

**IN THE SUPREME COURT  
STATE OF MISSOURI**

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**IN RE:** )  
 )  
**BRIAN ZINK,** ) **Supreme Court #SC89623**  
 )  
**Respondent.** )

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**INFORMANT'S REPLY BRIEF**

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**POINTS RELIED ON**

**I.**

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S  
LICENSE BECAUSE RESPONDENT VIOLATED RULES OF  
PROFESSIONAL CONDUCT:**

- a. 4-4.1 (TRUTHFULNESS IN STATEMENTS TO OTHERS)  
IN THAT RESPONDENT MADE UNTRUTHFUL  
STATEMENTS OF MATERIAL FACT TO THE FBI AND  
UNITED STATES ATTORNEY'S OFFICE IN  
CONJUNCTION WITH A PENDING CRIMINAL  
INVESTIGATION;**
- b. 4-8.4(c) (CONDUCT INVOLVING DISHONESTY, FRAUD,  
DECEIT OR MISREPRESENTATION) IN THAT  
RESPONDENT MADE UNTRUTHFUL STATEMENTS OF  
MATERIAL FACT TO THE FBI AND UNITED STATES  
ATTORNEY'S OFFICE IN CONJUNCTION WITH A  
PENDING CRIMINAL INVESTIGATION;**
- c. 4-8.4(e) (STATING ABILITY TO INFLUENCE OFFICIAL  
OR ACHIEVE RESULTS BY VIOLATIVE MEANS) IN  
THAT RESPONDENT INDICATED TO HIS CLIENT  
THAT HE COULD OBTAIN A REDUCTION IN FELONY**

**CHARGES IN EXCHANGE FOR SPORTS  
MEMORABILIA;**

**d. 4-3.5 (SEEKING TO INFLUENCE OFFICIAL) IN THAT  
RESPONDENT ATTEMPTED TO OBTAIN A  
REDUCTION IN FELONY CHARGES IN EXCHANGE  
FOR SPORTS MEMORABILIA;**

**e. 4-1.4 (COMMUNICATION) IN THAT RESPONDENT  
FAILED TO INFORM HIS CLIENT OF THE  
LIMITATIONS ON HIS CONDUCT WHEN HE KNEW  
THAT THE CLIENT EXPECTED ASSISTANCE NOT  
PERMITTED BY THE RULES OF PROFESSIONAL  
CONDUCT; and**

**f. 4-8.4(d) (CONDUCT PREJUDICIAL TO THE  
ADMINISTRATION OF JUSTICE) IN THAT  
RESPONDENT ATTEMPTED TO OBTAIN A  
REDUCTION IN FELONY CHARGES ON BEHALF OF A  
CLIENT IN EXCHANGE FOR SPORTS MEMORABILIA  
AND MADE UNTRUTHFUL STATEMENTS OF  
MATERIAL FACT TO A FEDERAL LAW  
ENFORCEMENT OFFICER IN CONJUNCTION WITH A  
PENDING CRIMINAL INVESTIGATION.**

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

*In re Hopkins*, 677 A.2d 55 (D.C. 1996)

*In re Smith*, 848 P.2d 612 (Or. 1993)

Rule 4-1.4

Rule 4-3.5

Rule 4-4.1

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**POINTS RELIED ON**

**II.**

**THE SUPREME COURT SHOULD DISREGARD THE DISCIPLINARY HEARING PANEL'S SANCTIONING RECOMMENDATION BECAUSE THE DISCIPLINARY HEARING PANEL'S RECOMMENDATION VIOLATES SUPREME COURT RULE 5.16, INVADES THE PROVINCE OF THIS COURT AND DOES NOT PROPERLY ADDRESS THE EGREGIOUSNESS OF THE RESPONDENT'S CONDUCT.**

Rule 5.16

Rule 5.27

**POINTS RELIED ON**

**III.**

**THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE  
BECAUSE SUSPENSION IS APPROPRIATE WHEN A LAWYER  
KNOWINGLY ENGAGES IN CONDUCT INVOLVING DISHONESTY,  
FRAUD, MISREPRESENTATION OR DECEIT.**

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

Standards for Imposing Lawyer Sanctions, American Bar Association, 1991

**ARGUMENT**

**I.**

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULES OF PROFESSIONAL CONDUCT:**

- a. 4-4.1 (TRUTHFULNESS IN STATEMENTS TO OTHERS) IN THAT RESPONDENT MADE UNTRUTHFUL STATEMENTS OF MATERIAL FACT TO THE FBI AND UNITED STATES ATTORNEY'S OFFICE IN CONJUNCTION WITH A PENDING CRIMINAL INVESTIGATION;**
- b. 4-8.4(c) (CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION) IN THAT RESPONDENT MADE UNTRUTHFUL STATEMENTS OF MATERIAL FACT TO THE FBI AND UNITED STATES ATTORNEY'S OFFICE IN CONJUNCTION WITH A PENDING CRIMINAL INVESTIGATION;**
- c. 4-8.4(e) (STATING ABILITY TO INFLUENCE OFFICIAL OR ACHIEVE RESULTS BY VIOLATIVE MEANS) IN THAT RESPONDENT INDICATED TO HIS CLIENT THAT HE COULD OBTAIN A REDUCTION IN FELONY**

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CONDUCT; and**

**f. 4-8.4(d) (CONDUCT PREJUDICIAL TO THE  
ADMINISTRATION OF JUSTICE) IN THAT  
RESPONDENT ATTEMPTED TO OBTAIN A  
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CLIENT IN EXCHANGE FOR SPORTS MEMORABILIA  
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MATERIAL FACT TO A FEDERAL LAW  
ENFORCEMENT OFFICER IN CONJUNCTION WITH A  
PENDING CRIMINAL INVESTIGATION.**

**Violations of Rules 4-8.4(e) (stating the ability to influence an official), 4-8.4(c) (conduct involving dishonesty, fraud or deceit) and 4-1.4 (failing to communicate limitations on the representation to the client)**

Respondent seems to argue that as a matter of course, this Court should wholly adopt the findings of the disciplinary hearing panel in every case. Simultaneously, Respondent acknowledges that the Panel in this case found Respondent guilty of violating Rules 4-8.4(e), 4-8.4(c) and 4-1.4, which Respondent declines to “revisit” in his brief. In doing so, Respondent appears to concede that he violated Rules 4-8.4(e), 4-8.4(c) and 4-1.4, which is more than enough to substantiate Informant’s position that an actual suspension is the appropriate disposition in Respondent’s case. Respondent concedes that he told his client that he could influence a prosecutor with a bribe, failed to communicate to his client the illegal nature of the activities and engaged in conduct that was dishonest, fraudulent and deceitful. The severity of such conduct is substantial.

Rule 4-8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud or deceit. Respondent, by his own admissions in his Answer and testimony at the disciplinary hearing, admitted to making false statements of material fact to federal authorities during a pending criminal investigation. This is not a small violation and its severity is in no way diminished by the fact that federal authorities previously entered into a plea agreement with Respondent to dispose of the criminal charges brought by federal authorities. Respondent’s violation of Rule 4-8.4(c), pertaining to Respondent’s duties as a lawyer in the State of Missouri, is only now before this Court. “Honesty and integrity are chief among the virtues the public has a right to

expect of lawyers. Any breach of that trust is misconduct of the highest order and warrants severe discipline.” *In re Carey*, 89 S.W.3d 477, 498 (Mo. banc 2002) (quoting *In re Disciplinary Action Against Thedens*, 602 N.W.2d 863, 865 (Minn.1999)). “These principles are as applicable to lawyers who are party litigants as they are to lawyers serving in their representative capacity.” *Id.*

Respondent’s admission that he told his client that he could “take care of” the felony charges by producing to the prosecutor a baseball signed by Terry Bradshaw constitutes a violation of Rule 4-8.4(e), which prohibits an attorney from stating the ability to improperly influence an official. The FBI taped the conversation between Respondent and his client during which Respondent stated his ability to influence the prosecutor, the Disciplinary Hearing Panel found that the violation of Rule exists and Respondent concedes the same. Again, such a violation calls into question Respondent’s integrity and fitness to practice law. Finally, it is undisputed that Respondent knew that his client believed the ball would be given to the prosecutor in a *quid pro quo* exchange for a reduced sentencing recommendation and that he did nothing to disavow such a belief.<sup>1</sup> Respondent’s admissions are sufficient to establish that Respondent violated

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<sup>1</sup> Respondent testified at hearing that he, too, believed that the baseball was part of a deal to have Hart’s felony charges reduced. **App. 8 (T. 24)**. Only now, in Respondent’s brief, does he state that the baseball was never to be given to the prosecutor in exchange for a reduced sentence. Respondent makes such assertion in his Statement of Facts and Argument I with no cite to the record for support of his assertion.

Rule 4-1.4 in that Respondent did not communicate the illegal and unethical nature of the bribery scheme to his client, therefore, failing to inform his client regarding the limitations on his representation. The egregiousness of all three of these Rule violations warrants a severe sanction and is appropriately addressed by Informant's suggestion that Respondent's license be actually suspended.

**Violations of Rules 4-3.5 (regarding seeking to improperly influence an official), 4-4.1 (regarding truthfulness in statement to others) and Rule 4-8.4(d) (conduct prejudicial to the administration of justice)**

Of the six Rule violations charged by Informant in its Information, Respondent only disputes that Rules 4-3.5, 4-4.1 and 4-8.4(d) were proven by a preponderance of the evidence. Given that Respondent admitted to having violated Rule 4-4.1 in his Answer, Respondent seemingly takes such an inapposite position based on the fact that the Disciplinary Hearing Panel nevertheless found that Informant failed to demonstrate a violation of Rule 4-4.1, as well as Rules 4-3.5 and Rule 4-8.4(d). While the disciplinary hearing panel's findings are respected and may be given their due weight, the review process exists for a reason and this Court conducts a *de novo* review of the evidence and reaches its own conclusions of law.

Rule 3.5 prohibits an attorney from seeking to influence an official by improper means. In the present action, Respondent testified at his disciplinary hearing that he believed that the baseball was part of a deal to have Hart's felony charges reduced. Respondent told Hart that he could have the charges taken care of by producing the baseball to the prosecuting attorney and when his client produced the baseball,

Respondent informed the prosecuting attorney that the baseball had been procured. In his brief, Respondent states that “showing Thornhill the baseball was only one part of obtaining a more favorable disposition,” thereby admitting that the baseball was, in fact, part of the plea negotiations. There can be no doubt that Respondent attempted to influence the prosecuting attorney by producing the baseball.

Respondent now endeavors to convince this Court that Respondent did not attempt to improperly influence the prosecuting attorney because the prosecuting attorney was only using the baseball to gauge Hart’s veracity, a proposition that is nonsensical and bears no relation to whether Respondent believed he was engaging in bribery. Respondent states that the prosecuting attorney, Thornhill, would have testified at hearing that the baseball did not represent a *quid pro quo* exchange for reduced charges. This may very well be the case. However, because it is *Respondent’s* conduct at issue, the only relevant inquiry pertains to whether *Respondent* thought that the ball would be used to reduce his client’s charges, and the answer is “yes.” When asked during his disciplinary hearing the nature of the misstatements to the federal agents, Respondent stated:

In the course of the interview with the federal agents, they began asking me about Miss Hart. At that point I was believing that they may have wanted her to work with them, that the theme of the interview quickly changed to this baseball. In the course of my conversations with the federal agents, I told the agents that the ball was a joke between Mr. Thornhill and myself. And in the course of that interview, in essence, the ball was a part of the

deal, and it wasn't just a joke or a game between me and Mr. Thornhill, and that that was the false statements.

Respondent believed that obtaining the baseball from his client was part of the deal to have his client's sentencing recommendation reduced and when Respondent took the affirmative steps of communicating this to his client and then telling the prosecutor that the baseball had been procured, he did so with the intent of furthering the agreement he believed he had with the prosecutor. This was the undisputed evidence at hearing. Rule 4-3.5 does not require that an attorney successfully complete a bribe, but it does prohibit an attorney from *attempting to improperly influence an official*. The suggestion by Respondent, that a prosecutor would go to such great lengths to determine the veracity of a defendant charged with forgery, while at the same time benefiting in no way from a valuable piece of sport's memorabilia, is ridiculous. At the same time, however, it has nothing to do with the determination as to whether Respondent attempted to influence the prosecutor by producing the baseball. Respondent believed that he had an agreement with the prosecutor for a reduced sentencing recommendation, he communicated that belief to his client and he informed the prosecutor that the baseball had been procured, all in an attempt to advance the agreement designed to improperly influence an official.

For the reasons outlined above, Respondent is also guilty of violating Rule 4-8.4(d), which prohibits an attorney from engaging in conduct prejudicial to the administration of justice. Throughout his brief, Respondent spends an inordinate amount of time distinguishing cases cited by Informant on bases very different than the proposition for which Informant offered the case. Respondent does the same when

erroneously suggesting that Informant encourages this Court to adopt a test for determining when Rule 4-8.4(d) has been violated. Informant makes no such suggestion. Instead, Informant suggests that whether the nature of Respondent's conduct is compared to the conduct of other attorneys found to have violated Rule 4-8.4(d) or whether analyzed under different state's analysis requiring that there be improper action or conduct, that the conduct bear directly upon the judicial process and finally that the conduct cause harm or potential harm in more than a *de minimis* way, (See *In re Hopkins*, 677 A.2d 55 (D.C. 1996) and *In re Smith*, 848 P.2d 612 (Or. 1993)), Respondent's conduct violates Rule 4-8.4(d). Respondent states that his actions did not bear upon the judicial process. However, the charges and sentencing recommendations of a prosecutor are very much a part of the judicial process and Respondent intentionally interfered with the same.

The substantiated and undisputed evidence demonstrates that Respondent has violated multiple Rules of Professional Conduct and that the common thread amongst Respondent's rule violations is his dishonesty. As such, Respondent's license should be actually suspended.

## ARGUMENT

### II.

**THE SUPREME COURT SHOULD DISREGARD THE DISCIPLINARY HEARING PANEL'S SANCTIONING RECOMMENDATION BECAUSE THE DISCIPLINARY HEARING PANEL'S RECOMMENDATION VIOLATES SUPREME COURT RULE 5.16, INVADES THE PROVINCE OF THIS COURT AND DOES NOT PROPERLY ADDRESS THE EGREGIOUSNESS OF THE RESPONDENT'S CONDUCT.**

Respondent suggests that the Disciplinary Hearing Panel acted appropriately in imposing a one year suspension for dates already passed at the time of the disciplinary hearing. Respondent further suggests that the Disciplinary Hearing Panel acted pursuant to Rule 5.16 in that they recommended that no time pass before Respondent be eligible to apply for reinstatement. The problem with such an assertion is that Respondent was never actually suspended which makes reinstatement a procedural impossibility.

In recommending that Respondent receive a suspension for dates passed, the Panel effectively recommended that no discipline be imposed or the Panel determined that discipline had already been imposed. Either scenario is inappropriate. The Panel is obligated to recommend an appropriate sanction after finding a violation of the Rules and the Rules do not provide for retroactive reinstatement. Further, only the Missouri Supreme Court can order suspension of an attorney's license to practice. Adoption of the Panel's recommendation presents several practical difficulties, as well. For instance, how is Respondent to comply with Rule 5.27 regarding notification to clients?

Respondent goes on to state in his brief that in asking this Court to disregard the Panel's sanctioning recommendation, "Informant ignores the important role played by the disciplinary hearing panels . . . [.]". Such is simply not the case. Informant recognizes the hard work and dedication of the members of the disciplinary hearing panels and respects their recommendations to the Court. At the same time, if every tribunal to first hear a case were impervious to incorrect analysis, we would not need a process for appeal and review.

## ARGUMENT

### III.

#### **THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE BECAUSE SUSPENSION IS APPROPRIATE WHEN A LAWYER KNOWINGLY ENGAGES IN CONDUCT INVOLVING DISHONESTY, FRAUD, MISREPRESENTATION OR DECEIT.**

Informant recommended to the Disciplinary Hearing Panel that Respondent be actually suspended. Informant recommended no different in its brief to this Court. Respondent is mistaken when he states that Informant has changed its position and now asserts that disbarment is the appropriate remedy.

This Court has considered the propriety of sanctions under the Standards for Imposing Lawyer Sanctions, American Bar Association, 1991 ("ABA Standards"). *In re Crews*, 159 S.W.3d 355, 360 (Mo. banc 2005). In the simplest terms, the ABA's framework provides that a specific rule violation coincide with a recommended sanction. The sanction can then be adjusted, up or down, depending on the aggravating or mitigating circumstances. Strictly pursuant to a sanctioning analysis, much of Respondent's conduct points to disbarment as the appropriate sanction. However, given the totality of the circumstances and the mitigating factors, Informant has recommended that Respondent be actually suspended.

The Disciplinary Hearing Panel suggested that Respondent's admissions and "full and free" disclosure operate as a mitigating factor in Respondent's case. However, in opposition to many of the admissions Respondent made in his Answer and in his

testimony before the Disciplinary Hearing Panel, Respondent now attempts in his brief to recast his actions in a different light. For instance, Respondent admits that he advised his client that the prosecutor would take sports memorabilia in exchange for a reduction of charges, but at the same time argues to this Court that the ball was never to be exchanged for a reduction of charges and was only going to be used to prove that Hart was not a liar. Similarly, Respondent admits to telling his client that he could take care of the felony charges by producing a baseball, but at the same time argues to this Court that he is not sure how his client was left with the impression that the sport's memorabilia could be exchanged for a reduction in sentence. Such inconsistencies cast doubt on the credibility of Respondent.

While Informant supports its initial recommendation that Respondent be suspended, Informant also maintains that Respondent should not receive credit for the time that he voluntarily abstained from the practice of law as part of his criminal diversion agreement as the egregious nature of his conduct warrants no such leniency.

**CONCLUSION**

For the reasons set forth above and the reasons set forth in Informant’s Brief, the Chief Disciplinary Counsel respectfully requests this Court:

- (a) find that Respondent violated Rules 4-4.1, 4-8.4(c), 4-8.4(e), 4-3.5, 4-1.4 and 4-8.4(d);
- (b) suspend Respondent’s license to practice law; and
- (c) tax all costs in this matter to Respondent, including the \$2000.00 fee for suspension, pursuant to Rule 5.19(h).

Respectfully submitted,

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ATTORNEYS FOR INFORMANT

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23<sup>rd</sup> day of December, 2008, two copies of Informant's Reply Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

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

**CERTIFICATION: RULE 84.06(c)**

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

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 3,264 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

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