORMANT FAILED TO PROVE BY A**

**PREPONDERANCE OF THE EVIDENCE THAT RESPONDENT'S FALSE  
STATEMENTS WERE PREJUDICIAL TO THE ADMINISTRATION OF**

**JUSTICE AND FAILED TO PROVE RESPONDENT ATTEMPTED TO  
OBTAIN A REDUCTION OF FELONY CHARGES AS A QUID PRO QUO  
FOR SPORTS MEMORABILIA.**

*In re Crews*, 159 S.W.3d 355 (Mo.banc 2005)

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

*In re Snyder*, 35 S.W.3d 380 (Mo.banc 2000)

Rule 4-4.1

Rule 4-3.5

Rule 4-8.4(d)

**POINTS RELIED ON**

**II.**

**THE SUPREME COURT SHOULD NOT DISREGARD THE DISCIPLINARY HEARING PANEL'S RECOMMENDATION. THE PANEL'S RECOMMENDATION COMPORTS WITH SUPREME COURT RULE 5.16, ACCOUNTS FOR MITIGATING FACTORS IN RECOMMENDING A SANCTION, AND THE PANEL'S DECISION IS CONSISTENT WITH THE AUTHORITY DELEGATED TO IT BY THE SUPREME COURT.**

*In Re Pate*, 107 S.W.2d 157 (Mo.App.W.D. 1937)

*In Re Richards*, 333 Mo. 907, 63 S.W.2d 672 (Mo. 1933)

*In Re Griffey*, 873 S.,.W.2d 600 (Mo.banc 1994)

*In Re Donaho*, 98 S.W.3d 871 (Mo.banc 2003)

Rule 5.16

Rule 4

**POINTS RELIED ON**

**III.**

**THE SUPREME COURT SHOULD FOLLOW THE RECOMMENDATION OF THE PANEL AS RESPONDENT S CONDUCT DOES NOT RISE TO THE LEVEL OF MISCONDUCT TO WARRANT DISBARMENT AND THE PANEL, AFTER FULL HEARING, RECOMMENDED THAT RESPONDENT S SANCTION BE A ONE YEAR SUSPENSION, CONSISTENT WITH RESPONDENT' S SELF IMPOSED ONE YEAR ABSTENTION FROM THE PRACTICE OF LAW.**

*In re Conner, 207 S.W.2d 492 (Mo.banc 1948)*

*In re Frank, 885 S.W.2d 328 (Mo.banc 1994)*

*In re Forge, 747 S.W.2d 141 (Mo.banc 1988)*

*In the Matter of Dorsey, 731 S.W.2d 252 (Mo.banc 1987)*

## ARGUMENT

### I.

**THE SUPREME COURT'S DISCIPLINE OF RESPONDENT'S LICENSE SHOULD NOT BE BASED UPON THE ALLEGED VIOLATIONS WHICH THE DISCIPLINARY HEARING PANEL FOUND HAD NOT BEEN PROVEN BY A PREPONDERANCE OF THE EVIDENCE:**

**a. 4-4.1 (TRUTHFULNESS IN STATEMENTS TO OTHERS) IN THAT RESPONDENT'S FALSE STATEMENTS TO THE FBI AND UNITED STATES ATTORNEY'S OFFICE WERE NOT MADE IN THE COURSE OF REPRESENTING A CLIENT;**

**d. 4-3.5 (SEEKING TO INFLUENCE AN OFFICIAL BY MEANS PROHIBITED BY LAW) IN THAT INFORMANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT RESPONDENT ATTEMPTED TO OBTAIN A REDUCTION IN FELONY CHARGES AS A QUID PRO QUO FOR SPORTS MEMORABILIA; and**

**f. 4-8.4(d) (CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE) IN THAT INFORMANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT RESPONDENT'S FALSE**

**STATEMENTS WERE PREJUDICIAL TO THE ADMINISTRATION OF**

**JUSTICE AND FAILED TO PROVE RESPONDENT ATTEMPTED TO OBTAIN A REDUCTION OF FELONY CHARGES AS A QUID PRO QUO FOR SPORTS MEMORABILIA.**

Although a disciplinary hearing panel's recommendation is advisory in nature, misconduct must be proven by Informant by a preponderance of the evidence. *In re Crews*, 159 S.W.3d 355 (Mo. banc 2005), *In re Shelhorse*, 147 S.W.3d 79 (Mo. banc 2004) and *In re Snyder*, 35 S.W.3d 380 (Mo. banc 2000).

The Information alleged that Respondent violated six (6) separate rules of professional conduct. At the hearing before the Disciplinary Hearing Panel (Panel), Informant and Respondent entered into a stipulation of facts that was filed as an Exhibit by Informant. Informant also filed as an Exhibit the Diversion Agreement entered into by Respondent and the United States Attorney's Office. At the June 26<sup>th</sup> hearing, Respondent testified before the Panel. Respondent was questioned by Counsel for the Informant, Counsel for the Respondent, and each Panel member. Members of the Panel questioned Respondent ten (10) times under oath about the specific violations of professional conduct set forth in the information.

The Panel found specific acts of misconduct in violation of the rules of professional conduct which Respondent does not revisit here. Consistent with

Supreme Court Rule 5.16 the Panel also found that Informant had failed to prove by

a preponderance of the evidence that Respondent had violated Rule 4-3.5 [Seeking to Influence an Official by Means Prohibited by Law], Rule 4-4.1 [Truthfulness in Statements to Others] and Rule 4- 8.4(d) [Engage in Conduct that is Prejudicial to the Administration of Justice].

As the trier of fact, the Panel was in the best possible position to assess the weight and credibility of the evidence, as well as the demeanor of Respondent and the Panel's evidentiary findings should not be disturbed.

**a. Rule 4-4.1 (Truthfulness in Statements to Others)**

Informant asserts that Respondent has violated Rule 4-4.1 because his statements to the FBI took place in the course of Respondent's representation of his client. Respondent admitted in his Answer that he violated this rule, in as much as Respondent has consistently acknowledged he made false statements to the government. Notwithstanding this admission, Informant failed to produce any evidence at the hearing which proved by a preponderance of the evidence that the false statements were made in the course of Respondent's representation of Mary Hart.

Informant placed into evidence the Diversion Agreement between Respondent and the Government. The stipulation contained within the Diversion

Agreement accurately recounts that the false statements were made to the FBI

during the FBI's criminal investigation into allegations of bribery. Specifically, the FBI was conducting a criminal investigation and Respondent was questioned because of his alleged involvement. Although Respondent initially thought he was being brought in to discuss his client's past cooperation with law enforcement, he quickly learned that the focus of the investigation was Respondent's conduct, not his client's. In fact, Miss Hart was already cooperating with the authorities by the time Respondent was questioned and she had secretly recorded at least two (2) conversations between herself and Respondent. The recordings were done at the direction of the FBI and ultimately led the FBI to request an interview of Respondent. The subject of the interview was Respondent, his conduct, and his communications with assistant prosecuting attorney Thornhill. Without speculating as to why Respondent made false statements to the government during this and a subsequent interview, by any stretch of the imagination, those statements were not made in the course of representing a client.

Informant further argues that Respondent's misstatements of fact to federal investigators (about his attempt to negotiate a reduced sentencing recommendation) were no different than making misrepresentations to a court. Informant cannot cite any authority to support this argument. While it is true that

that we are always acting in the course of representing a client.

Informant cites as authority *In the Matter of Rausch*, 32 P.3d 1181 (Kan. 2001) and *State ex rel. Oklahoma Bar Association v. Allford*, 152 P.3d 190 (Ok. 2006). These cases are distinguishable from the instant case.

In the case of *In the Matter of Rausch*, 32 P.3d 1181 (Kan. 2001), the Respondent was the sole signatory on a trust account involving his client. He was also the sole signatory on another account which he used to transfer client's money. In essence, Rausch transferred money from a client trust account to an account where he was a corporate officer, and then to accounts elsewhere. Rausch ultimately was convicted of fraud and deceptive business practices for his role in the scheme. *Rausch, supra at 1188*. The court in *Rausch* reviewed whether or not the attorney had violated Rule 4.1(b) of the Kansas Rules of Professional Conduct (KRPC), which reads in pertinent part:

In the course of representing a client a lawyer shall not knowingly:

. . . .

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by or made discretionary under Rule 1.6.

The court held that Rausch had acted as an attorney in representing a holding company which he had established and incorporated and through which he was funneling client funds. *Id.* It was Rausch's actions in creating the sham company and in playing various and conflicting roles in the scheme which prompted the court to conclude that Rausch had violated Rule 4.1(b) of the KRPC:

Because the Respondent failed to disclose to Mr. Van der Spuy and Mr. Fisher that he played various, and at times, conflicting roles in the investment program, and because the investment program was a sham, the Respondent 'fail[ed] to disclose a material fact to [the investors] when disclosure [was] necessary to avoid assisting . . . criminal or fraudulent act[s] by [Deerfield],' in violation of KRPC 4.1(b).

*Rausch, supra at 1189.*

In the case at bar, the intended beneficiary of Respondent's conduct was his client. Although Respondent's conduct ultimately created an impression that a bribe was being solicited (in the course of representing his client), his false statements to the government were made after the fact and were wholly unrelated to that conduct.

*Rausch* does not support Informant's position.

In the case of *State ex rel. Oklahoma Bar Association v. Allford*, 152 P.3d

a subpoena, which required her to testify at a deposition being held by the Bar (which was investigating a complaint against her). *Allford, supra at 192*. Allford further refused to acknowledge the Bar's complaint or that the Court had the authority to oversee her practice or to even investigate any complaint against her. She further compounded her troubles by giving inconsistent responses to questions posed by panel members and by showing a complete lack of remorse for her actions. *Id.*

What is important to note about *Allford* is that when the attorney willfully committed the crime of abuse of legal process, she was still representing the client who had filed a grievance with the Bar. Allford had apparently reached an agreement with the client to continue to handle the probate matter, while the Bar was conducting an investigation of her potential misconduct. Her false statements to others were made in trying to avoid an appearance at a deposition related to the Bar's investigation of that representation. The facts before this Court are inapposite. Informant cannot point to any evidence in the record to support her conclusion that Respondent was acting as Hart's attorney when he was being questioned by the FBI. Respondent should not be disciplined for violation of Rule 4-4.1, which Informant failed to prove by a preponderance of the evidence.

The Panel considered undisputed evidence that Assistant Prosecuting Attorney Matthew Thornhill would have testified that there was a memorandum in his file indicating that Hart was to get no special deals, that Hart had a long history of writing bad checks and that Hart was a known liar. Thornhill would further have testified that Respondent told him that Hart's godfather was Terry Bradshaw. Thornhill stated to Respondent that if Hart could obtain an autographed baseball he would reconsider his opinion that Hart was a liar. Thornhill would also testify that the baseball did not represent a quid pro quo for any special deal or reduced charges relating to Hart. This evidence was consistent with Respondent's testimony to the Panel that the ball was never to be given to the prosecutor in exchange for a reduction of charges. The ball was a means to demonstrate to the prosecutor that Respondent's client was not a liar. The prosecutor was seeking to measure or gage the truthfulness of Respondent's client. Even after Hart told Respondent she had obtained the autographed ball and Respondent said he would be able to take care of that (meaning the charges), the ball was never given to Thornhill, nor was it ever shown to Thornhill. Thornhill told Respondent that he would speak to officers that Hart had purportedly assisted in prior investigations and if Thornhill received a good report he would consider changing his recommendation. Thornhill never

asked for the baseball and in the end, he never changed or reduced his

recommendation based upon the ball.

Informant cites *In the Matter of Anast*, 634 N.E.2d 493 (In. 1994) to support her theory that Respondent solicited the baseball as an actual attempt to influence Thornhill's decision, that is, the baseball represented a quid pro quo. The facts of *Anast* are clearly distinguishable.

In *Anast*, the attorney was convicted of racketeering, conspiracy, obstruction of justice, witness tampering, perjury and corruptly endeavoring to influence an officer of the court. Anast failed to appear for sentencing and was a fugitive from justice when the opinion was handed down. *Anast, supra at 493*. Anast used his law office to conspire with others to obtain titles to stolen motor vehicles, filed false claims against fictitious defendants or co-conspirators to obtain default judgments, filed mechanic's liens on the stolen vehicles and used the fraudulent documentation to construct fraudulent court orders. He also counseled and assisted clients in obtaining money through insurance fraud. *Id.* The Court further noted that during the course of the FBI's investigation of Anast he instructed co-conspirators or potential government witnesses to avoid being questioned or served with subpoenas and paid certain co-conspirators to help them avoid service of process or to persuade them to testify falsely. Anast also committed perjury before

adopted the findings and recommendations of a hearing officer, who received evidence in the absence of Anast (who was a fugitive), that Anast had been charged with “very serious professional misconduct predicated on his conviction in the United States District Court . . . .” *Anast, supra at 493.*

The Panel correctly concluded that Informant failed to prove by a preponderance of the evidence that Respondent conspired with others or otherwise endeavored to influence the prosecutor by prohibited means, namely producing a baseball as a quid pro quo. Respondent should not therefore be disciplined for violation of Rule 4-3.5.

**f. Rule 4-8.4(d) (Engaging in Conduct Prejudicial to the Administration of Justice)**

Informant failed to prove by a preponderance of the evidence that Respondent interfered with the administration of justice. There was absolutely no action or conduct that bore directly upon the judicial process. Thornhill stated to Respondent that if Hart could obtain an autographed baseball he would reconsider his opinion that Hart was a liar. Thornhill would also testify that the baseball did not represent a quid pro quo for any special deal or reduced charges relating to Hart. Furthermore, the ball was never to be given to the prosecutor in exchange for

a reduction in the charges facing Respondent’s client. The ball was a way to

show the prosecutor that Respondent's client was not a liar. The ball was never given to Thornhill, nor was it ever shown to Thornhill. As such, the conduct never had any bearing directly upon the administration of justice as asserted by Informant.

Informant argues that whether or not Respondent committed bribery is irrelevant to a finding that Respondent engaged in conduct prejudicial to the administration of justice. Informant however spends a great deal of time trying to convince this Court that the baseball was meant to influence Thornhill in some inappropriate or corrupt manner. The evidence before the panel and the authority cited by Informant do not support such a conclusion.

For example, in the case of *In re Caranchini*, 956 S.W.2d 910 (Mo. 1997), the attorney was charged with numerous violations of the Rules of Professional Conduct, based upon Caranchini's misconduct in four separate federal court cases. The federal district courts had already made independent findings which resulted in various sanctions against Caranchini. *Caranchini*, 956 S.W.2d at 911. The Court found that Caranchini had filed numerous, frivolous pleadings, with the knowledge they lacked merit. The Court held that Caranchini had intentionally submitted false documents, intentionally made false statements and had intentionally withheld information from the court. As such it was the intent of Caranchini to intentionally

deceive the court and therefore, she violated multiple rules, all of which

resulted in prejudice to the administration of justice. *Caranchini, supra at 919*. The Court further noted that Caranchini continued to refuse to accept or acknowledge her wrongdoing, and as such this factor did not serve as a strong indicator of interim rehabilitation or remorse. *Id.* In the end, it was Caranchini's affront to the indispensable and fundamental principle that a "lawyer must proceed with absolute candor towards the tribunal" which caused her disbarment. "In the absence of that candor, the legal system cannot properly function." *Caranchini, supra at 919-920*.

Equally, *In re Carey & Danis*, 89 S.W.3d 477 (Mo. banc 2002) does not support Informant's position as in that case, the attorneys engaged in prejudicial conduct by "violating two of the most fundamental principles of the legal profession: loyalty to the client and honesty to the bench." *Carey & Danis, 89 S.W.3d at 503*. Further, *In Re Kazanas*, 96 S.W.3d 803 (Mo.banc 2003) fails to support Informant's position. Kazanas misappropriated over \$150,000 of attorney's fees from his law firm, filed fraudulent tax returns and in spite of a plea agreement and stipulation with the U.S. Attorney's office, refused to surrender his law license. *Kazanas, supra at 806*. This Court found that Kazanas had violated Rule 4-8.4(d)

because he had been convicted of filing a false tax return and misappropriating attorney fees from his law firm. *Kazanas, supra at 807*.

Further, Informant cites authority from other jurisdictions and seemingly

encourages this Court to adopt a “test” for determining whether Rule 4-8.4(d) has been violated. Whether or not this court adopts such a test, Informant failed to present evidence proving Respondent violated the rule. *In re Hopkins*, 677 A.2d 55 (D.C. 1996) stands for the proposition that when an attorney fails to act while her client’s estate account is depleted, she is guilty of violating the rule that a lawyer shall not engage in conduct prejudicial to the administration of justice. *Hopkins, supra at 58*. Hopkins knew her client had withdrawn more than his share of funds from an estate but Hopkins failed to act. In addition, Hopkins failed to follow up with the Register of Wills. By failing to act, she “not only prejudiced but destroyed the Probate Division’s ability to administer the estate assets.” *Hopkins, supra at 62*. The District of Columbia Court of Appeals therefore concluded that Hopkin’s inaction constituted improper conduct that arose directly out of her employment as an attorney for a personal representative, in a pending probate matter, and that her conduct bore directly on and seriously and adversely impacted the judicial process. *Hopkins, supra at 63*. Should this Court adopt the test set forth in *Hopkins*, the evidence presented to the Panel does not comport with a finding that Respondent prejudiced the administration of justice.

Finally, the Oregon Supreme Court concluded in *In re Smith*, 848 P.2d 612

(Or. 1993) that conduct must be prejudicial in nature - it must have caused, or

had the potential to cause, harm or injury. *Smith, supra at 614*. The amount of harm must be more than minimal, as a result of “repeated conduct causing some harm to the administration of justice or from a single act causing substantial harm to the administration of justice.” *Id.* Smith caused a doctor, who was a prospective witness, to withdraw from evaluating a litigant in a workers compensation action, by threatening to sue the doctor if the doctor’s opinion did not agree with a previous examination. Improperly threatening a witness in a legal proceeding was found to be substantially harmful to the administration of justice and akin to tampering with a witness. *Id.*

The authorities cited by Informant do not support this Court finding differently than that of the Panel. Respondent’s conduct did not, either directly or indirectly, prejudice the administration of justice.

Respondent’s conduct does not rise to the level of prejudice to the administration of justice, the Panel was correct in concluding that Informant had failed to prove a violation of Rule 4-8.4(d) and this Court should not discipline Respondent for violating said rule.

## II.

**THE SUPREME COURT SHOULD NOT DISREGARD THE DISCIPLINARY HEARING PANEL'S RECOMMENDATION. THE PANEL'S RECOMMENDATION COMPORTS WITH SUPREME COURT RULE 5.16, ACCOUNTS FOR MITIGATING FACTORS IN RECOMMENDING A SANCTION, AND THE PANEL'S DECISION IS CONSISTENT WITH THE AUTHORITY DELEGATED TO IT BY THE SUPREME COURT.**

Consistent with its duties under Supreme Court Rule 5.16, the Disciplinary Hearing Panel (Panel) held a hearing on June 26, 2008. After considering all of the evidence and the arguments of counsel, the Panel issued specific findings of fact, conclusions and recommendations. Rule 5.16 provides that the Panel decision shall include a finding regarding each specific act of misconduct charged in the information. The Panel followed the rule, finding that Respondent violated three provisions of Rule 4 but did not violate three others as alleged in the information. Rule 5.16 provides that the Panel decision shall include a recommendation for discipline where there is a finding of any violation of Rule 4. The Panel followed the rule and considered both aggravating and mitigating factors. The Panel

then recommended that Respondent be suspended from the practice of law for

a period of twelve (12) months commencing June 25, 2007 and ending June 26, 2008. The Panel also concluded that Respondent should complete certain conditions precedent to any reinstatement to the practice of law, including the conditions of reinstatement required by Supreme Court Rule 5.28.

Nowhere is it written that disciplinary hearing panels cannot find, conclude or recommend the length of suspension or the minimum time an attorney must wait before applying for reinstatement. In fact, Rule 5.16 provides in relevant part:

A recommendation for suspension shall include the length of time that must elapse before the respondent is eligible to apply for reinstatement.

Contrary to Informant's argument that the Panel "exceeded its authority," the Panel decided and recommended that Respondent be suspended for one year and that no time elapse before Respondent became eligible to apply for reinstatement.

It is of course true that this Court has the inherent authority to regulate the practice of law. Article 3 of the Missouri Constitution divides the powers of the government. What this Court does with that division of power is the more important question. *In Re Pate*, 107 S.W.2d 157, 162 (Mo.App. W.D. 1937) speaks to the division of power as follows:

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Each of these three divisions or departments of government is given certain inherent powers and each of the three departments of government

must be kept separate and must operate in its own sphere, yet in operating in its own particular sphere it is limited by the Constitution . . . . Section 1 of article 6 of the Constitution of Missouri vests the judicial power of the state in the Supreme Court and other courts named in that section, and while the Constitution does not expressly vest the power to define and regulate the practice of law in the judicial department . . . [then] it must be exercised by the department to which it naturally belongs for each department of government has, without any express grant, the inherent right to accomplish all objects naturally within the orbit of that department.

*In re Richards*, 333 Mo. 907, 63 S.W.2d 672 (Mo. 1933) (*other internal citations omitted*)

*In Re Pate*, 107 S.W.2d at 162.

It was held in *Richards* that the Supreme Court of Missouri had original jurisdiction in matters related to disbarment proceedings, originating in the power of the court to regulate the practice of law. *Richards*, 63 S.W.2d at 673-674. With this inherent power went the right to promulgate rules of procedure and delegation of certain powers to the Bar Committee. *In Re Pate*, *id.* Among these powers were the

power to investigate complaints, dismiss complaints, hold informal hearings and file an information. *Id.* Although not expressly granted, the Court found that the

committee had the right to dismiss an information as the Court had impliedly delegated this right to the committee. “It has the right to delegate to the inferior tribunals of record of this state the trial of these matters in accordance with the rules of procedure adopted by it.” *In Re Pate*, 107 S.W.2d at 159.

This Court has historically and traditionally delegated its inherent powers to “lower tribunals.” Under the current rules promulgated by this Court, those powers belong to disciplinary hearing panels or special masters. This Court has recognized that a master’s findings, conclusions and recommendations are “helpful” in determining disposition in a particular case. *In Re Griffey*, 873 S.W.2d 600, 601 (Mo. banc 1994). As to disciplinary hearing panels, while the panel’s recommendation as to the appropriate measure of discipline is merely advisory, this Court gives considerable weight to the panel’s suggestions. *In Re Donaho*, 98 S.W.3d 871, 873 (Mo. banc 2003).

In asking this Court to disregard the panel’s recommendation, Informant ignores the important role played by disciplinary hearing panels, which are made up of lawyers and non-lawyers. In delegating powers to hearing panels, this Court (as stated in *Richards and Pate*) has granted disciplinary panels the right to make

specific findings and recommendations under Rule 5.16 as to punishment. To ignore a panel’s findings and recommendation, as Informant would have this Court

do, is

to ignore their important role in protecting the public and maintaining the integrity of the legal profession. “Bar committee proceedings are a vitally important link in the attorney discipline chain.” *Donaho, supra at 874.*

While each case must necessarily stand upon its own facts, the primary theme running through many other disciplinary cases is that the ultimate purpose of disciplinary proceedings is to protect the public, the integrity of the Bar and the courts from the practice of law by persons unfit to serve as members of the Bar. *In Re Downs*, 363 S.W.2d 679, 691 (Mo.banc 1963). The Panel considered the principles set forth in *Downs* and further, considered Respondent’s actions, mitigating factors, the propriety of sanctions under the Missouri rules and the ABA model rules. In effect, the Panel’s recommendation for discipline recognized the “reasonable hope of reformation,” an appropriate factor to consider. *Downs*, 363 S.W.2d at 690; *In Re Crews*, 159 S.W.3d 355, 361 (Mo.banc 2005). The Panel considered that Respondent accepted responsibility for making false statements, made a full and free disclosure to the Panel, made admissions in his Answer to the

Information, maintained a cooperative attitude toward the proceedings, had

never been disciplined before and voluntarily abstained from the practice of law for one (1) year, even though he was duly licensed and a member of the Bar in

good standing.

While Informant seems focused on Respondent's pretrial diversion agreement with the federal authorities (and the sanctions imposed therein), Respondent submits that the Panel appropriately considered all relevant factors in its detailed findings. This Court, while not bound by the Panel's findings and recommendations, should conclude that the sanction recommended was appropriate under the totality of the circumstances and should enter an order accordingly.

### III.

**THE SUPREME COURT SHOULD FOLLOW THE RECOMMENDATION OF THE PANEL AS RESPONDENT S CONDUCT DOES NOT RISE TO THE LEVEL OF MISCONDUCT TO WARRANT DISBARMENT AND THE PANEL, AFTER FULL HEARING, RECOMMENDED THAT RESPONDENT S SANCTION BE A ONE YEAR SUSPENSION, CONSISTENT WITH RESPONDENT' S SELF IMPOSED ONE YEAR ABSTENTION FROM THE PRACTICE OF LAW.**

The power to disbar or suspend a member of the legal profession is not an arbitrary one to be exercised lightly, at pleasure, in hostility, or with either passion or prejudice. Courts approach the problem with a deep sense of responsibility, conscious that such power is to be used only in moderation, with sound discretion, and in a clear case for weighty reasons and on clear proof. *In re Conner*, 207 S.W.2d 492, 498 (Mo.banc 1948). This Court's review must be done with a view as to

whether or not the Panel's findings and recommendations were a

reasonable exercise of their discretion. *Conner*, 207 S.W.2d at 498. Although

*Conner* involved a previous version of Rule 5 (which delegated disciplinary proceedings to trial courts), the legal tenants remain the same.

The Panel had the responsibility of hearing all of the evidence and judging credibility of the testimony. The Panel determined that the discipline should amount to a twelve month suspension, consistent with Respondent s voluntary abstention from the practice of law, and that Respondent should be immediately eligible to apply for reinstatement. The Panel's findings and recommendations were reasonable.

Respondent voluntarily stopped practicing law from June 26, 2007 to June 26, 2008. The Panel was aware of Respondent s abstention. Additionally, Respondent agreed to fully cooperate with the Missouri State Bar Disciplinary Commission. The Panel, after consideration of all the evidence, including aggravation and mitigation, concluded a one year suspension was appropriate. Informant recommended suspension to the Panel but now asserts that disbarment is an appropriate remedy. Informant further asserts, without proof or supporting

evidence, that Respondent actively participate[d] in an attempt to bribe a prosecutor . . . (Inf. Brief, p. 33) Informant's careless assertion ignores her original

recommendation to the Panel and ignores the evidence in this case.

Informant cites *State ex rel Oklahoma Bar Association v. Allford*, 152 P.3rd 190 (Ok. 2006), to support the proposition that ABA standard 5.1 provides justification for disbarment. (Inf. Brief, p. 33) *The Allford* case is distinguishable from the present case. In *Allford*, the attorney intentionally and willfully took actions to deceive the legal system. Allford convinced sheriff s deputies to place false data on the service of the subpoena by convincing the deputy that the whole case would be dismissed soon. *Allford, supra at 192*. The subpoena related to Allford's deposition for allegations of misconduct before the Bar. *Id.* Allford further aggravated her conduct when she made inconsistent statements under oath before panel members at her hearing. *Id.* The Court in *Allford* recognized the willfulness of her intent to falsify legal documents and her failure to accept responsibility for her actions. The court in *Allford* determined that only a six month suspension was appropriate, recognizing that Allford had never been disciplined before and concluded: " Her behaviour, although unacceptable, did not result in a client or a member of the public suffering a legal or financial loss."

Informant argues for disbarment pursuant to *Allford*, because of Respondent's false statements to FBI agents and the U.S. Prosecuting Attorney. The Panel recognized, as this Court should, that Respondent stipulated to certain statements made in the course of interviews with the FBI agents and the Prosecuting Attorney. In that stipulation Respondent admits that he called the baseball a joke in reference to its significance in the negotiations between the parties. Respondent also stipulated that his client's past cooperation with law enforcement was the only point of negotiation between Respondent and Assistant Prosecuting Attorney Thornhill. Finally, Respondent stipulated and consistently admitted that he never told Hart her charges would be reduced in exchange for a baseball. Although the false statements were made to the federal authorities, none of the statements were intended to be a fraud on the court or pending litigation. Further, Respondent admitted to all misstatements and completely cooperated with Informant during the investigation. He submitted to a sworn deposition in both his case and in the investigation by Informant of Thornhill. Respondent also candidly testified before the Panel. In contrast, Allford willfully committed fraud in an attempt to avoid legal process and the disciplinary process. The Oklahoma Supreme Court saw fit to suspend Allford

for six months. *Allford* simply does not support Informant's argument that disbarment

is justified.

Informant also cites *In re Tucker*, 776 A.2d 510 (D.C. 2000) in support of her argument that disbarment has been a common sanction for attorneys who have engaged in conduct similar to Respondent's. The facts in *Tucker* do not however support her assertion. Tucker had been paying money to an employee of the District of Columbia Bureau of Traffic Adjudication ( BTA ) to fix pending traffic tickets. Tucker paid the employee of the BTA cash in exchange for that employee's promise to use his position to alter BTA records. Tucker admitted that the activity had been ongoing for years. Ultimately, Tucker pleaded guilty to one count of attempted bribery. *In re Tucker*, 776 A.2d at 511 (FNI) The District of Columbia Court of Appeals reviewed the Board of Professional Responsibility's findings, that Tucker had been convicted of a crime involving moral turpitude, as the crime involved intentional dishonesty for personal gain. *Tucker, supra at 513*. The D.C. Court ordered disbarment and concluded that Tucker's conduct was committed for personal gain, that he knew his conduct was illegal, that his conduct went to the heart of integrity of the judicial and governmental system and finally, that Tucker failed to present any mitigation. *Id.*

Unlike Tucker, Respondent was not convicted of a crime nor was he prosecuted for bribery or attempted bribery. While his false statements (later acknowledged) were unfortunate, the matter was fully investigated and no bribery charges resulted. The Panel, in concluding that Respondent had not violated Rule 4-3.5 (Seeking to Influence an Official by Means Prohibited by Law) and Rule 4-8.4(d) (Engaging in conduct Prejudicial to the Administration of Justice), must have concluded that no bribery attempt occurred. *Tucker* is inapposite.

Informant cites *In re Dickson* 968 So.2d 136 (La. 2006). *Dickson* on its face does not support Informant's position. The attorney in *Dickson* committed a multitude of egregious violations of the ethical rules. The Court found aggravating factors to be prior disciplinary offenses, dishonest or selfish motive, a pattern of misconduct, multiple offenses, failure to cooperate, refusal to acknowledge the wrongful nature of the conduct, substantial experience in the practice of law, vulnerability of the victims, and indifference to making restitution. *Dickson*, 968 So.2d at 140. The sole mitigating factor was the remoteness of his prior disciplinary offenses. *Id* *Dickson* manipulated and co-mingled client funds. He extorted from his client \$18,000 with a promise that he could bribe both the district attorney and the judge in favor of a lenient sentence. *Id*. The Court in *Dickson* noted that the

attorney's conduct was an intentional corruption of the judicial process and caused direct harm to his client. *Dickson, supra at 141*.

Respondent's actions do not rise to the level of misconduct evidenced in *Dickson*. Respondent's conduct did not directly harm his client. Although Respondent consistently has admitted that he created an impression that the baseball would get her charges reduced (they were ultimately dismissed entirely), there was no quid pro quo. Additionally, Respondent has no prior disciplinary actions in thirteen years of the practice of law. He was cooperative and forthcoming, maintained a cooperative attitude during the proceedings, made admissions and completed his diversion agreement with the government. Informant correctly concludes that Given that the illegal nature of Respondent's conduct has been addressed by his criminal case and subsequent diversion agreement, this aggravating factor is not substantial and is far outweighed by the mitigating circumstances. (Inf. Brief, p.36) Disbarment is not an appropriate sanction.

Finally, Informant cites *Office of Disciplinary Counsel v. DiAngelus*, 907 A.2d 452 (Penn. 2006) for support of disbarment. Diangelus was initially disbarred by recommendation of a Disciplinary Board, but ultimately suspended for five years. It was found in three separate matters that: 1. He signed his co-counsel's name to

pleadings and verified the signature as his own; 2. He lied to a judge; and 3. He lied to an assistant prosecutor about the existence of a plea agreement, and based upon that intentional misrepresentation, the prosecutor advised the court of its position in the matter. *DiAngelus*, 907 A.2d at 453. Moreover, DiAngelus had previously been disbarred and admonished. *DiAngelus*, *supra* at 458. In spite of finding that DiAngelus' conduct was material and prejudicial to the administration of justice, the court refused to adopt a *per se* rule requiring disbarment for specific acts of misconduct. *Id.* Instead, the court decided that a five year suspension was appropriate. *DiAngelus* does not support Informant's position as Respondent's conduct does not even approach the egregiousness of DiAngelus.

Unlike DiAngelus where the attorney continued the lie to the tribunal, here there was never an intent to lie to further any malfeasance. Respondent's false statements were not made in furtherance of any misrepresentation and at the time the statements were made, there had never been an intent to transfer the baseball or other memorabilia to effect the outcome of his client's case. Additionally, the Respondent's statements to the FBI agent were minimizing the role the baseball played in the negotiations with the Prosecuting Attorney. Respondent told the agent that the ball was a joke and not a part of the negotiations. Again, in *DiAngelus*, the attorney

completely falsified a statement relating to events that did not occur and forwarded that information to a prosecuting attorney and a judge. Furthermore, the attorney in *DiAngelus* had previous, serious discipline imposed. Respondent has never been disciplined. *DiAngelus* fails to support Informant's position.

The Court should follow the recommendation of the Panel in this case.

Disciplinary actions are primarily remedial in nature. *In re Caranchini* 956 S.W.2d 910 (Mo.banc. 1997). The principle is to protect society and maintain the integrity of the legal profession. *In re Frank*, 885 S.W.2d 328, 333 (Mo.banc. 1994). While Informant makes an argument for disbarment of the Respondent she acknowledges that Respondent's actions in this case may not warrant disbarment. Nevertheless, Informant cites *In re Forge* 747 S.W. 2d 141 (Mo.banc 1988) where this Court found that an attorney had violated Rule 4.8(c) by commingling funds of his client, failed to respond to correspondence from the Committee, failed to appear before the Committee and made false representations to the Committee during the proceedings. *In re Forge*, 747 S.W.2d at 144. This Court, in explaining its decision to suspend Forge, found that his testimony before the Committee barely skimmed the surface of the truth. *Id.* In spite of Forge's lack of cooperation and candor before the Committee, and in spite of the precedent that disbarment is the appropriate sanction

(in the absence of mitigation) when a client's funds are commingled with those of an

attorney, this Court ordered a six month suspension. *Forge, supra at 145.*

Disbarment is reserved only for clear cases of severe misconduct. To disbar an attorney it must be clear that the attorney is not fit to continue in this profession.

*In re Forge, 747 S.W.2d at 145* (internal quotes omitted)

This Court should follow the recommendation of the Panel in this matter as in certain circumstances this Court has found that a lesser sanction should be provided than that requested by Disciplinary Counsel. *In re Cupples, 952 S.W.2d 226, 229* (Mo.banc 1997) (an attorney who had violated Rule 4-8.4(c) by secretly removing files from his firm was publicly reprimanded when the recommended sanction was suspension); *In the Matter of Dorsey, 731 S.W.2d 252* (Mo. banc. 1987) (this Court suspended attorney for three months where Disciplinary Counsel recommended disbarment because of attorney's subsequent conduct during pendency of disciplinary proceedings).

This Court should therefore follow the recommendation of the Panel, find that Respondent's misconduct does not warrant disbarment and further, find that the Panel's recommended sanction is appropriate under the circumstances. Respondent's

voluntary abstention from the practice of law for one year and the Panel's

recommendation that he be allowed to immediately apply for reinstatement sufficiently protects the public and maintains the integrity of the legal profession.

For the reasons set forth herein, Respondent respectfully requests this Court enter an order adopting the findings, recommendations and discipline of the Disciplinary Hearing Panel.

Respectfully submitted,

LAW OFFICES OF  
WOLFF & D'AGROSA

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Paul J. D'Agrosa (#36966)  
8019 Forsyth  
Clayton, Mo. 63105  
(314) 725-8019  
(314) 725-8443 FAX  
Paul@wolffdagrosa.com

ATTORNEY FOR  
RESPONDENT

I hereby certify that on this 17th day of December, 2008, two copies of Respondent's brief and a cd rom containing the brief in WordPerfect format have been sent via First Class Mail to Ms. Shannon L. Briesacher and Mr. Alan Pratzel, counsel for Informant, Office of Chief Disciplinary Counsel, 3335 American Avenue, Jefferson City, Missouri 65109.

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Paul J. D'Agrosa

**CERTIFICATION: RULE 84.06(c)**

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

1. Includes the information required by Rule 55.03;
2. Comports with the limitations of Rule 84.06(b);
3. Contains 8,826 words, according to WordPerfect, the word processing system used to prepare this brief; and
4. That Trend Micro PC security software was used to scan the disk for viruses and that it is virus-free.

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Paul J. D'Agrosa