

**IN THE SUPREME COURT
OF MISSOURI**

In re

THOMAS MICHAEL FISHER,

Respondent.

Case No. SC89089

RESPONDENT'S BRIEF

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Statement of Jurisdiction

Respondent Thomas Michael Fisher concurs with the Statement of Jurisdiction in Informant's Brief. This Court has jurisdiction pursuant to Article V Section 5 of the Missouri Constitution and Missouri Revised Statute § 484.040.

Statement of Facts

This matter comes before this Court with a Stipulation of Facts and after Informant and respondent Thomas Michael Fisher both indicated they would accept the sanction recommended by the Disciplinary Hearing Panel, a suspension of Mr. Fisher's license with right to reapply in six months. In light of this, Mr. Fisher corrects or supplements the Statement of Facts in Informant's Brief on only two issues.

First, Informant's Brief states that Mr. Fisher "requested that the Missouri Governor's Office grant him executive clemency with respect to the Burglary and Robbery Charges." (Informant's Brief at 7.) This is incorrect.

As Mr. Fisher has previously indicated in his Motion to Correct Disciplinary Hearing Panel Order (App. 82), Mr. Fisher did not request clemency from the Missouri Governor or the Missouri Board of Probation and Parole ("Missouri Parole Board"). Instead, as part of the pardon process for Nevada, the Nevada Board of Pardon Commissioners ("Nevada Pardon Commissioners") contacted the Missouri Parole Board and requested the Missouri Parole Board's input regarding Mr. Fisher's request for a pardon in Nevada. (Transcript of Disciplinary Hearing ("Trans.") 23, App. 14)

In this context, and unaccustomed to the very different standard that Nevada employs for determining pardons, the Missouri Parole Board's investigator found

that Mr. Fisher had demonstrated he was a “competent employee, excellent student, and dedicated husband and son,” but recommended that Mr. Fisher should not receive a pardon based on the seriousness of his crimes. (Investigation, Missouri Parole Board, App. 58) Nevada, however, allowed a pardon based on Mr. Fisher’s showing of rehabilitation.

Second, the Statement of Facts does not elaborate fully on Mr. Fisher’s life from 1979-1997. Thus, Mr. Fisher offers the following:

In 1979-80, twenty years before he applied for the Missouri Bar, Mr. Fisher committed crimes in California and Nevada. He was arrested, charged, and in some instances convicted for crimes as follows:

- * In 1979, Mr. Fisher broke into a Nevada home, held a woman at gunpoint, and stole her car. Mr. Fisher was charged with and convicted of Burglary and Robbery in Nevada, sentenced to ten years incarceration, and imprisoned for this misconduct. (Trans. 32-33, App. 16-17) Charges of Grand Larceny – Auto and Use of a Deadly Weapon were also brought related to the same conduct, but were dismissed pursuant to a 1980 plea agreement. (Trans. 49, App. 21)
- * In or about 1980, in California, Mr. Fisher vandalized some cars, motor homes, a backhoe, and some other tools, and stole several steaks from an employer. (Trans. 33-34, App. 17) He was charged in

California with Burglary of a Residence, Receiving Stolen Property, and Embezzlement – charges that do not really track the underlying conduct, which conduct Mr. Fisher admits. (Trans. 50-51, App. 21) These California charges were never refined, prosecuted, or pardoned; instead, they were dismissed for failure to prosecute. *Id.*

After these convictions, Mr. Fisher was incarcerated for more than three years. (Trans. 35, App. 17) Upon his release, he began the upward climb that resulted in his attending law school and becoming a patent lawyer. He married his co-defendant (now his wife of twenty-seven years) from the Nevada armed burglary. They have three children. Mr. Fisher worked hard, including progressing from fry cook to manager at a Steak ‘n Shake restaurant. *Id.* He also completed his bachelor’s degree, earning awards as a top student in the University of Missouri-St. Louis (“UMSL”) physics department. (App. 58) Mr. Fisher managed employees and money. (Trans. 36:15-20, App. 17) In all these tasks, he earned solid reviews from supervisors and peers. (App. 55-58)

While a student at UMSL, Mr. Fisher applied for and ultimately received a pardon of his Nevada criminal convictions. (Trans. 41:1-7, App. 19)

Later, when applying for the Missouri Bar, Mr. Fisher did not disclose any of these Nevada and California arrests, charges, or convictions on his Missouri Bar application. However, as discussed in greater detail below, his failure to disclose

the Nevada crimes was not based upon an intent to deceive. Rather, he believed – wrongly, as discussed below – that he had received a pardon, and this pardon had “cleaned” his record. (Trans. 23, App. 14; *see also* Trans. 74, App. 27) Mr. Fisher had asked the Nevada Pardon Commissioners’ executive clerk the effect of the pardon and was told that the Federal Bureau of Investigations (“FBI”) would be contacted and his record erased. (Trans. 24, App. 14) Mr. Fisher later had obtained a copy of his FBI record after receiving the pardon, and it was in fact blank. (Trans. 30, App. 16; Trans. 73, App. 27) In 2000 when Missouri had obtained an FBI record on Mr. Fisher it was still blank. However, in 2005 when Mr. Fisher moved to North Carolina and sought admission to that state’s bar, those previously erased charges were apparently listed on the FBI record. North Carolina notified Missouri about the charges, initiating this case. (Trans. 27, App. 15) North Carolina, meanwhile, has held Mr. Fisher’s application awaiting the outcome of this case.

Upon learning that the Nevada charges were on his FBI record, Mr. Fisher asked a Nevada judge to seal his record, the Judge issued a seal order and all Nevada acts are now deemed never to have occurred. (App. 87) With regard to the California charges, despite communications that might have jogged his memory, Mr. Fisher simply forgot those charges. (Trans. 29, App. 16)

Points Relied On

- I. Mr. Fisher does not contest that he violated Rules 4-8.1 and 4-8.4 because he failed to disclose criminal conduct from 1979-80 on his Missouri Bar application, and did so knowingly.**

- II. Appropriate sanction for Mr. Fisher is a suspension with right to reapply in six months, and his rehabilitation may justify a substantially lighter sanction.**

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

Argument

Standard of Review

Mr. Fisher concurs with Informant's Brief that this Court may review the recommendation of the Hearing Panel *de novo*. *In re Crews*, 159 S.W.3d 355, 358 (Mo. 2005).

Point I: Mr. Fisher does not contest that he violated Rules 4-8.1 and 4-8.4 because he failed to disclose criminal conduct from 1979-80 on his Missouri Bar application, and did so knowingly.

As discussed above, Mr. Fisher committed crimes in Nevada and California in 1979-80, about twenty years before he applied for admission to the Missouri Bar. Mr. Fisher was convicted of robbery and burglary in Nevada, sentenced to 10 years incarceration, and spent more than three years in prison. Other Nevada charges, specifically charges of Grand Larceny – Auto and Use of a Deadly Weapon – were dismissed pursuant to a plea agreement. Mr. Fisher knew of these crimes when he applied for the Missouri Bar. Nevertheless, believing the Nevada pardon had “cleaned” his record, Mr. Fisher answered “no” to whether he had ever been arrested, charged, or convicted of a crime. Mr. Fisher understands and concedes that this was a knowing failure to answer a question accurately on his

Missouri Bar application. Thus, Mr. Fisher concedes that he failed to disclose criminal conduct from 1979-80 on his 2000 Missouri Bar application, and that he did so “knowingly.”

In addition, in 1980 California charged Mr. Fisher with crimes – apparently burglary of a residence, receiving stolen property, and embezzlement – for breaking into and vandalizing some cars and mobile homes, damaging a backhoe and other equipment, and stealing several steaks. These charges were all dismissed for failure to prosecute. Mr. Fisher should also have disclosed the arrest and these 1980 California charges on his 2000 Missouri Bar application. While it may simplify things for Mr. Fisher to indicate he knew of these charges but failed to disclose them, this would not be accurate. When he applied for the Missouri Bar in 2000, Mr. Fisher did not recall these charges.

Nevertheless, Mr. Fisher concedes that in or about 1996 he received a copy of the Missouri Parole Board Investigation, and that this report references – with several incorrect details – the California charges. (*See* Informant’s Brief at 8 (citing App. 59).) Thus, he certainly could have been (but was not) reminded of the California charges, or conducted a further investigation into the California charges. If these admissions would satisfy this Court’s interpretation and application of Rules 4-8.1 and 4-8.4, then Mr. Fisher’s failure to disclose the

California arrests and charges would provide another basis for finding Mr. Fisher violated Rules 4-8.1 and 8-8.4.

Point II: Appropriate sanction for Mr. Fisher is a suspension with right to reapply in six months, and his rehabilitation may justify a substantially lighter sanction.

“The purpose of discipline is *not to punish the attorney*, but to protect the public and maintain the integrity of the legal profession.” *In re Carey*, 89 S.W.3d 477, 502 (Mo. 2002) (emphasis added). Thus, this case is not about punishing Mr. Fisher again for the crimes he committed twenty-seven years ago. (Informant’s Brief at 28) Rather, proper punishment in this case should be the measure appropriate to protect the public and integrity of the Bar from Mr. Fisher’s failure to disclose information on his 2000 Missouri Bar application

Mr. Fisher has already indicated that he would accept a suspension with right to reapply after six months. Informant does not seek a more serious sanction. Such suspension should be adequate to protect the public and maintain the integrity of the bar, particularly when – at least as Mr. Fisher understands it – he will be required to seek readmission and to pass a character and fitness review based on his recent conduct at the end of his suspension before he can be reinstated.

Moreover, such suspension would be consistent with precedent including *In re Warren*, 888 S.W.2d 334 (Mo. 1994), where respondent's misconduct included his failure to disclose that he had previously failed the Illinois bar, a disqualifying fact, when he sought admission by motion to the Illinois bar.

Yet if this Court instead evaluates Mr. Fisher's rehabilitation and reasons for non-disclosure, a lesser sanction appears quite appropriate. The conduct that suggests a real potential threat to the public was shocking unlawful conduct – armed robbery and burglary – but it occurred more than a quarter century ago. Mr. Fisher has already been convicted and incarcerated for this conduct.

Moreover, Mr. Fisher has proven himself to be a good father and employee, a point even the Missouri Parole Board report concedes (App. 58), and an attorney who has practiced without problem for almost eight years. Such facts prove that Mr. Fisher deserves more leniency, than respondent in *Warren*. In *Warren*, the respondent had hid his past failure of the Illinois bar examination when seeking admission by motion in Illinois. Yet respondent had also committed crimes – harassment and criminal nonpayment of child support – while an attorney and shortly before the disciplinary proceedings commenced. 888 S.W.2d at 335-36. Thus, Warren received a minimum six month suspension not only for non-disclosure of a fact that would have automatically disqualified him for reciprocal

admissions, but also for criminal conduct while admitted to the bar and only a few years prior to the imposition of discipline.

Mr. Fisher had a legitimate, albeit erroneous, belief that the pardon gave him a legal basis to indicate he had no criminal record. Neither attack Informant makes against this position is compelling. First, Informant charges that Mr. Fisher could have conducted additional research, and that such research should have resulted in Mr. Fisher gaining an understanding that the Missouri Bar wanted him to disclose every offense, even those for which he had received a pardon. As an attorney, Mr. Fisher has an obligation to know the law. But the reality is that Mr. Fisher studied to be and practices as a *patent attorney*, not someone who studied or expected to practice criminal law. In addition, Mr. Fisher had two solid indications – statements from the Nevada Pardon Commissioners’ executive clerk, whom Mr. Fisher assumed would know the effects of Nevada law, as well as his own clean criminal history (*cf.* App. 48) – both of which supported that Mr. Fisher had in fact “cleaned” his record such that a “no” answer was legally appropriate. Given these circumstances, it is unclear why Mr. Fisher would see a need to secure a third or further indication that answering “no” was permissible.

The sole reason that his failure to disclose was identified was because Mr. Fisher moved to North Carolina for work and sought admission to that state’s bar, apparently after Nevada or the FBI changed how they handled their reporting of

past criminal conduct. Mr. Fisher has not engaged in some misconduct that prompted this investigation; rather, he moved, and sought admission in the court of his new home state. Mr. Fisher also never rechecked his FBI record because he believed he had taken the correct means to have a clean record. In fact, had Mr. Fisher thought the Nevada offenses would be on his record, he would have had his record sealed. Mr. Fisher's failure to request that his Nevada record be sealed prior to the commencement of this proceeding evinces his (erroneous) belief that the Nevada pardon had cleaned away all arrests, charges, and convictions he had in that state.

Second, Informant attacks the notion that a "legal defense" should allow Mr. Fisher to answer a question about his criminal history "no" when the real past required a "yes" answer. (Informant's Brief at 17.) Yet the entire purpose of procedures to seal or expunge criminal records, which procedures Mr. Fisher has used to seal his Nevada criminal records, exist solely so that a person may answer "no" to a question of criminal history when reality would require a "yes," and to live his or her life without the burden of a criminal history when such burden should otherwise exist. In seeking a pardon, and then to have his record sealed, Mr. Fisher sought to use the Nevada legal process to remove the stigma and burden that would otherwise come from his criminal convictions. Nevada has granted Mr.

Fisher such relief, and those decisions are entitled to Full Faith and Credit including by this Court. U.S. Const. Art. I § 4.

Another reason not to impose the full suspension sought is that Missouri has altered its application since Mr. Fisher applied to make clear that a person with sealed, pardoned, or expunged crimes *must* disclose those crimes. In 2000, Mr. Fisher answered “no” to the question, “Have you ever, either as an adult or juvenile, been cited, arrested, charged, or convicted for any violation of law?” (App. 5) After 2000, however, an introductory paragraph was added to make clear that a bar applicant must disclose all criminal conduct. That paragraph reads:

NOTE: In answering Questions [regarding criminal history and related matters], [an applicant] must disclose each instance even if the charges were not brought against [the applicant] or were dismissed, [the applicant] w[as] acquitted, [the applicant] received a suspended imposition of sentence, the conviction was stayed or vacated, or the record was sealed or expunged, and regardless of whether [the applicant] w[as] advised by any source that [the applicant] need not disclose the incident. No statute, court order or legal proceeding withholding adjudication, expunging or sealing any record, dismissing, vacating, or setting aside any arrest, charge, or conviction shall

excuse less than full disclosure of the incident. If the records have been sealed, take the appropriate steps to have them unsealed and released directly to the Board of Law Examiners.

(App. 49) This language should prevent any future applicant from believing, as Mr. Fisher has wrongly believed, that it was appropriate for him to answer “no” because of the pardon or “cleaning” of his record.

Finally, if this Court is considering a sanction less than suspension with right to reapply after six months, ample precedent would support a lesser sanction. In a case that Informant cites as addressing a similar situation to Mr. Fisher’s, *Kentucky Bar v. Guidugli*, 967 S.W.2d 587 (Ky. 1998), the Kentucky Supreme Court imposed only a thirty-day suspension where the applicant failed to disclose an unpardoned criminal conviction for sexual indiscretions with a minor about six years prior to his seeking admission to the Bar. Considering that Mr. Fisher’s crimes had been pardoned, that his crimes were more remote in time, and his rehabilitation and life since that time, perhaps a penalty of less than suspension with right to reapply in six months would be appropriate.

Conclusion

For the reasons stated herein, Mr. Fisher asks that, should this Court find that he violated Rules 4-8.1 or 4-8.4, this Court impose a sanction of suspension

with right to reapply after six months, or a lesser sanction, or other relief as this Court deems just and proper.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that on the 27th day of June, 2008, two copies of Respondent's Brief and a diskette containing the brief in Microsoft Word format were served on the following counsel of record by United States Mail:

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Certificate of Compliance with Rule 84.06

The undersigned hereby certifies that to the best of his knowledge, information and belief, this Brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 2927 words according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. The accompanying disk was scanned and found to be virus free.