IN THE SUPREME COURT
STATE OF MISSOURI

No. SC 84189

In re:
John J. Carey,

Respondent.

Brief of Respondent Carey

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I.

Mr. Carey did not violate Rule 4-1.9(a) in representing Mr. Beam against Chrysler because the lawsuit was not substantially related to any matter in which Mr. Carey formerly represented Chrysler, in that defective ABS brakes are not substantially related to defective heater cores or defective latches.

Other Authorities:

II.

The Court should not hold that Mr. Carey is barred under principles of non-mutual offensive collateral estoppel from contesting the district court's holding, affirmed by the Court of Appeals for the Eighth Circuit, that he committed intentional discovery abuse, because the legal requirements for application of non-mutual offensive collateral estoppel are not present, in that (a) the issues decided in the district court and the Eighth Circuit are not identical to the issue presented here and (b) Mr. Carey did not receive a full and fair hearing in federal court.

Other Authorities:

III.

Mr. Carey's response to document request No. 25 was accurate, and therefore not in violation of Rule 4-3.4(a) & (d) or Rule 4-8.4(c) & (d), because the request sought documents related to an "agreement" on fee sharing or joint representation and the response stated that "no such documents exist," in that while there were documents relating to *proposals* concerning fee sharing and joint representation, the Informant has failed to show by the preponderance of the evidence that any *agreement* on those subjects was ever reached.

Other Authorities:

IV.

Although Mr. Carey's response to interrogatory No. 2 was not completely accurate due to his failure to disclose the meetings with the Blumenfeld lawyers, he was not in violation of Rule 4-3.4(a) & (d) or Rule 4-8.4(c) & (d), because Mr. Carey honestly did not understand the interrogatory to be seeking information about pre-suit communications and the Blumenfeld meetings took place before any Chrysler ABS suits were filed.

Same authorities as prior points relied on

V.

Mr. Carey's response to interrogatory No. 2 was accurate, and therefore not in violation of Rule 4-3.4(a) & (d) or Rule 4-8.4(c) & (d), notwithstanding Mr. Carey's failure to disclose the Danises' meeting and correspondence with Grossman, because he was not a party to that meeting or that correspondence.

Same authorities as prior points relied on

VI.

Mr. Carey's response to interrogatory No. 2 was accurate, and therefore not in violation of Rule 4-3.4(a) & (d) or Rule 4-8.4(c) & (d), notwithstanding Mr. Carey's failure to disclose a lunch conversation with Mr. Paletta, because the conversation did not relate to the "subject matter of" any Chrysler ABS lawsuit and was so insignificant that a reasonable person would not disclose it in response to the interrogatory.

Same authorities as prior points relied on

VII.

Mr. Carey's response to interrogatory No. 2 and to Document request No. 12 is not in violation of Rule 4-3.4(a) & (d) or Rule 4-8.4(c) & (d), because it was made honestly after reasonable inquiry, notwithstanding Mr. Carey's failure to disclose the so-called 42 documents, in that (a) the evidence does not establish that Mr. Carey received or ever knew about the great majority of the 42 documents, which were directed to be delivered to Danis Cooper and not Carey & Danis, (b) many of the 42 documents were not responsive to either discovery request, and (c) almost without exception, the 42 documents were such innocuous and insignificant documents that, if seen by Mr. Carey (which they were not), they would have been immediately forgotten.

Same authorities as prior points relied on

Rule 26(g)(2), Federal Rules of Civil Procedure 105

VIII.

Under the totality of the facts and the circumstances of this case, the proper discipline, if any, to be imposed on Mr. Carey is a public reprimand without suspension of his law license.

STATEMENT OF THE CASE

This is an attorney disciplinary action.

The Office of Chief Disciplinary Counsel (the "Informant") brought an information against John J. Carey in three counts. The first two counts arose out of Mr. Carey's brief representation of a client against Chrysler Corporation, his former client. Mr. Carey had represented Chrysler while employed as an associate at the former Thompson & Mitchell law firm. The third count arose out of a lawsuit Chrysler brought against Mr. Carey alleging breach of fiduciary duty in Mr. Carey's representation of his client against Chrysler. The Informant alleged that Mr. Carey intentionally provided false responses to one interrogatory and two document requests served on him in Chrysler's lawsuit against him.

In this Court, Informant limits its allegations to two claims. The first claim contends that Mr. Carey violated Rule 4-1.9(a) by representing a client against Chrysler, his former client, in a putative consumer class action. *Informant's Brief* at 32, 39-46. The second claim contends that Mr. Carey violated Rules 4-3.4(a) & (d) and 4-8.4(c) & (d) by intentionally providing false discovery responses in Chrysler's lawsuit against him. *Id.* at 31, 34-38.

The Disciplinary Hearing Panel (the "Panel") found Mr. Carey did not violate Rule 4-1.9(a) because the case he brought against Chrysler was not

substantially related to any matter on which he had formerly represented Chrysler. The Panel found, however, that Mr. Carey violated Rules 4-3.4(a) & (d) and 4-8.4(c) & (d) through his discovery responses in Chrysler's lawsuit against him. Relying on *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997), the Panel held Mr. Carey was barred from denying he made intentionally false discovery responses in Chrysler's lawsuit. The Panel further held that, even absent *Caranchini*, Mr. Carey had given an intentionally false responses in Chrysler's lawsuit to Chrysler's interrogatory No. 2 and document requests Nos. 12 and 25.[1]

The Panel recommended Mr. Carey's law license be suspended indefinitely with leave to apply for reinstatement after six months.

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[1] The remaining charge in the information alleged Mr. Carey used or disclosed confidential Chrysler information obtained through his former representation of Chrysler. The Panel found Mr. Carey did not use or disclose any confidential Chrysler information, and that Mr. Carey had not violated any of the Supreme Court rules alleged in this regard. Informant has not advanced this charge in a Point Relied Upon in its brief. Therefore, the former charge has been abandoned. *Accord Duncan v. Duncan*, 751 S.W.2d 763, 766 (Mo. App. 1988) (claims not asserted in a point relied upon are deemed abandoned on appeal).

The Informant and Mr. Carey have each taken exception to the findings of the Panel, and Mr. Carey has taken exception to the discipline recommended by the Panel. Although the Informant contends that Mr. Carey should be found guilty of violating Rule 4-1.9(a), the Informant does not contend that the discipline should be any more severe than recommended by the Panel.

Mr. Carey contends the Panel erred in concluding that he intentionally made false discovery responses and, to the extent his discovery responses were inaccurate, the inaccuracies were the result of negligence. Mr. Carey contends that if discipline is appropriate, it should be limited to at most a public reprimand.

STANDARD OF REVIEW

Professional misconduct must be proven by a preponderance of the evidence. *In re Snyder*, 35 S.W.3d 380, 382 (Mo. banc 2001); *In re Weier*, 994 S.W.2d 554, 556 (Mo. banc 1999). Charging a lawyer with professional misconduct does not create a presumption that professional misconduct occurred. *In re Mirabile*, 975 S.W.2d 936, 939, 942 (Mo. banc 1998).

The Panel's findings of fact, conclusions of law, and recommendations are advisory. The Court reviews the evidence *de novo*, independently determining all issues pertaining to the credibility of witnesses and the weight of the

evidence, and draws its own conclusions of law. Supreme Court Rule 5.16; *In re Snyder*, 35 S.W.3d at 382; *In re Weier*, 994 S.W.2d at 556.

STATEMENT OF FACTS

The statement of facts in Informant's brief is inadequate because, although the Informant has the burden of proof, Informant fails to present essentially any evidence supporting Mr. Carey's defenses. Moreover, the Informant includes numerous facts relating to Mr. Carey's alleged use and disclosure of confidential information, claims that Informant has abandoned, even though these facts are not relevant to any of the charges pending before the Court. It appears that these superfluous facts are offered to unfairly prejudice the Court against Mr. Carey.

For these reasons, Mr. Carey offers the following statement of facts as a supplement to Informant's statement of facts.

I. Mr. Carey represented a client against Chrysler in an action alleging defective anti-lock braking systems ("ABS"); Mr. Carey had formerly represented Chrysler in actions alleging defective heater cores and defective latches.

Mr. Carey was admitted to the Missouri bar in 1987. With the exception of the transactions alleged in this proceeding, no court has ever criticized him or brought any disciplinary action against him. [Tr. 679].

Mr. Carey was employed by Thompson & Mitchell as an associate between August 1987 and January 13, 1995. As an associate in the litigation department,

he was not assigned to work for any particular partner. During his seven years at Thompson & Mitchell, he worked for every one of the 20 to 25 partners in the litigation department. [Tr. 680, 690].

Charles A. Newman was the partner at Thompson & Mitchell primarily responsible for handling Chrysler's consumer class action defense. Mr. Carey worked for Mr. Newman on two Chrysler matters. The first was the defense of a putative class action alleging defective heater cores in 1983 through 1987 Renault Alliance automobiles. The heater core is a radiator in the passenger compartment used to warm the interior. The heater core case was known as *Osley*. [Tr. 80-83, 88-92, 680-81, 700].

The second matter on which Mr. Carey worked was the defense of a series of putative class actions alleging a defect in the rear lift-gate latch of Chrysler minivans. The actions alleged that the latch failed to keep the lift-gate closed in collisions. The latch cases, as they were called, included *Larpenteur, Peterson, Drake,* and several California class actions. [Tr. 91-92, 680-81, 700].

Mr. Carey was the senior associate on these two Chrysler matters. He drafted pleadings, prepared discovery requests and discovery objections, or directed a more junior associate to do so, and was present for conference calls with the client. [Tr. 683].

After Mr. Carey left Thompson & Mitchell, he formed his own law firm, Carey & Danis. [Tr. 409]. While a partner in Carey & Danis, he represented Dennis Beam in a putative class action against Chrysler alleging defects in the anti-lock braking system ("ABS") in some Chrysler minivans and automobiles. While the evidence was disputed as to the duration and extent of Mr. Carey's involvement in the ABS case, it in undisputed that Mr. Carey was not involved in any heater core or latch cases against Chrysler after he left Thompson & Mitchell.

While Mr. Carey was employed at Thompson & Mitchell, he did not work on any matters concerning alleged defects in ABS brakes, and nobody ever mentioned any such defects while he was employed there. [Tr. 680-81, 700]. Mr. Newman conceded that Mr. Carey was not exposed to ABS issues while representing Chrysler. While Mr. Carey worked at Thompson & Mitchell, no class actions had been filed against Chrysler alleging ABS defects. Mr. Newman never discussed Chrysler ABS problems with Mr. Carey. [Tr. 179; *see also* Tr. 244 (Chrysler in-house attorney never spoke to Mr. Carey about the ABS cases)].

Three Chrysler lawyers testified at the hearing. They were Mr. Newman; William McLellan, an attorney employed in-house by Chrysler; and Lewis Goldfarb, vice president and general counsel of Chrysler. [Tr. 219, 339]. Each Chrysler lawyer contended that ABS cases were substantially related to the

heater core and latch cases because, as stated by Mr. Goldfarb, "[t]he products at issue in [a] class action are almost irrelevant to how we go about defending class actions." [Tr. 352; *see also* Tr. 142-43, 152-54].

Mr. Newman admitted, however, that in a lawsuit involving a rear latch defect, one does not have to prove anything about the brake system; and in a case involving a brake system, neither the rear latch nor the heater core is relevant. [Tr. 211]. Mr. McLellan admitted that different vendors supplied Chrysler with ABS parts than supplied lift-gate latches. [Tr. 248].

Not only did Mr. Carey not learn anything about Chrysler's ABS problems from his representation of Chrysler, Mr. Carey learned little, if anything, from Chrysler regarding anything that was not in the public domain. Mr. Carey testified that he never visited a Chrysler manufacturing plant. Mr. Carey never interviewed any witnesses, and no Chrysler employee was ever deposed in any case in which Mr. Carey represented Chrysler. The heater core and latch cases never went beyond the class certification stage, a preliminary stage in the proceedings. [Tr. 684, 687, 689].

The National Highway Transportation Safety Administration ("NHTSA") is the federal agency that regulates motor vehicle safety. NHTSA often investigates issues relating to vehicle safety. In Mr. Newman's experience, class actions filed on behalf of consumers often track NHTSA's investigations. [Tr. 86].

The only documents Mr. Carey ever saw in either the heater core or latch cases were the public NHTSA documents, and those public documents were the only documents Thompson & Mitchell ever produced to the plaintiffs in the heater core and latch cases, other than records about a plaintiff's own vehicle. [Tr. 744].

Chrysler's ABS problem first came to Mr. Carey's attention when he read an article in the Sunday *Post-Dispatch* August 6, 1995, exposing the problem and disclosing NHTSA's ongoing investigation. [Tr. 681; Exhibit Z]. The *Post-Dispatch* article, which began on the upper right corner of page one and continued with a full page on page 5A, began:

Iffy Brakes Vex Chrysler

Some Owners Get Buyout Offers: Others Get $3,000 Repair Bills

The anti-lock braking systems on many Chrysler Corp. minivans built in the 1990s are inexplicably failing, often with no warning.

The National Highway Transportation Safety Administration, which is investigating Chrsyler's anti-lock braking systems (ABS), and others involved in auto safety have compiled nearly 2,000 reports of anti-lock brake failure on Chrysler cars and minivans.

> Not all failures are reported, and the total number is certain to be much higher.
>
> Although Chrysler has denied that its anti-lock brakes are unsafe, the car maker has also said it does not know why so many are failing.…

[Exhibit Z at p. 1.]

Mr. Newman admitted that there was a public disclosure of the NHTSA investigation of Chrysler's ABS before the filing of the *Beam* ABS case. [Tr. 135-36; *see also* Tr. 359-60 (all Chrysler ABS cases were filed after public announcement of NHTSA's investigation)].

The day after the *Post-Dispatch* article ran, Mr. Carey's former secretary at Thompson & Mitchell telephoned him to ask whether her brother-in-law, Mr. Beam, could contact Mr. Carey. Mr. Beam was having ABS problems with his Chrysler minivan. Mr. Beam subsequently called Mr. Carey and discussed his ABS problems. [Tr. 698, 753].

II. Mr. Carey and others determined that accepting an ABS case against Chrysler would not create a conflict of interest with his former representation of Chrysler.

When Mr. Carey first received the call from Mr. Beam, he researched whether he would be barred from representing Mr. Beam because of his former representation of Chrysler. [Tr. 702].

> And I made the determination that since Joey [Danis] and I had no knowledge or information at all concerning antilock brakes, the other cases that we represented Chrysler involved heater cores and allegedly defective rear door latches, that those were not substantially related under my review of the case law and reading of those rules.

[Tr. 703-04].

Mr. Danis, although much less experienced than Mr. Carey, also considered whether there was a conflict of interest with a former client. Based on his personal experiences while at Thompson & Mitchell, Mr. Danis concluded that there would be no conflict of interest in representing a plaintiff in an ABS case against Chrysler. Mr. Danis's experiences included his observation that former Thompson & Mitchell attorneys who had formerly represented the Union Pacific Railroad in cases brought by workers alleging on the job injuries were not barred from representing other railroad workers alleging on the job injuries against the

railroad so long as the claimant's case was not pending when they left Thompson & Mitchell. Mr. Danis concluded that because the ABS case related to an entirely different product and an entirely different matter, it was not substantially related to the heater core or latch cases. [Tr. 823-26].

The Blumenfeld firm is a large law firm located in Clayton, Missouri. In 1995, Evan Buxner, an attorney employed by the Blumenfeld firm, and John Young, the head of Blumenfeld's litigation department, Messrs. Carey and Danis, and David Danis (an attorney and Mr. Danis's father), met to discuss Blumenfeld's possible involvement in Mr. Beam's proposed suit against Chrysler. As part of Blumenfeld's investigation of the proposed case, Mr. Buxner researched whether Carey & Danis's representation of Mr. Beam would create a conflict of interest because of their former representation of Chrysler. Mr. Buxner shared the results of his research with Mr. Carey. Although the Panel would not permit Mr. Buxner to testify about the conclusion he reached,[2] he was permitted to

[2] The Panel erred in excluding the evidence of Mr. Buxner's conclusion regarding the potential conflict of interest, which he had shared with Mr. Carey. It goes without saying that an attorney's state of mind is relevant to the discipline to be imposed for violation of a Supreme Court Rule — intentional violations are more egregious, and thus are to be more severely disciplined, than

state that Blumenfeld was willing to proceed with the case notwithstanding Carey & Danis's former representation of Chrysler. [Tr. 659-61, 663].

III. When Mr. Carey left Thompson & Mitchell, he only took with him a "form file" containing copies of public and generic documents.

Although the Informant has abandoned its charge that Mr. Carey used or disclosed confidential Chrysler information, it nevertheless discusses in its brief the fact that when Mr. Carey left Thompson & Mitchell, he took copies of documents referred to as his form file. [Exhibit L]. The documents included copies of Chrysler-related materials. [Exhibit 76]. *See Informant's Brief* at 10.

David Wells, an attorney admitted to the Missouri bar in 1965, has spent his entire career with Thompson & Mitchell and its predecessor and successor law firms, and was head of Thompson & Mitchell's litigation department while Mr. Carey worked at the firm. [Tr. 774]. Mr. Wells reviewed all of the documents that Mr. Carey took when he left Thompson & Mitchell, and had no problem with him having taken any of the documents:

> Generally what I see in here are — there are a few that aren't, but generally documents that are a matter of public record, or sent to opposing counsel if they're not filed with the court. There are a few that are not, but they are more from what I can tell kind of generic memos on

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violations resulting from an honest but careless mistake.

conflicts of law or evidentiary questions that might apply to a variety of clients.

[Tr. 782].

Mr. Wells testified that the custom among Thompson & Mitchell lawyers was to take such documents with them when they left the firm. "[M]ost of them are a matter of public record anyway. I don't see it as a problem and I don't think anyone in the firm would." [Tr. 783].

Although Mr. Goldfarb testified that Chrysler had provided documents to Thompson & Mitchell that he considered confidential, there is no evidence at all that Mr. Carey took any of these confidential documents when he left Thompson & Mitchell. [Tr. 346-58; *see also* Tr. 263 (testimony of Mr. McLellan)].

IV. Mr. Carey was not exposed to confidential Chrysler information.

While Mr. Carey represented Chrysler, he was exposed to Chrysler-related information. Whether any of this information was confidential, however, is disputed.

Mr. Newman did not testify that Mr. Carey had been exposed to confidential *facts* relating to Chrysler. Rather, he contended that Mr. Carey had been exposed to "confidential" *litigation techniques* and a "confidential" *approach to litigation* purportedly helpful to anyone bringing a class action against Chrysler, without regard to the subject matter of the action. Mr. Newman testified that

one of the "confidential" things that Mr. Carey learned by working on the Chrysler cases was how to structure a motion and a brief:

Q. They had worked with you. One other thing that you considered confidential was the fact that when you would file a motion to dismiss a class action while Joey and John worked with you, or that you would file a motion to remand a case — pardon me — to remove a case to federal court, that you didn't always provide the detail and the basis for the information in a separate brief, but instead you put some of the detail in the body of the motion itself, correct?

A. Yes.

Q. Okay. And you feel — is that something that you feel that you developed from your own experience and knowledge?

A. Yes.

Q. And you feel that that's something you told them that was highly confidential and unique to Chrysler?

A. It was something that I told them in the course of their representation of Chrysler.

Q. Yes. But you also stated in your deposition that you considered that unique, didn't you?

A. Yes.

Q. Okay. Just so there's no misunderstanding, what I'm now talking about is with respect to this uniqueness that you feel existed is that fact that instead of putting all of the details in a brief which accompanied a motion, you would put some of the detail in the body of the motion itself, right?

A. Yes.

[Tr. 172-73].

Another item that Mr. Newman believed was "confidential" was that Mr. Carey knew that Mr. Newman would be defending any case brought against Chrysler and that he knew how Mr. Newman worked:

Q. I think you said that you believed it would be an advantage to our clients in filing the Beam case because they knew that you would be defending the case?

A. And that they had worked with me.

Q. So that they would gain some advantage because they had worked with you, is that what you're telling the panel?

A. Yes.

* * *

Q. Okay. The fact that they had worked with you and understood how you worked, you're not suggesting that that is confidential to them, are you?

A. Yes, I am.

Q. You are?

A. Yes. Because it only occurred in the context of their relationship as associated attorneys at Thompson Mitchell and in the course of working with me on matters for clients.

[Tr. 214-15; *see also* Tr. 142-43 (Mr. Newman's testimony about similarity of defenses in class actions)].

Mr. Carey testified that he had worked with other Thompson & Mitchell partners in defending class actions, and Mr. Newman's strategies and techniques in defending Chrysler class actions were not unique. [Tr. 693-94; *see also* Tr. 694-98]. Mr. Carey also denied any involvement in Chrysler's business decisions. [Tr. 687].

Mr. Newman testified that Mr. Carey was exposed to expert witnesses who Chrysler might use in any case, including a Chrysler engineer named Jim Tracy, and that he considered the identity of these experts confidential.[3] [Tr. 144-48].

[3] Mr. Carey testified he met Mr. Tracy during a half-day meeting in Detroit in late 1992 or 1993 concerning heater cores. Mr. Tracy was introduced to Mr. Carey as the Chrysler employee who interfaced with NHTSA. The only substantive statement made by Mr. Tracy to Mr. Carey was that Chrysler had completed a complete recall of the heater cores two years before suit was filed.

Mr. Newman admitted, however, that he was not aware of *any* information, confidential or otherwise, including the identity of potential expert witnesses, that Mr. Carey used in the ABS case, with a single exception: Mr. Newman believed that the amended complaint in *Osley*, the heater coil case, was used as a model for the petition in the ABS case. Mr. Newman admitted, however, that the *Osley* amended complaint was a public record on file in the United States District Court for the Southern District of Illinois. [Tr. 133-35, 147-48].

Mr. McLellan testified that Mr. Carey learned the "confidential" fact that "we [Chrysler] would compromise very valid legal and factual defenses if it meant preserving the reputation of the product…" Mr. McLellan did not state how this information was confidential.[4] [Tr. 237-38].

[Tr. 684-86]. Contrary to the statement in Informant's Brief that Mr. Tracy "testified for Chrysler as an expert witness," *Informant's Brief* at 7, there is no evidence that any expert ever testified for Chrysler in any case in which Mr. Carey was involved.

[4] The Court can take judicial notice that defendants often settle claims, notwithstanding valid legal and factual defenses, for a variety of business reasons.

V. Mr. Carey had limited involvement in the ABS case.

Although Carey & Danis concluded that they were not barred from representing a plaintiff in an ABS case against Chrysler, they nevertheless decided not to be involved in the litigation. There were two reasons for this decision. First, Carey & Danis was receiving many referrals from Thompson & Mitchell, and Mr. Carey did not want to do anything to embarrass his colleagues and friends at that firm. Second, Carey & Danis had filed many cases that had reached the motion to dismiss and discovery stages, "[s]o at that time we were very busy and it just didn't make sense to us at that time to take on a big case like this ABS case." [Tr. 701].

For these reasons, Carey & Danis referred *Beam* to the Blumenfeld firm and to David Danis, Joseph Danis's father.[5] Mr. Buxner of the Blumenfeld firm

[5] David Danis was a partner in the law firm of Danis Cooper Cavanaugh and Hartweger ("Danis Cooper"), and was an experienced trial lawyer, having practiced law in St. Louis for 43 years. David Danis started his career as a state prosecutor, and later practiced with a defense firm for many years. He represented the Commission on Retirement and Removal and Discipline for the State of Missouri for about ten years, during a portion of which period he also represented the St. Louis Metropolitan Police Department,

drafted the petition in *Beam*. He modeled his petition on the *Visintine vs. Saab* petition (not the *Osley* complaint, as assumed by Mr. Newman). *Visintine* was a case filed by Carey & Danis against Saab, an automobile manufacturer unrelated to Chrysler. Mr. Buxner's initial draft listed Carey & Danis as counsel for Mr. Beam. The Carey & Danis name appeared because Mr. Buxner initially had the *Visintine* petition scanned or retyped in its entirety, and that firm's name had appeared on the *Visintine* petition. [Tr. 664-66]. The petition actually filed in *Beam* did not list Carey & Danis as counsel because they were not participating in the litigation. [Tr. 667].

After David Danis and the Blumenfeld firm filed *Beam*, Richard Paletta, a local attorney and insurance agent, received a telephone call from an attorney at a large law firm representing Chrysler in St. Louis, telling him that Blumenfeld was involved in a potential conflict of interest situation due to its involvement in *Beam* because Messrs. Carey and Danis had been on Chrysler's defense team at Thompson & Mitchell. The call concerned Mr. Paletta because he was Blumenfeld's insurance agent for malpractice coverage. Mr. Paletta contacted

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Internal Affairs Division, investigating and prosecuting police officers. David Danis served as city attorney for the City of Ladue for 30 years. He retired from the practice of law at the end of 2000. [Tr. 543-45].

the Blumenfeld firm to express his concern. After Mr. Paletta made that call, the Blumenfeld firm withdrew from *Beam*. [Tr. 294-95, 309-10].

When Blumenfeld withdrew from *Beam*, David Danis and Richard Cooper, his law partner in Danis Cooper, felt they needed help in handling the case and asked Carey & Danis to become involved. Although they had previously decided not to be involved, they now agreed to assist Danis Cooper:

> The case was starting to get very active. They needed help. There wasn't time to try and go out and find another co-counsel. So at that point the interests of adequately representing Mr. Beam and the other clients that Richard Cooper had retained by this time overrode our parochial concerns about not wanting to embarrass or do anything to upset our referral of cases from Thompson & Mitchell. And our other concern about being too busy, we'd just have to work harder.

[Tr. 707-08].

After Carey & Danis entered their appearance in *Beam*, Mr. Newman contacted Mr. Carey and told him that he believed Carey & Danis had a conflict precluding them from representing plaintiffs in a class action against Chrysler. While Mr. Carey disagreed with Mr. Newman's statements, he agreed to consider withdrawing from *Beam*. [Tr. 712-19].

At the same time Mr. Carey was discussing *Beam* with Mr. Newman, Mr. Danis was in New York City with David Danis on an unrelated case involving all-terrain vehicles. Aware that a New York lawyer named Stan Grossman had filed an ABS putative class action against Chrysler independent of *Beam*, the Danises met with him to discuss his case. Mr. Grossman's investigation was very advanced, and the Danises decided to have the *Beam* plaintiffs join Mr. Grossman's case. When Mr. Danis returned to St. Louis, he learned about Mr. Carey's conversation with Mr. Newman. Carey & Danis decided to withdraw from *Beam* and to dismiss the case without prejudice. David Danis and Mr. Cooper of the Danis Cooper firm then had Mr. Beam and the other plaintiffs they represented added as plaintiffs in Mr. Grossman's Chrysler ABS case pending in federal district court in New Jersey. [Tr. 487-88].

A major factual issue at the hearing concerned whether Carey & Danis truly withdrew from participation in Chrysler ABS cases when *Beam* was dismissed, or whether they continued to participate surreptitiously. This issue is closely tied to the allegations of discovery abuse.

Carey & Danis were involved in many class action cases with a group of attorneys from various states. Many members of this group, including Danis Cooper, had ABS cases against Chrysler in New Jersey, Mississippi, and Alabama. The group had periodic meetings and conference calls concerning their

many common cases. Because Carey & Danis did no work on any ABS case after *Beam* was dismissed, Mr. Carey did not participate or remain present for the portion of the group's discussions concerning Chrysler cases. To accommodate Carey & Danis's non-participation in the Chrysler cases, the group's discussions about Chrysler was reserved for the end of the group's meetings and calls, and both Mr. Carey and Mr. Danis would be excused before Chrysler was discussed. [Tr. 558-60, 570, 717-18].

David Danis described the procedure followed by the group in respect of Carey & Danis's decision not to be exposed to information concerning Chrysler cases:

> [W]henever we had meetings with these group of lawyers, Deakle, Phebus, Chestnut, where we were talking about maybe 10 or 15 cases we were handling together, and we would sit around in a conference room table here in our office in St. Louis, or maybe a conference room in Mississippi, and we would talk about all of our cases, and when we got to this case [the Chrysler cases] Joey and John would get up and walk out of the room.

[Tr. 561; *see also* Tr. 559-61].

VI. The handling of Chrysler ABS-related correspondence after Mr. Carey stopped working on the case.

Carey & Danis shared office space with Danis Cooper. [Tr. 446, 738]. The office had a single fax machine. Although Carey & Danis ceased any involvement in the Chrysler cases, Danis Cooper remained very actively involved. As a result, Carey & Danis took steps to ensure that they would not receive or see Chrysler ABS correspondence that arrived at the office and fax machine that they shared with Danis Cooper. Carey & Danis instructed the office staff to give any correspondence or other documents related to Chrysler to Danis Cooper only. [Tr. 794-95]. These instructions were in place well before Chrysler sued Carey & Danis, and Carey & Danis gave no new instructions on the handling of these documents after Chrysler sued them. [Tr. 441-43, 794-95].

Mr. Carey testified that had something slipped through and reached him notwithstanding the direction to deliver all Chrysler ABS correspondence to Danis Cooper, he would have either thrown it away or given it directly to David Danis:

> My secretary would have been instructed that Joey or I did not get any Chrysler materials, and that it should be given to David Danis who was involved in the New Jersey case at the time.
>
> * * *
>
> If something had gotten to me that I was not supposed to get it was sent to me in error, and that happened in a couple of instances as I recall. I

would have disposed of it because it was sent to me in error, or I would have put it in David Danis' in-box.

[Tr. 425-26].

David Danis's testimony was consistent with Mr. Carey's:

Q. During the period that the Carey and Danis law firm officed with your firm, will you tell the panels something about the office procedures with respect to incoming — the incoming faxes and documents that you've described.

A. Well, a lot of the faxes that would come in on these class action cases would come — the ones that came in from the lawyers that were a part of the group, they would send one fax addressed to all of us, typically, you know, let's say just in the case that they were sending it on.

And then the office would then make the appropriate copies and deliver one to me, one to John, one to Joey. And then I would read mine, and if these were cases that I was not the active person on, I would throw it away. And the Chrysler case, the staff was instructed that they were only supposed to go to me.

[Tr. 571-72].

Lawana Hotop is employed by Carey & Danis. She began working for them in June, 1995. During the relevant time period, 1995 and 1996, Ms. Hotop also

worked for Danis Cooper as Mr. Cooper's secretary. At the time of the hearing, she was a part-time employee of Carey & Danis and was in her second year of law school at St. Louis University. [Tr. 788-89]. Mr. Carey was not computer literate, and Ms. Hotop did all of his typing. [Tr. 791]. The only work she ever did on a Chrysler ABS case for Carey & Danis was an entry of appearance. [Tr. 792-93]. Although she believes she was familiar with every matter Carey & Danis worked on, she was not aware of any work done by Carey & Danis in any Chrysler case after their entry of appearance in *Beam*. [Tr. 792, 796].

Ms. Hotop testified that Carey & Danis received an extraordinary number of faxes in 1995 and 1996. Some days, they would receive a stack of up to a foot of faxes and Federal Express packages combined. [Tr. 792]. Before working for Carey & Danis, Ms. Hotop had worked for Rabbitt, Pitzer & Snodgrass, an insurance defense firm. Although Rabbitt Pitzer had fifteen attorneys, each with many files, Carey & Danis — with only two attorneys — received many more faxes than Rabbitt Pitzer ever did. [Tr. 793-94].

Ms. Hotop testified that on one occasion, she saw a Chrysler ABS fax sitting in Mr. Danis's in-box. She removed the fax and delivered it to Mr. Cooper, and reminded the receptionist that Carey & Danis were not to receive any Chrysler ABS faxes. [Tr. 796].

VII. The alleged discovery abuse.

While the Panel found that Mr. Carey did not have a conflict of interest and did not use confidential Chrysler information, it did find that he provided false discovery responses. While Mr. Carey agrees that the answer to interrogatory No. 2 and the response to document request No. 12 were inaccurate, the inaccuracy was the result of negligence and not an intentional deception.[6]

Each of the allegedly inaccurate discovery responses and the evidence relating to them are discussed in detail in the argument section below. In addition, however, regarding whether Mr. Carey had an intent to deceive Chrysler in his responses to its discovery, the Court should note that Mr. Carey made a full disclosure of his meetings with the Blumenfeld lawyers in St. Louis, as well as about his knowledge of Mr. Danis's meeting with Mr. Grossman in New York, on the third day of his first deposition taken by Chrysler in its lawsuit against him. This testimony was given July 23, 1997, long before Chrysler obtained the so-called 42 documents in later discovery.

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[6] Mr. Carey does not agree that the response to document request No. 25 was inaccurate. If the Court finds that this response was inaccurate, this inaccuracy was also not intentional.

In his deposition, Mr. Carey disclosed the names of the lawyers and law firms with whom he was frequently co-counsel. Those names included the names of the various lawyers referred to in the record as "the group." He disclosed that he was co-counsel frequently with Messrs. Deakle, Phebus, Campbell, Simms, and Chestnut, and that Danis Cooper was his co-counsel in the majority of his class action suits. [*Carey Depo.* at 658-66]. Mr. Carey testified that he had frequent, and usually weekly meetings or telephone conference calls with these lawyers. [*Id.* at 669-71]. He testified that at the time he ceased active involvement in *Beam* and agreed with David Danis that Carey & Danis would not be sharing in any fees that may be awarded, he knew of two Chrysler ABS cases then pending, the Missouri case (*Beam*) "and the one that was subsequently filed in New Jersey Federal Court by Stan Grossman's firm." [*Id.* at 677].

Mr. Carey testified in his deposition about the various communications he had concerning Chrysler ABS claims. He first spoke with Ann McMahon, a legal secretary at Thompson & Mitchell, who called him by telephone to speak with him about Mr. Beam's experience. [*Carey Depo.* at 730-33]. He spoke with Mr. Danis and with David Danis and Mr. Cooper about potential ABS claims against Chrysler. [*Id.* at 734-35]. He testified that he introduced Mr. Beam to Mr. Buxner of the Blumenfeld firm, and that Mr. Buxner participated in a telephone conference with him and Mr. Beam. [*Id.* at 742-43]. He had conversations

with David Danis and Mr. Cooper. [*Id.* at 760-62]. Mr. Carey further testified in his first deposition in Chrysler's lawsuit:

> Q: Were you involved in conversations that included representatives of the Blumenfeld firm other than this telephone conversation with Mr. Beam that included Even Buxner?
>
> A: Yes.
>
> Q: Okay. What was discussed in those conversations?
>
> A: I recall a meeting at Cardwell's with David Danis, Joey Danis, Even Buxner and a partner of Blumenfeld Kaplan by the name of John Young and myself.
>
> * * *
>
> Q: What was discussed in the meeting at Cardwell's?
>
> A: The purpose of the meeting was an exploratory meeting from Blumenfeld Kaplan's standpoint to see whether they would be interested in acting as co-counsel with Danis Cooper in the ABS litigation.
>
> Q: All right. And what was said in this meeting, as best you can recall?
>
> A: I recall that we discussed the St. Louis Post-Dispatch article, the tens of thousands of complaints that had been made involving the Chrysler anti-lock brake system, and generally whether Blumenfeld Kaplan had an interest in acting as co-counsel in the case with the Danis Cooper firm.

[*Carey Depo.* at 774-75; *see also id.* at 776-79, 789]. Mr. Carey further testified that he provided sample class action petitions to Mr. Buxner at his request. [*Id.* at 781-82].

Discussing the meeting with Mr. Grossman in New York, Mr. Carey testified in his deposition that while he personally did not speak to anyone at Mr. Grossman's law firm [*Carey Depo.* at 802], "David Danis and Joey Danis were in New York meeting with Stan Grossman, Brian Hufford and I don't know whether Allyn Lite was in that meeting or not…" [*Id.* at 809-810; *see also id.* at 812].

Although Informant alleges that 42 documents were sent between Carey & Danis and other members of the group concerning Chrysler ABS cases, this number is speculative and incorrect. The Informant's count is based on the number of documents produced by members of the group in discovery during Chrysler's lawsuit against Carey & Danis. As discussed in the argument below, many of the documents did not relate to Chrysler ABS cases at all. Those that did relate in some respect to Chrysler ABS were entirely unmemorable, and, as discussed above, were delivered to Danis Cooper and not Carey & Danis.

Furthermore, it is unclear which of these documents were actually transmitted to Carey & Danis, as many of the documents produced in discovery merely had associated with them fax cover sheets listing attorneys' names,

including the names of Messrs. Carey or Danis. Just because Mr. Carey's name appeared on a fax cover sheet, however, does not mean that the document was actually faxed to him. Mr. Phebus, the most prolific writer in the group, testified:

> Q: Have you — have you ever sent any correspondence or documents to John Carey or Joe Danis regarding litigation against Chrysler?
>
> * * *
>
> A: I certainly have sent a letter to Joe Danis concerning drafting a remand motion in the Olivia case.[7] That letter also went to counsel of record and contained various thoughts and observations I had concerning certain issues. And Joe wrote me back and said I am not going to be working on this file….[8]

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[7] Exhibit 105. The *Olivia* case did not involve ABS brakes. It involved *defective paint* on Chrysler vehicles. Documents relating to *Olivia* and other Chrysler paint cases, many of which are included in the Informant's list of 42 documents, were not responsive to the discovery requests at issue. *See* the discussion in the argument below.

[8] Carey & Danis chose not to work on *Olivia* consistent with their decision not to work on any Chrysler cases. [Tr. 430].

Q: Okay. Other than that document, have you ever sent any correspondence or documents to Carey or Joe Danis pertaining to litigation against Chrysler?

A: I may have inadvertently, I don't know, because I send a lot of things out by fax, and my secretary has a fax form she uses, different forms she uses from time to time. And having somebody go through the file for me, I observed that the file copies of the transmittal sheets were not checked as to who they went to. So one could not ascertain, in my opinion, from those sheets who — whether they went to everybody or who they went to….

And the form, the transmittal form, which is the preprinted form she has, had other attorneys, including Carey and Danis, on the form, and it's not checked as to who it was sent to is what I'm saying. So I guess it raises in my mind the possibility that those may have been inadvertently transmitted by either the receptionist or my secretary to Mr. Danis or Mr. Carey.

Phebus Depo. at 42-43.

Mr. Carey did not recall receiving any of the 42 documents. [Tr. 422-46]. During the period when the disputed documents were allegedly sent to Carey & Danis, and, if received, either disposed of or forwarded to Danis Cooper, Carey

& Danis were involved in 20 to 40 class actions. In almost all of these cases, the members of the group were also involved. [Tr. 446-47].

Further testimony confirmed that whatever documents the group sent to Carey & Danis mentioning Chrysler were sent by mistake due to their involvement in these 20 to 40 other cases, and not because Carey & Danis were involved in any Chrysler ABS case. Mr. Phebus explained:

> [T]hey were involved in other litigation with us, and I think the secretary sometimes just because we were involved, are involved in other litigation together had just kind of sent it to everybody that was customarily involved in litigation.
>
> * * *
>
> You know, it's unfortunate, but — but Deakle and Sims and myself were sending things to John and Joey and that have been produced that we shouldn't have. It wasn't their fault. It was our fault, but there wasn't any assistance that came back from them or information that would be of assistance to us that came back to us from them.

Phebus Depo. at 75, 160. "We shaped up our act and endeavored to do a better job of complying with John and Joey's request that they not be copied on Chrysler documents…" *Phebus Depo.* at 196.

Another attorney in the group, John Deakle, testified about Mr. Phebus's writing habits:

> Let me say that Mr. Phebus is incredibly prolific. He is a born again plaintiff's lawyer, having been a defense attorney. If you go to his office he has three or four secretaries that literally sit around a desk, each with a computer on it. It would not be unusual for me to receive 30 or 40 faxes a day from Mr. Phebus, sometimes more than that. I couldn't keep up. Eventually we just started putting them in a box. I love Mr. Phebus, but … I received so much from him I can't remember.

Deakle Depo. at 73.

On one occasion, however, Mr. Phebus intentionally sent Carey & Danis a copy of Chrysler-related document. Discussing Exhibit 133 and an order that was originally attached to it, Mr. Phebus testified:

> Q: And did you send that to John Carey and Joseph Danis?
>
> A: Yes.
>
> Q: Why?
>
> A: Because I thought they would enjoy Judge Gillmore's order, because I knew they were being sued by Chrysler, and I thought it might be a little moral boost to them to see an order strongly adverse to Chrysler.

Phebus Depo. at 176.

David Danis testified that, in his opinion, given the volume of correspondence generated in class actions, it would be easy for Mr. Carey to have no memory of documents received in cases on which he was not working. David Danis, a very experienced trial lawyer, found that a class action practice generates considerably more documents than does a more typical litigation practice. His experience in consumer class action practice is that routinely there are similar lawsuits filed in different courts, and that the plaintiffs' counsel either have their cases combined by the courts or, alternatively, voluntarily cooperate with each other. As a result, one receives copies of pleadings and discovery in many, many different but similar lawsuits. On a typical busy day, David Danis will receive 50 different documents ranging anywhere from five to fifty pages long. [Tr. 548-49].

At the time the Chrysler suit was pending, David Danis was involved in about 50 different class actions. Each of those cases might have ten or twenty lawyers involved, each sending out copies of what they are doing. In most of the class actions in which he is involved, some other lawyer is appointed lead counsel by the court. David Danis has a lead position in only ten to fifteen percent of his cases. It was his usual practice to discard faxes and other correspondence when one was not the responsible attorney on the file. [Tr. 550-51, 571-72].

VIII. Mr. Carey's failure to produce the Grossman letter or to supplement his interrogatory answer and responses to document requests was the result of negligence on the part of his attorneys and not any intent to deceive or defraud.

Lou Basso is a lawyer who was retained by Carey & Danis to represent them in Chrysler's lawsuit against them. Carey & Danis's insurance company, CNA, subsequently refused to engage Mr. Basso, and ultimately hired Rick Wuestling to provide them with a defense. While Mr. Basso did not formally withdraw from the case when Mr. Wuestling was retained, he ceased active participation at that time. [Tr. 497-500].

Soon after Mr. Basso was retained, and before he was supplanted by Mr. Wuestling, Carey & Danis gave him the original of the Grossman letter along with other documents. [Tr. 466-68]. Mr. Basso immediately made all of Carey & Danis's documents, including the Grossman letter, available to Chrysler's lawyers for their review. Chrysler's lawyers failed to review the documents at that time. [Tr. 500].

Mr. Basso testified that when CNA refused to authorize his retention and hired Mr. Wuestling in his place, he gave Mr. Wuestling the documents he had received from Carey & Danis. Unfortunately, through an oversight on Mr. Basso's part, he failed to deliver to Mr. Wuestling the Grossman letter and

several other documents. As a result of this error, Mr. Wuestling did not have and never produced the Grossman letter during discovery. [Tr. 466-68].

Mr. Wuestling's testimony agreed with Mr. Basso. Mr. Wuestling testified that when he began to represent Carey & Danis in Chrysler's lawsuit, he received documents from Mr. Basso. These documents did not include the Grossman letter. Subsequent to the fiasco in federal court, Mr. Basso told Mr. Wuestling that he had had the Grossman letter in his files, but had forgotten about it. [Tr. 849-50, 859].

After Carey & Danis's insurance coverage ran out, Mr. Wuestling withdrew from the case and they rehired Mr. Basso as their attorney. On the fourth day of trial, Mr. Basso, unaware that the Grossman letter had not been produced in discovery, decided to use the letter at trial. The document was still in a notebook Mr. Basso's paralegal had prepared for him at the very beginning of the lawsuit. Mr. Basso testified that he showed the Grossman letter to Carey & Danis during the evening of the third day of trial, "[a]nd they looked at me shocked. They didn't even remember writing the letter." [Tr. 466-68, 512-14].

During Chrysler's lawsuit, Chrysler served subpoenas on the members of the group. These subpoenas yielded the 42 documents discussed in Informant's brief. After the 42 documents were discovered, Mr. Wuestling did not think it was necessary to supplement Carey & Danis's answers to discovery, and, in

particular, their answers to interrogatory No. 2. Mr. Wuestling testified that, at the time, he felt that if he was going to supplement the discovery responses, he would do it after Chrysler took its supplemental depositions of Messrs. Carey & Danis. Instead, Mr. Wuestling testified, "I guess I never got around to doing it." [Tr. 857-58].

Mr. Wuestling testified that throughout his representation of Carey & Danis, even after the discovery of the 42 documents, he never believed that they were withholding information from him or that they had lied to him, either in their responses to Chrysler's discovery or otherwise. [Tr. 859-60].

IX. Factors in mitigation.

Mr. Carey has three children and is the primary support of his family. [Tr. 679].

Mr. Carey has not been the subject of any other Bar complaints, and has had an unblemished record since the events that are the subject of this proceeding. [Closing Argument Tr. 26-27; *see Informant's Brief* at 30 (no history of discipline)].

Mr. Carey has provided *pro bono* services during his professional career. He provided legal counseling a couple of hours one evening per week at Kingdom House, a facility in north St. Louis run by the Lutheran Church. He has handled social security disability claims on a *pro bono* basis. He also provides *pro bono*

counseling and legal services to consumers having problems with creditors or banks through the National Association of Consumer Advocates. [Tr. 681-82].

As a result of the judgment entered against them in Chrysler's lawsuit, Carey & Danis were required to pay Chrysler $854,000, the amount of the legal fees and expenses Chrysler incurred in defending all of the ABS litigations and in prosecuting its suit against Carey & Danis. Carey & Danis paid the judgment to Chrysler in full. [Tr. 827-28].

Opinion and reputations evidence concerning Mr. Carey's integrity was offered at the hearing.

George Fitzsimmons is a lawyer who has been in trial practice in the St. Louis area for 34 years. He is active in the local, state, and national voluntary bar associations; is a member of the America College of Trial Lawyers, the International Academy of Trial Lawyers, and the International Society of Barristers; and received the Lon Hocker Award and other honors. [Tr. 531-34].

Mr. Fitzsimmons testified that Mr. Carey had an excellent reputation for both honesty and ethical conduct. [Tr. 536-37]. Mr. Fitzsimmons has read the decisions of the federal courts in Chrysler case against Mr. Carey. Although his opinion about Mr. Carey has not changed, he recognizes that the events have damaged Mr. Carey's reputation. [Tr. 537]. Having reviewed many of the

documents in the case, including the depositions, Mr. Fitzsimmons has not changed his opinion about Mr. Carey's honesty and ethical behavior. [Tr. 541-42].

Mr. Wells, the former head of litigation at Thompson & Mitchell, testified that Mr. Carey's reputation for honesty and truthfulness "was excellent. John was one of our bright shining stars as an associate." [Tr. 778]. Mr. Wells was the partner with whom Mr. Carey worked most closely while employed by Thompson & Mitchell. [Tr. 691, 774]. Notwithstanding the problems Mr. Carey has had arising out of the Chrysler matter, Mr. Wells "believe[s] him still to be truthful and honest. Absolutely." [Tr. 779].

Importantly, Informant's counsel, in oral argument before the Panel, admitted that Mr. Carey did not pose a danger to the public. "I don't think it is reasonably likely Joe or John is going to go out and do anything like they did here ever again. I don't think the public is going to be in a position to face this type of misconduct in the future." [Closing Argument Tr. 27].

SUMMARY OF THE ARGUMENT

The Panel correctly determined Mr. Carey's representation of Mr. Beam in his suit against Chrysler did not violate Rule 4-1.9(a), which prohibits an attorney from bringing an action against a former client in a matter substantially related to the matter in which the lawyer represented the former client. A matter alleging defective ABS brakes is simply not substantially related to a matter alleging defective heater cores or defective latches.

The Panel erred in determining Mr. Carey violated Rules 4-3.4(a), 4-3.4(d), 4-8.4(c), and 4-8.4(d) through alleged discovery abuse. The Informant has not established by a preponderance of the evidence the Mr. Carey knowingly, intentionally, or recklessly failed to provide truthful and accurate responses to Chrysler's discovery requests in its lawsuit against him. While Mr. Carey's discovery responses may have been marked by carelessness and negligence — both on his own part and on the part of his two lawyers, Messrs. Basso and Wuestling — this carelessness and neglect ultimately harmed no one other than himself and does not merit any sanction more severe than a public reprimand.

ARGUMENT

I. Mr. Carey did not violate Rule 4-1.9(a) in representing Mr. Beam against Chrysler because the lawsuit was not substantially related to any matter in which Mr. Carey formerly represented Chrysler, in that defective ABS brakes are not substantially related to defective heater cores or defective latches.

Supreme Court Rule 4-1.9(a) states:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation

It is undisputed that Mr. Carey's representation of Mr. Beam in the ABS case was materially adverse to the interests of Chrysler, his former client. The key issue, therefore, is what is meant by the phrase "substantially related," as used in Rule 4-1.9(a).

The phrase is undefined in the case law — in reading the published opinions on the issue, the courts appear to assume that, like obscenity, one knows it when one sees it; with one federal appellate judge acknowledging, "In

this context, the question of 'a substantial relationship' between the two matters is not one whose dimensions are delineated with mathematical precision." *Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp.*, 518 F.2d 751, 758 (2nd Cir. 1975) (Adams, J., concurring). The meaning of the phrase "substantially related" as used in the rule is made clearer, however, by review of the Comment to the rule.

The Comment to Rule 1.9 states:

> The scope of a "matter" for purposes of Rule 1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, *a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type* even though the subsequent representation involves a position adverse to the prior client.… The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.…

Rule 4-1.9, Comment (emphasis added).

Here, even if the Court determines that the defense of consumer class actions is a "type of problem" that Mr. Carey recurrently handled for Chrysler, the Comment to the rule expressly states that he is not precluded from taking an adverse position against Chrysler "in a wholly distinct problem of that type." The class actions in which Mr. Carey represented Chrysler involved problems with the heater core of Renault Alliance cars and problems with gate latches in minivans. The case in which Mr. Carey represented Mr. Beam, albeit briefly, involved a problem with anti-lock braking systems. This problem was distinct from those in which Mr. Carey represented Chrysler, and therefore the matters are not substantially related.

In *State v. Smith*, 32 S.W.3d 532 (Mo. banc 2000), this Court held that a lawyer was not barred from prosecuting a death penalty case, notwithstanding that the lawyer had formerly represented the defendant in two criminal cases, even though evidence touching upon both of the former cases was admitted in evidence in the murder trial. The Court held that the subsequent adverse representation was not prohibited because there was no central issue common to the cases, holding:

> This Court is not persuaded that it should abandon Rule 4-1.9, under which the various representations that allegedly result in a conflict of interest must be connected by something substantially more than the

> prosecutor himself if they are to be substantially related. A focused approach, where the court examines the relevant facts of the case in order to determine whether the various matters are substantially related, is preferable.

Id. at 542-43.

The Missouri Court of Appeals analyzed the issue of "substantially related matter" by examining what the issues would be at trial. *Massey-Ferguson Credit Corp. v. Black*, 764 S.W.2d 137, 141 (Mo. App. 1989). In *Massey-Ferguson*, the lawyer had represented the former clients in their acquisition of a farm. In a later action, the lawyer sued the former clients on behalf of a new client for repossession of farm equipment. The former clients objected, contending that the former representation was substantially related to the current suit and that the lawyer had learned about their "financial situation" through his representation of them. The Court of Appeals rejected the contention that the lawyer should have been disqualified, stating: "The farm and/or appellants' financial situation were not issues in the trial." *Id*; *see also Misemer v. Freda's Restaurant*, 961 S.W.2d 120, 122 (Mo. App. 1998) (refusing to disqualify lawyer from bringing suit on a note against former client where lawyer had prepared incorporation papers and drafted a real estate contract for former client, even

though former client asserted that the real estate transaction was the basis for the note).

Similarly, in the present case, a case involving allegedly defective ABS brakes is not substantially related to cases involving allegedly defective heaters or allegedly defective door latches. The products, their function, their design, the relevant technical experts, the component suppliers — all of these relevant facts are different case by case.

The Second Circuit's decision in *Silver Chrysler* case is particularly on point. In *Silver Chrysler*, plaintiff's attorney, Dale A. Schreiber, was formerly an associate in the Kelley Drye law firm, a law firm that had served as Chrysler's primary outside legal counsel for many years. Although Kelley Drye had an intense involvement in all aspects of Chrysler's legal life, including the defense of actions brought against it by automobile dealers, Mr. Schreiber was primarily involved in four or five Chrysler cases that did not involve claims by automobile dealers, although he did engage in some "brief, informal discussions on a procedural matter or research on a specific point of law" in automobile dealer cases. *Silver Chrysler*, 518 F.2d at 752-53, 756.

Mr. Schreiber left Kelley Drye and formed his own law firm. He sued Chrysler on behalf of a automobile dealer. Chrysler sought to have Mr. Schreiber disqualified, with Chrysler characterizing Mr. Schreiber's involvement in its

representation in terms similar to those its witnesses used in these proceedings to describe Carey & Danis's involvement while employed at Thompson & Mitchell — that is, by statements strong in conclusory characterizations, but weak in details and facts. The Second Circuit discounted Chrysler's evidence, stating:

> Chrysler was in a position here conclusively to refute Schreiber's position that his role in these cases had been non-existent or fleeting. Through affidavits of those who supervised Schreiber on particular matters or perhaps through time records, the issue was capable of proof. Chrysler instead chose to approach the matter in largely conclusory terms.
>
> Example from a Kelley Drye (Chrsyler) affidavit:
>
> "[Schreiber] obtained unmeasurable confidential information regarding the practices, procedures, methods of operation, activities, contemplated conduct, legal problems, and litigations of [Chrysler]"

Id. at 757 & n.8. The Second Circuit concluded:

> Neither Chrysler nor any other client of a law firm can reasonably expect to foreclose either all lawyers formerly at the firm or even those who have represented it on unrelated matters from subsequently representing an opposing party.

Id. at 757.

Here, the Panel correctly concluded that an ABS brake case is not substantially related to a heater core case or to a rear latch case. The Court should find that Mr. Carey did not violate Rule 4-1.9(a) by representing a client in a case alleging defective ABS brakes against his former client, Chrysler.

The authorities cited by the Informant do not support a contrary result.

T. C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268 (S.D.N.Y. 1953), announced the "substantial relationship" test, but did not define it. Respondent agrees with the holding in *T. C. Theatre* that, where a subsequent representation is substantially related to a former representation, the former client is not required to show that the lawyer received confidential information during the former representation. Informant's argument begs the question, however, because it fails to analyze, much less establish, that the ABS case is substantially related to the heater core and latch cases. In *T. C. Theatre*, in contrast, it was clear beyond dispute that the matters were substantially related — in fact, they were exactly the same:

> But a comparison of the plaintiff's complaint with the findings of fact, conclusions of law and decree in the Paramount case shows beyond peradventure that the plaintiff charges and relies upon the same conspiracy which the government established against the defendants in the Paramount case. The same distributor-defendants are named in both

> suits. The conspiracy charged in the two cases traverse substantially the same periods. Cooke in opposing a motion to dismiss the original complaint (drafted by him) categorically stated that the essential allegations charging a conspiracy by Universal and others against independent exhibitors, such as the present plaintiff, were pleaded *in haec verba* from the opinion and decree in the Paramount case. Thus, charges now made by Cooke on behalf of his present client against Universal parallel those against which he previously had defended Universal.

Id. at 269. The same, or even a similar, circumstance does not exist here.

Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2nd Cir. 1973), also involved a situation where the subsequent representation involved *exactly the same issue* as the prior representation. In both cases, the key issue in a patent case was whether a corporate parent which owned 50% of a subsidiary in fact exercised dominant control over that subsidiary. "It is clear, therefore, that there are matters in controversy in each case — both the nature and scope of control, if any, exercised by Burlington over Patentex — that are not merely 'substantially related,' but are in fact identical." *Id.* at 572.

Because the issues in the subject litigations in *T. C. Theatre* and in *Emle*, respectively, were *identical*, those cases provide no guidance about how to deter-

mine whether two matters are *substantially related*, which is something less than identical. These cases, therefore, are not helpful authority and thus do not support the Informant's contentions.

The final case cited by Informant, a district court case from New Jersey, is the only authority cited possibly supporting Informant's contentions. In *Cardona v. General Motors Corp.*, 942 F. Supp. 968 (D.N.J. 1996), the district court held, relying on a pre-Model Rules decision of the New Jersey Supreme Court (and holding contrary to a written opinion of the New Jersey Supreme Court Advisory Committee on Professional Ethics), that an attorney who had worked exclusively representing GM in the defense of "lemon law" suits for the preceding five years could not immediately change sides and represent plaintiffs in "lemon law" suits against GM. *Id.* at 972-73. In reaching its decision, the district court held, similar to Informant's contention here, that because the facts of an individual "lemon law" case, "do not 'drive' the decision to settle, or litigate a given case … the absence or presence of a 'factual nexus' between the former representation and the current one, cannot be dispositive." *Id.* at 973.

Cardona should not be used as a basis for finding Mr. Carey to have violated Rule 4-1.9(a). The decision is inconsistent with the Missouri precedent cited above. It is also quite different on the facts. In *Cardona*, the lawyer moved to a law firm that was on the other side of many of the cases he himself was

defending for GM. The lawyer believed there was a conflict and therefore sought GM's consent to a waiver of conflict. When GM failed to consent, his new employer established an "ethics screen" to prevent the lawyer from having contact with its cases against GM. *Id.* at 970-71. Finally, after the magistrate judge determined that the lawyer's disqualification was imputed to the law firm, the lawyer left the firm. Thus, the arguments made to the district judge for reversal of the disqualification of the law firm *assumed* that the lawyer individually was disqualified from representing a client against GM, and instead argued, first, that the issue was moot and, second, that the law firm should not suffer imputed disqualification after the lawyer had left its employ because of its use of an "ethics screen." *Id.* at 975-76.

For all these reasons, Mr. Carey respectfully suggests that the *Cardona* case, which was not decided until August 1996, months after he had ceased his involvement in *Beam*, should not be used as a basis supporting the imposition of discipline on his law license.

Furthermore, even if the Court should determine that Mr. Carey by his representation of Mr. Beam against Chrysler violated Rule 4-1.9(a), no substantial discipline should be imposed. As discussed in detail in the statement of facts, at the time Mr. Carey first considered whether to accept representation of Mr. Beam, he and the other lawyers involved, including Mr. Danis and Mr. Bux-

ner of the Blumenfeld firm, carefully considered the facts and circumstances and reached the conclusion that his involvement in the case was not barred. This was a reasonable conclusion and, if incorrect, was the result of an honest mistake. If this Court determines Mr. Carey violated Rule 4-1.9(a), the Court should take into consideration the fact that the violation was the result of an honest mistake, and limit its sanction to a public reprimand.

II. The Court should not hold that Mr. Carey is barred under principles of non-mutual offensive collateral estoppel from contesting the district court's holding, affirmed by the Court of Appeals for the Eighth Circuit, that he committed intentional discovery abuse, because the legal requirements for application of non-mutual offensive collateral estoppel are not present, in that (a) the issues decided in the district court and the Eighth Circuit are not identical to the issue presented here and (b) Mr. Carey did not receive a full and fair hearing in federal court.

The issue presented in the Point Relied On is whether Mr. Carey is barred from presenting evidence on the issue of his alleged discovery abuse and from contesting the holding of the district court, affirmed by the Eighth Circuit, that he committed intentional discovery abuse, by reason of the principles of non-mutual offensive collateral estoppel stated in the Court's opinion in *In re Caran-*

chini, 956 S.W.2d 910 (Mo. banc 1997). For the following reasons, *Caranchini* is not applicable, and the Court should consider the evidence without deference to or consideration of the decisions of the federal courts.

The Informant argues that Mr. Carey is barred from contesting the discovery abuse charges because the Eighth Circuit in *Chrysler Corp. v. Carey*, 186 F.3d 1016 (8th Cir. 1999), affirmed the district court's decision finding intentional discovery abuse. This Court in *Caranchini* held that collateral estoppel bars an attorney from contesting charges at a disciplinary hearing where the charges are related to the findings of another court if: (1) there is an identity of the issues; (2) the prior judgment was on the merits; (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior judgment; and (4) the party had a full and fair opportunity to litigate the issue at the prior adjudication. *Id*. at 912-913. All four elements must be met, or there is no collateral estoppel.

Here, two of the four elements are missing. Mr. Carey did not have a full and fair hearing in the prior adjudication. While the Eighth Circuit found that the proceedings before the district court were full and fair *for purposes of imposing discovery sanctions*, the proceedings were not full and fair for purposes of suspending a lawyer's law license. Furthermore, the issue before this Court is not identical to the issue before the federal court because no court had deter-

mined whether Mr. Carey, *as opposed to his lawyers*, committed any discovery abuses. Although the Eighth Circuit found the existence of discovery abuses, it did not further find that Mr. Carey, as compared to Messrs. Basso and Wuestling, his lawyers, committed the abuse.

A. An attorney is entitled to a greater degree of due process in a disciplinary proceeding than a party is entitled to in a discovery sanction proceeding.

Collateral estoppel prevents a party who unsuccessfully litigated an issue in a prior action from retrying the identical issue in a subsequent action. This Court has limited collateral estoppel to "those issues which were necessarily and unambiguously decided" in the prior action. *King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. banc 1991). Only two Missouri cases have permitted non-mutual offensive collateral estoppel — *Caranchini* and *Scott v. Daniels*, 789 S.W.2d 243, 245 (Mo. App. 1990) (defendant who pled guilty to marijuana possession held barred from denying knowledge of the presence of the possessed marijuana in subsequent forfeiture proceeding). *See James v. Paul*, 49 S.W.3d 678, 685 n.5 (Mo. banc 2001) ("Missouri appears to follow the narrow use of offensive collateral estoppel laid down in *Park Lane Hosiery Co.*").

Consequently, the party asserting collateral estoppel, here, the Informant, must establish that "the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit." *King General Contractors* at 500. Informant cannot meet this burden as Mr. Carey did not have a full and fair opportunity to litigate the discovery issues, and in particular his knowledge and intent in Chrysler's lawsuit.

Furthermore, even if two actions concern the same factual issues, and even if the losing party had "a full and fair opportunity to litigate the issue," the decision in the first case will not control the second case if, the burden of proof in the two cases is different. For example, if a defendant is found liable in a civil battery case (by the preponderance of the evidence), he will not be automatically convicted in a subsequent related criminal case (by beyond a reasonable doubt); similarly, a defendant who is acquitted in a murder case can still be found liable in a subsequent civil wrongful death suit. *See, e.g., the O.J. Simpson cases.* Missouri appellate decisions recognize this principle:

> There is also a different standard of proof in criminal proceedings, in which guilt must be shown beyond a reasonable doubt. In [parental] termination cases, the grounds for termination must be shown by clear, cogent, and convincing evidence rather than the higher standard. If the party against whom estoppel is sought had to satisfy a significantly

> higher burden of persuasion in the preceding action, there could be no identity of issues and the doctrine of collateral estoppel cannot apply in the second action.

In the Interest of T.G. v. A.O.G., 965 S.W.2d 326, 334 (Mo. App. 1998), *citing Shaffer v. Terrydale Management Corp.*, 648 S.W.2d 595, 608 (Mo. App. 1983); *accord* Restatement (Second) of Judgments, § 28.

Here, while both proceedings apply the same burden of proof, there is a comparable and significant difference in *the degree of due process required* by the Constitution in the two proceedings. As shown below, much less due process is constitutionally required prior to the imposition of discovery sanctions compared to the imposition of attorney discipline. While the proceedings in the district court, which did not include an evidentiary hearing, were held by the Eighth Circuit to be sufficient to permit the imposition of sanctions, those proceedings were not sufficient constitutionally to permit Mr. Carey's law license, a valuable property right, to be indefinitely or otherwise suspended. Consequently, Mr. Carey is constitutionally entitled to a full plenary hearing, even as to factual issues previously decided by the federal courts.

1. Due process requirements in an action to impose discovery sanctions do not include the requirement of an evidentiary hearing.

No evidentiary hearing is required before a district court can impose sanctions upon a party for an abuse of the discovery process. The district court may simply rely upon the record before it. *Chrysler Corp. v. Carey*, 186 F.3d 1016, 1022 (8th Cir. 1999), *citing Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958). Indeed, for purposes of such sanctions, a "chance to respond to the charges through submission of a brief is usually all that due process requires." *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 606-07 (1st Cir. 1988) (Breyer, J.), *cited by Jensen v. Federal Land Bank of Omaha*, 882 F.2d 340, 341 (8th Cir. 1989); *see also Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 232, 335 (2nd Cir. 1999).

2. An attorney has a significant property interest in his law license, and is therefore entitled to an evidentiary hearing before discipline is imposed.

The Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, provide that no person shall be deprived of property without due process of law.

A law license is "property" for purposes of these constitutional provisions. *Accord In re Ruffalo*, 390 U.S. 544 (1968) (reversing federal disbarment of attorney previously disbarred by state court due to lack of constitutionally sufficient notice of the charges in the state court proceedings).

In determining what is "property" for due process purposes, the United States Supreme Court has held:

> The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except "for cause." Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating to the whole domain of social and economic fact.

Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) (citing cases holding a variety of interests to be property, including, among others, horse trainer's licenses and driver's licenses) (citations omitted). Missouri cases have also held a variety of interests to be property, including employment as a police officer, *Belton v. Board of Police Comm'rs*, 708 S.W.2d 131 (Mo. banc 1986); retention of a medical license, *Russell v. State Board of Registration for the Healing Arts*, Appeal No. WD54818 (Mo. Ct. App. W.D., Dec. 22, 1998), available on Lexis at 1998 Mo. App. Lexis 1744; and retention of a driver's license, *Dabin v. Director of Revenue*, 9 S.W.3d 610 (Mo. banc 2000).

Because a law license is property, the critical question is: How much due process is required before a lawyer can be disciplined? In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the United States Supreme Court held that the amount of due process depends upon, among other factors, the *importance* of the interest at jeopardy. *Id.* at 334-35. In other words, the more important the interest at stake, the greater the process that is due. *See Donelon v. Division of Employment Security*, 971 S.W.2d 869 (Mo. App. 1998), holding that three-day suspension of employment was "an important interest" entitling the employee to "a chance to tell his side of the story." *Id.* at 876. "Due process contemplates the opportunity to be heard at a meaningful time in a meaningful manner." *Dabin*, 9 S.W.3d at 615 (driver's license).

Where the interest at stake is as important as a law license, due process requires that the lawyers facing possible discipline be given an *effective opportunity to defend* against the charges. "An 'effective opportunity to defend' must include advance notice of the right to contest the charges *and the right to present evidence*." *Russell, supra* (emphasis added).

Here, Mr. Carey had no opportunity to present evidence in the district court concerning the allegations of discovery abuse, and in particular the allegations of perjury. The district judge never permitted Mr. Carey to address

the Court. Instead, the district judge relied solely on the argument of his counsel, who in turn limited his argument to the Grossman letter.[9]

Significantly, no one involved — not the lawyers, not the district judge, and not the appellate judges — ever considered the fact that Mr. Carey was not a party to any of the communications with Mr. Grossman. If Mr. Carey had been permitted to present evidence, that important fact could have been made known to the trial and appellate judges.

B. The trial court's oral statements are not binding for purposes of collateral estoppel.

The trial court transcript from the Chrysler lawsuit includes a lengthy dialogue between the district judge and the lawyers — but not Mr. Carey — about the Grossman letter and, after sanctions were announced, about other discovery matters as well. Informant would have this Court treat all of the district judge's statements, invectives, questions, and musings, as though they were all findings of fact and conclusions of law, equal in dignity with the formal, written findings of fact and conclusions of law issued by courts.

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[9] Mr. Basso limited his argument to the Grossman letter because he understood from Chrysler's motion and the judge's comments that the only issue for possible sanctions was the Grossman letter.

In effect, it is Informant's position that Mr. Carey should not have been permitted at the hearing to present any evidence related to any of the district judge's utterances. Informant presents no authority to support this extra-ordinary expansion of collateral estoppel.

When a court intends to make findings of fact and conclusions of law, it considers the issues and then sets out its findings and conclusions in writing. There are obvious reasons why courts do this. Spoken words can be careless or ill considered. Written words should be the product of greater care. Written words are placed in the case file. Sometimes they are published. That is why no cases hold that collateral estoppel applies to every word uttered by judges during the course of the cases they preside over. *See Carondelet Savings & Loan Ass'n v. Boyer*, 645 S.W.2d 24, 26-27 (Mo. App. 1982), in which the appellate court discussed certain "oral findings" made by a trial court, holding:

> In a series of points Boyer challenges oral findings of fact made by the trial court.… The court's "findings" concerning fraudulent conveyances were unresponsive to any issue then before it, were made without evidentiary hearing on the subject to which they were directed, and purported to pass on the legal rights of a non-party…

> They were at best volunteered expressions of opinion on a subject not before the court. They were not judicial findings and can form no basis for collateral estoppel or res judicata.

Similarly, Judge Perry's "volunteered expressions of opinion" in the Chrysler case are not usable as a basis for collateral estoppel here.

C. No court has found that Mr. Carey (as opposed to his lawyers) committed discovery abuses.

Collateral estoppel applies to issues that were "necessarily and unambiguously decided" in a prior action. *King General Contractors*, 821 S.W.2d at 501. *In a civil trial, the actions of a party's lawyers are imputed to the party.* "Generally, actions of a party's attorney, including procedural neglect that precludes a party's substantive rights, are imputed to the client." *Cotleur v. Danziger*, 870 S.W.2d 234, 238 (Mo. banc 1994) (party's lawyer failed to appear at trial and the court ordered a default judgment against her).

Similarly, the federal trial and appellate courts in *Chrysler v. Carey* did not distinguish between Mr. Carey and his lawyers. There was no need to. The actions (and inactions) of his lawyers were attributable to Mr. Carey — but *only* in the context of the civil damage lawsuit, where clients are often sanctioned for the sins or sloppiness of their lawyers. Disciplining the lawyer-client *for the*

conduct of his lawyer through the deprivation of his property right in his law license, however, is quite another matter.

In this proceeding, the issue is whether Mr. Carey personally, and not vicariously through his lawyers, abused the discovery process. The issue of whether he *personally* gave knowingly false responses to discovery was not necessarily before the district court or the Eighth Circuit, and therefore the issue was not "necessarily and unambiguously decided."

For all of these reasons, Informant's contention that *Caranchini* applies and that this Court can ignore all of the evidence concerning Mr. Carey's state of mind and the absence of any intent on his part to file false or misleading discovery responses, should be rejected. The Court should consider Mr. Carey's evidence as set forth herein.

III. Mr. Carey's response to document request No. 25 was accurate, and therefore not in violation of Rule 4-3.4(a) & (d) or Rule 4-8.4(c) & (d), because the request sought documents related to an "agreement" on fee sharing or joint representation and the response stated that "no such documents exist," in that while there were documents relating to *proposals* concerning fee sharing and joint representation, the Informant has failed to show by the preponder-

ance of the evidence that any *agreement* on those subjects was ever reached.

Supreme Court Rule 4-3.4(a) & (d) states:

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
>
> * * *
>
> (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

Supreme Court Rule 4-8.4(c) & (d) states:

> It is professional misconduct for a lawyer to:
>
> * * *
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;

The Informant contends Mr. Carey violated these rules by his response to document request No. 25 directed to him and to Carey & Danis in Chrysler's lawsuit. Document request No. 25 requested production of:

> All documents which refer or relate to fee sharing or joint representation *agreement* with any other attorney(s) or law firm(s) concerning a client represented by Carey & Danis, L.L.C. (emphasis added).

Carey & Danis's attorney signed a joint response on behalf of the three defendants in Chrysler's lawsuit, Messrs. Carey and Danis and the Carey & Danis law firm, stating:

> With regard to matters in which Chrysler was a party, no such documents exist. Defendant never had a fee arrangement on the *Beam* case or any Chrysler matter, and Defendant has never received any fee derived from any matter related to Chrysler.

[Exhibit 236 at 236-2].

Informant contends that this response was false because it failed to identify (a) the Grossman letter [Exhibit 260]; (b) a January 9, 1996 letter by Mr. Deakle regarding fees [Exhibit 92]; (c) a July 1996 letter by David Danis regarding Chrysler fees [Exhibit 153]; or (d) a July 1996 letter by Mr. Phebus regarding Chrysler fees [Exhibit 104]. *See Informant's Brief* at 35.

Contrary to Informant's contentions, the response to document request No. 25 was factually accurate. Even if the Court were to determine that the response was for some reason not factually accurate, the Informant has failed to establish by a preponderance of the evidence that any factual inaccuracy was the result of conduct by Mr. Carey in violation of the foregoing rules.

Both common usage and Missouri law makes a distinction between an "agreement" and a "proposal." *The American Heritage Dictionary of the English Language* (Houghton Mifflin: 1978) defines "agreement" as:

> **1.** The act of agreeing. **2.** The state of being agreed; concord; harmony. **3.** An arrangement between parties regarding a method of action; covenant; treaty. **4.** *Law*. **a.** A properly executed and legally binding compact. **b.** The writing or document embodying this.…

Missouri law recognizes the difference between an agreement and discussions preliminary to an agreement: "The term 'mutuality of agreement' implies a mutuality of assent by the parties to the terms of the contract." *L. B. v. State Committee of Psychologists*, 912 S.W.2d 611, 617 (Mo. App. 1995). "Negotiations or preliminary steps towards a contract do not constitute a contract." *Gateway Exteriors, Inc. v. Suntide Homes, Inc.*, 882 S.W.2d 275, 279 (Mo. App. 1994). "There must have been, in addition to consideration, an offer and acceptance… An unsigned bid is no more than an offer to contract.… Without proof of mutual-

ity of agreement, plaintiff's evidence was insufficient to prove the existence of a valid oral contract." *White v. Pruiett*, 39 S.W.3d 857, 862 (Mo. App. 2001).

The evidence at the hearing establishes that Mr. Carey's response to document request No. 25 was factually accurate. There was *no* evidence that Carey & Danis reached any fee sharing *agreement* or any joint representation *agreement* with anyone in connection with any Chrysler matter. In addition, no document in evidence established any such purported agreement.

Mr. Carey testified that Carey & Danis never had an agreement relating to fee sharing or joint representation in a Chrysler ABS case. [Tr. 721-23]. There was no fee agreement between Carey & Danis and the Blumenfeld firm, David Danis, or any other person. [Tr. 705-06, 716-17]. David Danis confirmed that Carey & Danis were not going to share in any fees obtained in the Chrsyler ABS cases. [Tr. 581-83]. While there were *discussions* about whether the group would use future proceeds, if any, from the Chrysler ABS actions to pay some of Carey & Danis's legal fees in Chrysler's lawsuit against them, *no agreement was ever reached*. [Tr. 433, 579-80]. Mr. Carey testified: "It was something that we discussed, but it was never agreed upon and it kind of died on the vine. I never heard it mention[ed] again." [Tr. 759-60].

Mr. Carey also testified in his deposition in Chrysler's lawsuit:

Q: So, is it fair to say that that would have been your understanding of the situation in the Beam case at the time you were actively participating in the case, i.e., that Carey & Danis would share the fees equally with Danis Cooper?

A: No, it was never discussed.

* * *

Q: Why was it that you didn't seek to come to any agreement or arrangement as to the sharing of fees in the Beam litigation?

A: It's difficult to say what's going to happen in the litigation, what would be the involvement of the respective firms, and it's just something that never came up.

[*Carey Depo.* at 681-82].

An examination of the four documents cited by the Informant demonstrates that none of the documents shows a fee agreement in which Mr. Carey or Carey & Danis was to receive a fee in any Chrysler case.

A. The Grossman letter.

Mr. Carey did not author the Grossman letter, Exhibit 260. Nor did he participate in any discussions with Mr. Grossman. Mr. Carey did, however, testify about the Grossman letter at the hearing before the Panel:

Q. You're familiar, are you not, with a letter that Joey had sent to — the so-called Grossman letter?

A. Yes, I am.

Q. And you know there's a reference in that letter to the possibility of sharing legal fees, is that correct?

A. There is a proposal to share legal fees. There's no written agreement or arrangement that I'm aware of that ever existed.

[Tr. 723].

The Grossman letter stated in regard to the potential for joint representation and fee sharing in Chrysler ABS litigation:

> We have preliminarily discussed your suggestion of consolidating our cases and pursing the matter in the United States District Court for the District of New Jersey. Your suggestion has merit, and we are seriously entertaining the invitation.…
>
> Please provide us with a general analysis of what you anticipate our role in the litigation would be if we consolidated our case, the Mississippi case and join the other plaintiffs we have lined up in other states to your suit. It is my suggestion that we negotiate some percentage of attorney fee allocation at the onset to protect both of our interests… We would be interested to hear your proposed allocation if we consent to consolidation.

[Exhibit 260].

The Grossman letter is simply not a document referring or relating to a fee sharing or joint representation agreement, as opposed to a proposal. Chrysler had the ability to ask in discovery for documents relating to fee proposals which never concluded in an agreement, but chose not to do so. Mr. Carey's document response is not inaccurate for not disclosing the Grossman letter.

B. The January 9, 1996 letter by Mr. Deakle

The Informant contends that Exhibit 92, a letter written by Mr. Deakle, a member of the group, dated January 9, 1996, should have been disclosed or produced in response to document request No. 25. The letter, which clearly references a fee split in a Chrysler litigation in New York (the litigation was actually in New Jersey), is addressed to **Dan** Danis, Esq., of Carey & Danis. There is, of course, no Dan Danis — there is Joseph Danis of Carey & Danis and David Danis of Danis Cooper. The text of the letter makes it clear that it was directed to David Danis. The letter states, "you have arrived at an agreement with the New York counsel wherein your firm will be co-lead counsel in regard to this litigation…" [Exhibit 92]. The record establishes it was David Danis, not Joseph Danis, who reached an agreement to be co-counsel in the New Jersey litigation. [Tr. 555-58].

Because this letter does not reflect a fee agreement for *Carey & Danis* in a Chrysler case, it was not responsive to the document request, and Mr. Carey's discovery responses were not inaccurate for not disclosing the letter.

C. The July 16, 1996 letter by David Danis.

The Informant contends that Exhibit 153, a letter written by David Danis July 16, 1996, should have been disclosed or produced in response to document request No. 25. This letter, which was addressed to all of the members of the group *except for Messrs. Carey and Danis*, stated:

> Re: Chrysler Anti-Lock Brake Case
>
> Gentlemen:
>
> As you are aware, Chrysler Corporation has filed suit against Carey & Danis arising out of the Chrysler anti-lock brake litigation.…
>
> I have talked with Joe Phebus who I understand was going to talk with John Deakle regarding the matter of any expenses that are incurred by Carey & Danis in the defense of that action. We discussed that our group will agree that any such expenses will be applied as expenses to the Chrysler anti-lock brake case under our arrangement and division of fees and payment of expenses.
>
> Also, I would like to clarify our arrangement regarding the division of fees. As you know, the *Chrysler* case has primarily been worked on in our office by Richard Cooper over the last year who we had a fee-sharing arrangement with. He is not a part of our normal class action division of persons or fees.

> At the time that we were in Selma, we agreed to the *Chrysler* case becoming part of the overall package even though we had over a year's work in it. It was agreed that Richard would receive one full share which is 1/8 of the fee. Therefore, 3/8 of the fee will come to the St. Louis group, 1/8 to J. L. Chestnut, 2/8 to Deakle/Sims, and 2/8 to Phebus/ Campbell.…
>
> /s/ David O. Danis

[Exhibit 153].

There are two aspects of this letter which need to be discussed. The first is the notion that the lawyers prosecuting the Chrysler ABS case would use their fees in that case to cover Carey & Danis's expenses in Chrysler's lawsuit against them. As discussed earlier, the evidence was that while this notion was discussed, it never resulted in any agreement, and this document does not show otherwise.

The second aspect of the letter is the division of fees in the Chrysler ABS cases and, in particular, the allocation of 3/8 of the fee "to the St. Louis group." David Danis, the author of the letter, testified that "the St. Louis group" referenced in his letter referred only to himself and Mr. Cooper, and did not include Carey & Danis. David Danis was personally to receive 2/8th of the fee. [Tr. 582-83]. As the letter expresses, his demand for a greater share was reasonable,

given that Danis Cooper "had over a year's work in" the Chrysler ABS case before the case became part of the group's "overall package." [Exhibit 153].[10]

Finally, there was no evidence that Mr. Carey ever saw this letter or knew of its contents prior to its production in discovery during Chrysler's lawsuit, and the Informant does not suggest that he had any such knowledge. [Tr. 586]. Without knowledge of the letter, the absence of any reference to the letter in the discovery responses could not cause that response to be made in violation of the Supreme Court Rules.

D. The July 16, 1996 letter by Mr. Phebus.

The Informant contends that Exhibit 104, a letter written by Mr. Phebus July 16, 1996 in response to David Danis's letter of that date, should have been disclosed or produced in response to document request No. 25. The letter stated:

RE: Chrysler ABS

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[10] Even if the Court were to conclude the David Danis was aggressive in seeking a double-share of the fees for himself, his aggressiveness *vis-a-vis* the group does not support the conclusion that a portion of his share of the fee was secretly intended for Carey & Danis. Even if David Danis had a secret intent to gift a portion of his share to his son or his son's law firm, there was no *agreement* that Carey & Danis would share in Chrysler ABS fees.

> This is in follow up to David Danis' Chrysler anti-lock brake letter of July 16. I have not gotten around to talking with John or others of the group concerning this. However, from discussing the matter with Carey, Danis and Danis, I believe it is quite reasonable and appropriate that we agree that the expenses that are incurred in defense of the Chrysler claim will be applied as non-client expenses to any recovery we make from Chrysler.…

[Exhibit 104]. This letter was addressed to the group, including Carey & Danis, although Carey & Danis's "address" had neither a mail address nor a fax number associated with it. *Id.* With this letter, as with the other three documents, there is no evidence of *an agreement* — the conversation is still in the proposal stage. As noted previously, the proposal "died on the vine" and never became an agreement. Thus, because this letter does not reflect a fee *agreement* for Carey & Danis in a Chrysler case, it was not responsive to the document request, and Mr. Carey's discovery responses were not inaccurate for not disclosing the letter.

In summary, these four documents were not responsive to the document request, and therefore the response to the request for production (to the extent the documents were known to Mr. Carey, which is not established), was not misleading or dishonest in violation of Rule 4-3.4(a) & (d) or Rule 4-8.4(c) & (d).

IV. Although Mr. Carey's response to interrogatory No. 2 was not completely accurate due to his failure to disclose the meetings with the Blumenfeld lawyers, he was not in violation of Rule 4-3.4(a) & (d) or Rule 4-8.4(c) & (d), because Mr. Carey honestly did not understand the interrogatory to be seeking information about pre-suit communications and the Blumenfeld meetings took place before any Chrysler ABS suits were filed.

Interrogatory No. 2 to Mr. Carey asked him:

> State whether you communicated with anyone (other than Dennis Beam and Joseph Danis or any employee of Carey & Danis, L.L.C.) *regarding the subject matter* of the St. Louis, Hattiesburg, or New Jersey class actions referenced in paragraphs 1, 19, and 21 of the Complaint, or the class action suit *Betty Brown, et al. v. Chrysler Corp., et al.*, filed in the Circuit Court of Sumter County, Alabama. For each such communication, state the following:
>
> a. the time and place at which it was made;
>
> b. the name and address of each person who was a party to such communications;
>
> c. the substance of the communication, providing as much detail as possible;

d. identification of any document or recording relating to such communication.

[Exhibit 251 (emphasis added)]. Mr. Carey responded:

a. From time to time, the exact dates are unknown;

b. David Danis, 8182 Maryland Avenue, St. Louis, Missouri 63105;

c. These were casual conversations that took place, over lunch, as to what was going on with the New Jersey case;

d. No such documents exist.

[Exhibit 251].

The Panel found Mr. Carey's answer to interrogatory No. 2 to be false because it failed to disclose meetings held with the Blumenfeld lawyers prior to the filing of *Beam*.[11]

[11] Although the Informant contends that the interrogatory answer was misleading because it did not disclose any documents or recordings relating to the conversations with the Blumenfeld lawyers, this contention cannot stand because there is no evidence that any such documents or recordings ever existed. Thus, the interrogatory answer was not incomplete due to the absence of an identification of such documents.

It is important to recognize that interrogatory No. 2 was poorly drafted and is exceedingly vague and unclear.[12] It directs Mr. Carey to "[s]tate whether you communicated with anyone .... *regarding the subject matter of*" the four specified lawsuits (emphasis added).

What does this request mean? What is the "subject matter" of the four named lawsuits — is it Chrysler ABS brakes, ABS brake defects generally, the specific claims of the named plaintiffs only, or anything mentioning the word "Chrysler"? Does the interrogatory mean disclose conversations in which the four lawsuits were mentioned, even if the "subject matter" of the lawsuits (whatever that may be) was not discussed, or, alternatively, does it mean do *not* disclose

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[12] Interrogatory No. 2 was one of approximately 150 interrogatories and document requests promulgated by Chrysler and directed to Messrs. Carey and Danis during Chrysler's lawsuit. The number of discovery requests were excessive, and the quality of the drafting was poor. Messrs. Carey and Danis were also deposed on multiple occasions. It is significant that, given the volume of discovery directed toward them, Chrysler questions the accuracy of only one interrogatory and two document requests, all of which can be reasonably read differently than how Chrysler and the Informant would have the Court read them.

conversations in which the four lawsuits are mentioned unless information regarding ABS brake defects is specifically discussed? And what about conversations relating to Chrysler ABS brakes but specifically about some case other than the four cases specified?

Although these multiple positions are all radically inconsistent with each other, the Informant essentially adopts all of them, on an *ad hoc* basis, as needed to justify a purported requirement to disclose one or another of the so-called 42 documents.

Setting aside for the moment the difficult question of what the interrogatory can reasonably be understood to mean, Mr. Carey testified before the Panel that he thought his answer to interrogatory No. 2 was correct and honest notwithstanding that he did not mention the Blumenfeld meeting in his answer. Mr. Carey testified that he did not mention the meeting with the Blumenfeld lawyers in his answer to the interrogatory because that meeting took place *before Beam* (or any of the four identified lawsuits) was filed. "That would have been pre-suit…. It was certainly before the *Beam* lawsuit was filed." [Tr. 729].

Mr. Carey honestly understood, rightly or wrongly, that the interrogatory was seeking information concerning communications about the four lawsuits specifically mentioned, and that such a communication could not take place until one of the specifically named lawsuits came into existence, *i.e.*, until after the

relevant lawsuit was filed. Mr. Carey simply did not realize that the interrogatory was intended to be directed toward the discovery of communications regarding not just the four specifically mentioned lawsuits but also possible lawsuits which had not yet been filed at the time of the communications. [Tr. 727-29].

As evidence that Mr. Carey had no intent to conceal his conversations with the Blumenfeld lawyers, he testified at length about the Blumenfeld meeting during his first deposition taken in Chrysler's lawsuit. This first deposition took place well *before* Chrysler obtained the 42 documents from its discovery from the non-party witnesses. [Tr. 729-32; *see Carey Depo.* at 742-43, 771-79, 781-82, 789 (detailing communications with lawyers with the Blumenfeld firm)].

Thus, even if the Court determines that it would have read the interrogatory to have included communications concerning possible future lawsuits, the preponderance of the evidence does not support a conclusion that Mr. Carey was "unlawfully obstruct[ing]" Chrysler's discovery, or that he failed to make a "reasonably diligent effort to comply" with Chrysler's discovery requests, or that he was being dishonest or deceitful, or that his honest failure to realize what was intended by this very vague interrogatory was "prejudicial to the administration of justice." The interrogatories were poorly written; there were 150 interrogatories and document requests in total; and Mr. Carey fully disclosed the Blumen-

feld meetings and conversations when, in his deposition, he was asked a question about any communications he might have had in connection with *Beam*.

Finally, both the Informant and the Panel during the course of the hearing placed heavy emphasis on the fact that Mr. Carey never filed a supplemental answer to interrogatories disclosing the Blumenfeld meetings. As noted previously, Mr. Carey's lawyer, Mr. Wuestling, testified that he did not believe that it was necessary to file a supplemental answer because, in his view, the deposition testimony served to supplement the interrogatory answers. [Tr. 857-58]. Under the Federal Rules of Civil Procedure, Mr. Wuestling's view was correct. Rule 26(e)(2) states:

> **Supplementation of … Responses.** A party who has … responded to a request for discovery with a … response is under a duty to supplement or correct the … response to include information thereafter acquired if ordered by the court or in the following circumstances: …
>
> (2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and *if the additional or corrective information has not*

> *otherwise been made known to the other parties during the discovery process* or in writing.

Fed.R.Civ.P. 26(e)(2) (emphasis added).

Consequently, given that Mr. Carey's own deposition testimony supplemented any omissions in his discovery responses, and given Mr. Carey's honest belief that this (poorly drafted) interrogatory did not seek the information he did not disclose, the Court should find that Mr. Carey did not violate the rules by failing to disclose the Blumenfeld meeting in his interrogatory answer. Alternatively, the Court should determine that any violation of the rules which it may find was unintentional and careless, and that the appropriate discipline should be no more severe than a public reprimand, without a suspension of Mr. Carey's law license.

V. Mr. Carey's response to interrogatory No. 2 was accurate, and therefore not in violation of Rule 4-3.4(a) & (d) or Rule 4-8.4(c) & (d), notwithstanding Mr. Carey's failure to disclose the Danises' meeting and correspondence with Grossman, because he was not a party to that meeting or that correspondence.

The Panel found Mr. Carey's answer to interrogatory No. 2 to be false because it failed to disclose the meeting with Mr. Grossman in New York City

and failed to disclose documents relating to that meeting, *i.e.*, the Grossman letter.

Interrogatory No. 2 states, "State whether *you* communicated with anyone…" (emphasis added). Here the evidence is clear: Mr. Carey was not a party to any of the communications with Mr. Grossman. Mr. Danis is the one who had those communications. Because Mr. Carey did not have any communication with Mr. Grossman, and because the interrogatory is limited to communications that Mr. Carey personally had, Mr. Carey's interrogatory answer was not incomplete due to the absence of any disclosure of Mr. Danis's communications with Mr. Grossman. (Indeed, if Mr. Carey had responded that he had communicated with Mr. Grossman, it would have been a false answer.)

Similarly, because the interrogatory only sought the identification of documents "relating to such communication," Mr. Carey was not obliged to disclose the Grossman letter.[13]

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[13] The Court should note, as previously discussed, that Mr. Carey did not recall the Grossman letter at the time he responded to the interrogatory, and, further, that the Grossman letter had been delivered to Carey & Danis's lawyer, Mr. Basso, and made available for review by Chrysler's lawyers, at the very beginning of Chrysler's lawsuit.

VI. Mr. Carey's response to interrogatory No. 2 was accurate, and therefore not in violation of Rule 4-3.4(a) & (d) or Rule 4-8.4(c) & (d), notwithstanding Mr. Carey's failure to disclose a lunch conversation with Mr. Paletta, because the conversation did not relate to the "subject matter of" any Chrysler ABS lawsuit and was so insignificant that a reasonable person would not disclose it in response to the interrogatory.

Informant contends, albeit briefly, that Mr. Carey's answer to interrogatory No. 2 was false because it failed to disclose a casual lunch conversation Mr. Carey once had with Mr. Paletta in which Mr. Carey apparently mentioned that J. L. Chestnut (one of the lawyers in the group) had filed suit against Chrysler in Alabama. *Informant's Brief* at 34; *see also id.* at 19-20.

An examination of Mr. Paletta's testimony at the hearing makes it abundantly clear that this lunch time conversation was so insignificant and casual that a reasonable person in Mr. Carey's place would most likely not recall the conversation, and that if they did recall the conversation, they would not believe that its disclosure would be responsive to an interrogatory seeking "communicat[ions] with anyone ... regarding the subject matter of ... the class action suit *Betty Brown*..." [*See* Tr. 305-09 (cross-examination of Mr. Paletta)].

The insignificance of this conversation is borne out both by the lack of importance given it by the Informant in its brief and by the fact that it did not even rate a mention in the Panel's decision. The fact that this conversation was not disclosed in the interrogatory answer is a complete red-herring, and should not be deemed a basis for any sanction or discipline whatsoever.

VII. Mr. Carey's response to interrogatory No. 2 and to Document request No. 12 is not in violation of Rule 4-3.4(a) & (d) or Rule 4-8.4(c) & (d), because it was made honestly after reasonable inquiry, notwithstanding Mr. Carey's failure to disclose the so-called 42 documents, in that (a) the evidence does not establish that Mr. Carey received or ever knew about the great majority of the 42 documents, which were directed to be delivered to Danis Cooper and not Carey & Danis, (b) many of the 42 documents were not responsive to either discovery request, and (c) almost without exception, the 42 documents were such innocuous and insignificant documents that, if seen by Mr. Carey (which they were not), they would have been immediately forgotten.

Informant contends that the so-called 42 documents should have been disclosed and produced in response to subpart (d) of interrogatory No. 2, and

document request No. 12, which paralleled the document identification request found in interrogatory No. 2. Document request No. 12 requested production of:

> Any correspondence, memoranda, or notes *relating to the subject matter* of the St. Louis, Hattiesburg, or New Jersey class actions referenced in paragraphs 17, 19, and 21 of the Complaint, or the class action suit *Betty Brown, et al. v. Chrysler Corp., et al.* filed in the Circuit Court of Sumpter County, Alabama.

[Exhibit 235 at 235-3-4 (emphasis added)]. Carey & Danis's attorney signed a joint response on behalf of the three defendants in Chrysler's lawsuit, Messrs. Carey and Danis and the Carey & Danis law firm, stating: "No such documents are in the possession of Defendants." [Exhibit 235 at 235-3-4].

The Federal Rules of Civil Procedure govern discovery in federal courts. Rule 26(g)(2), F.R.Civ.P., specifies what a party is certifying when he or she signs a response to a discovery request:

> The signature of the attorney or party constitutes a certification that *to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry,* the … response … is: (A) consistent with these rules… (emphasis added).

In short, the standard is honesty, within the limits of the party's knowledge after reasonable inquiry. Neither the federal rules, nor this Court's

disciplinary rules, require perfection — what is required is honesty, disclosing what one actually knows, after a reasonable inquiry.

The evidence does not establish that Mr. Carey received or ever knew about the great majority of the 42 documents, which through established office procedure were delivered to Danis Cooper and not Carey & Danis. Moreover, there is still no evidence that any of the documents (other than the Grossman letter, which was in Mr. Basso's files, and Exhibit 94) were in Mr. Carey's possession, or even constructively in his possession.

As discussed in detail above, Carey & Danis decided not to be involved in the Chrysler ABS cases after Mr. Carey's conversation with Mr. Newman about the alleged conflict of interest. In an honest effort to comply with their commitment not to participate in the case, they directed that all faxes concerning Chrysler received at the fax machine which they shared with the Danis Cooper law firm should be delivered to Danis Cooper and not Carey & Danis. Carey & Danis put into place procedures to guarantee that they would not receive Chrysler ABS documents. This fact was confirmed by their own testimony; by the testimony of Mr. Carey's secretary, Ms. Hotop; by the testimony of David Danis; and by the deposition testimony of other attorneys in the group. The testimony was, in fact, unrebutted. Indeed, to find otherwise, the Court would have to conclude that both respondents, David Danis, Ms. Hotop, Mr. Phebus, and

Mr. Deakle all perjured themselves in their testimony in this matter, notwithstanding the fact that not one witness testified inconsistently with their testimony.

Thus, the evidence strongly supports the conclusion that very few of the 42 documents managed to make their way to Mr. Carey. Indeed, Mr. Carey did not recall receiving any of the 42 documents. [Tr. 422-46]. Informant has the burden of proving by the preponderance of the evidence that these documents were in the possession of Carey & Danis at the time their responses to the interrogatory and document request were filed. This burden Informant has not, and cannot, meet.[14]

[14] Mr. Carey was not required to supplement his response to the document request after the documents were obtained by Chrysler in discovery. Rule 26(e)(2), F.R.Civ.P., specifically provides that there is no duty to supplement if the additional information has been otherwise made known to the other parties during the discovery process. Chrysler learned about each of the 42 documents during the discovery process, and therefore Mr. Carey was not obliged to supplement his response.

A. Many of the 42 documents were not responsive to the discovery requests because they did not refer to any Chrysler ABS case, but instead referred to Chrysler paint cases or to non-Chrysler cases, all of which were outside the scope of the discovery requests.

The notion that all of the 42 documents, if known to Mr. Carey, would be responsive to Chrysler's discovery, although repeated incessantly like a mantra, is contradicted by an examination of the documents.

For example, the following documents contained no reference to the four specified Chrysler ABS cases or to the subject of defects in Chrysler ABS systems:

Exhibits 101, 105, 115, 117, 121, 123, 127, 128, 130, 131, 132 and 133 relate to *Olivia v. Chrysler.* This Texas case involved defective *paint* on Chrysler vehicles. None of Chrysler's discovery requests sought information about the paint cases, and therefore these documents were not responsive to any of Chrysler's discovery requests.[15]

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[15] Exhibits 121 and 123 are significant, and when read in conjunction support the conclusion that the nonproduction was innocent oversight rather than discovery abuse, because these documents support Carey & Danis's version

Exhibit 95 is a letter from Mr. Deakle to Hank Sanders (not a member of the group) dated June 7, 1996. Although this letter references a "Chrysler anti-lock brake client," it is in the context of the *Cox* case, a case apparently proposed to be filed in Green County, Alabama. The *Cox* case was not one of the four cases specified in the discovery requests, and therefore this document would not have been responsive to the discovery requests even if Mr. Carey knew of it.

Exhibits 96, 97, and 98, are all letters from Mr. Deakle dated June 14, 1996, concern the *Cox* lawsuit. Exhibit 100 is a letter from Mr. Phebus dated July 8, 1996, about the *Cox* case and other, non-Chrysler, cases. As with Exhibit 95, these documents were not responsive to Chrysler's discovery requests.

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of the events, and they would not gain in anyway from suppressing the documents. Exhibit 121 is a letter from Mr. Phebus dated October 25, 1996 relating to the Chrysler paint case, *Olivia*. In the letter, Mr. Phebus asks Mr. Carey if he would prepare a motion to remand and memorandum in support in federal court for *Olivia*. In Exhibit 123, Mr. Carey responds November 4, 1996, writing: "I have your letter requesting that we draft a remand. As you know, I am not going to be working on this file. If I can be of any assistance in anything else, please advise."

The four documents relating to potential fee agreements — Exhibits 92, 104, and 153, and the Grossman letter [Exhibit 260] discussed in detail above — also did not concern the "subject matter of" the four specified Chrysler ABS cases, and therefore were not responsive to interrogatory No. 2 or document request No. 12.

B. For many of the documents, it is unclear or ambiguous as to whether they would be responsive to the discovery requests even if known to Mr. Carey.

As noted previously, interrogatory No. 2 and document request No. 12 are both quite ambiguous. They do not clearly require identification and production of documents which merely mention the four specified Chrysler ABS cases — they only require identification and production of documents which relate to the *subject matter* of those four, specific lawsuits. Consequently, reasonable minds could disagree about whether the following documents would be responsive to the discovery requests even if known to Mr. Carey.

The following documents do not clearly refer to any of the four specified Chrysler ABS cases:

Exhibit 93, a letter from Mr. Deakle to Marvin Morris (not a member of the group) dated March 18, 1996 with a copy to Joe Danis referring to "Chrysler Minivans." It is not apparent on its face whether this letter relates to Chrysler

ABS — neither ABS nor brakes nor anti-lock braking is mentioned anywhere in the letter.

Exhibit 109, a letter from Mr. Deakle to Mr. Phebus dated August 7, 1996. It is unclear on its face whether the letter relates in any way to the four Chrysler ABS cases. Moreover, it does not concern the subject matter of any ABS case; rather, it asks a procedural question. The letter states: "I have your motion to stay in the Chin case, as well as your motion to dismiss the MDL. Both of these, as usual, look just fine. Do you think there is a requirement to file a brief in the New Jersey federal court? If so, you may want to 'cookie cutter' from the brief which Bob Crouch prepared and which we filed in the Ford ignition fire case in the same federal district in New Jersey."

Exhibit 110, a letter from Mr. Phebus to all of the members of the group including Carey & Danis relating to "Chrysler ABS." It is unclear whether the letter is addressing "the subject matter" of any of the four specified case, as it concerns "the MDL proceedings," which could be a separate case, and procedural matters only.

Exhibit 111, and apparent fax cover sheet from Mr. Deakle, addressed to "The Group", dated August 13, 1996. Although the reference line is "Chrysler Brake," there is nothing attached to the cover sheet and it does not indicate what case it concerns or what subject matter was discussed.

Exhibit 122 is a letter from Mr. Danis to Mr. Phebus indicating that NHTSA had sent Mr. Phebus File EA95-016. While the letter concerns ABS cases, no Chrysler case is mentioned in the letter, and the group was involved in ABS litigation against other automobile manufacturers.

Exhibit 126 is a letter from Mr. Phebus to William Rosenbluth (not a member of the group), with copies to the "group" referring to Chrysler ABS. The letter is forwarding copies of discovery, but does not appear to relate to any of the four specified ABS cases.

Exhibit 129 is a letter from Mr. Deakle to Mr. Chestnut forwarding papers relating to the *pro hac vice* admission of Nancy Glidden. It does not appear on its face to refer to any of the Chrysler ABS cases.

The following documents mention one or more of the four Chrysler ABS cases by name, but state nothing about the *subject matter* of those cases:

Exhibit 99 is a letter from Mr. Deakle to all of the members of the group, including Carey & Danis but not Danis Cooper, dated July 3, 1996, referencing the *Brown* case, one of the specified Chrysler ABS cases. The body of the letter states, in its entirety: "Faxed herewith is a letter I have written to the Circuit Clerk in Sumter County transmitting the personally served process upon Chrysler and Allied Signal in the GM brake case."

Exhibit 102 is a letter from Mr. Phebus to all of the members of the group, including David Danis and Carey & Danis, dated July 16, 1996, regarding "Chrysler ABS," stating in its entirety: "We desperately need an attorney in New Jersey who can appear for us in the Chrysler ABS case and file a motion to stay. If anyone can do anything in that regard, please proceed to do so immediately."

Exhibit 113 is a letter from Mr. Danis to members of the group regarding Chrysler. The letter states (emphasis added):

> I just happened to see a copy of the remand order entered in *your* Chrysler case. Congratulations. I know from my own experience in the past that justice has truly been served. Enclosed please find a copy of a Federal District Court in Florida's order ruling that a defendant pay for Rule 23 notification costs. I thought this may be of some interest to you.

The letter is simply a congratulatory letter that, while it mentioned a Chrysler case, does not discuss the subject matter of that case. There is, in any case, no evidence that Mr. Carey knew about this letter.

Exhibit 114 is a letter from Mr. Deakle to the group, including Carey & Danis but not Danis Cooper, concerning procedural matters in the *Brown* case.

Exhibit 125 is a letter from Mr. Deakle to the group, including Carey & Danis, which references Chrysler but does not relate to the ABS litigation.

C. Several of the documents were not created until after the discover responses were served.

Chrysler's interrogatories and document requests were responded to October 28, 1996. Exhibits 122 through 126 are all dated after the response date. The discovery responses, therefore, could not include reference to these documents even if they were responsive.

D. There were nine documents produced by the group members that appear to have been probably responsive to Chrysler's discovery requests if in the possession or control of Mr. Carey at the time of the discovery requests

The remaining nine documents, or less than one-quarter of the documents asserted by Informant, are the only documents in the group which appear likely to have been responsive to the document request at the time the response was made, assuming that they were in the possession of Mr. Carey or Carey & Danis. These documents were marked as Informant's exhibits 94, 103, 106, 112, 116, 118, 119, 120, and 124 at the hearing. As noted previously, however, Carey & Danis had implemented office procedures to insure that all such documents would be delivered solely to Danis Cooper prior to the date Chrysler sued Mr. Carey.

There is, however, one document which should be discussed. This document, Exhibit 94, is the most significant document from Mr. Carey's

perspective. This document is a memorandum written by John Carey on March 28, 1996, the day after Chrysler filed its suit against him. It records a telephone call Mr. Carey received from Paul Sheridan, a former Chrysler employee. The memorandum states:

> On Wednesday, March 27, 1996, at approximately 4:00 p.m., David Danis, Joseph Danis and myself received a telephone call from Paul Sheridan. Mr. Sheridan had read about Chrysler's frivolous suit against us in the local Detroit newspapers, and that was the reason for his call to us.
>
> Apparently, Mr. Sheridan worked in the Minivan Operations Group for 10 and 1/2 years at Chrsyler, and for a period of time was Chairman of the Minivan Safety Committee. According to Mr. Sheridan, he is aware of numerous safety problems and issues regarding the Chrysler minivan, and has been retained by attorneys in other cases against Chrysler.
>
> He indicated that Chrysler has sued him and taken all kinds of outrageous actions. At the very least, Sheridan should be useful to us in two respects: (1) as an expert witness in the New Jersey ABS case regarding defects in the Chrysler's anti-lock braking system; and (2) as

> a fact witness in Chrysler's suit against us regarding Chrysler's outrageous and abusive practices.…

[Exhibit 94].

Mr. Carey testified about this document at the hearing before the Panel.

> Q: Well, let me preface this, this is regarding a man named Paul Sheridan, the man who contacted you?
>
> A: Yes. *The day after Chrysler filed suit against us*, a gentleman by the name of Paul Sheridan contacted us out of the blue, and this is the file memorandum I prepared in — for Chrysler v. Carey and Danis file following that conversation.
>
> * * *
>
> Q: Now, at this time you're maintaining you have no connection to any Chrysler antilock brake case; is that true?
>
> A: We did not. And that's why I copied David Danis on this memo. He was involved in the New Jersey case at the time.

[Tr. 423-24 (emphasis added)].

The record is silent as to why this document was not produced in discovery. Mr. Carey suggests that the best explanation for the non-production of this document is innocent oversight — it was written immediately after Mr. Carey was sued; he undoubtedly was in a state of emotional turmoil; there

is no evidence that the memo was properly filed and there is no suggestion that Mr. Carey ever followed up on this memo by contacting Mr. Sheridan to serve as a witness in Chrysler's lawsuit.

In the overall context of the case, with 150 written discovery requests, numerous objections as to attorney-client privilege and work-product immunity; the change in counsel at the beginning and the end of the lawsuit; it appears that the memorandum was simply forgotten and then overlooked, an innocent omission in the context of an overwhelming barrage of discovery.

The remaining eight documents are substantially less significant than Mr. Carey's memorandum. The Informant has failed to establish by a preponderance of the evidence that Mr. Carey received these documents, or had them in his possession or control at the time he was served with the interrogatory and the document request or at the time he provided his responses to that written discovery.

Exhibit 103 is a letter from Mr. Phebus to Courtney Morgan (not a member of the group) dated July 16, 1996. The letter relates to "Paul Sheridan," and states, "We are among class counsel in a case where there has been a national certification entered as to Chrysler in regard to ABS braking.... We understand that Mr. Sheridan may be knowledgeable concerning the Chrysler ABS problems. If he is in a position to work with us as an expert, we would like to do so." The

letter was copied to all of the members of the group, including Carey & Danis but not Danis Cooper.

Exhibit 106 is a letter from Mr. Phebus to Messrs. Chestnut and Sanders dated July 31, 1996 relating to the *Brown* case. The letter indicates it was copied to the remaining members of the group, including Carey & Danis but not Danis Cooper. It appears to relate to the "subject matter" of the suit because it concerns whether a particular named plaintiff still owned her vehicle.

Exhibit 112 is a letter by Mr. Deakle to the group, including Carey & Danis but not Danis Cooper, relating to *Brown*. Although concerned with procedural matters rather than the subject matter of the suit as such, because of the detail contained in the letter, a reasonable person would likely consider it to be responsive to the discovery requests if one knew about it.

Exhibit 116 is a three-page letter from Mr. Phebus to Messrs. Deakle and Chestnut, with copies to all group members, updating the status of all class action cases. There are three brief references to Chrysler ABS matters within the letter.

Exhibit 118 is a letter from Mr. Phebus to Mr. Danis and Chris Horn (an attorney in Mr. Phebus's office) regarding *Brown* dated September 10, 1996, stating: "Enclosed are Alabama documents for your background. I will be needing a lot of help from you in this matter."

Exhibit 119 is a letter to all group members including Carey & Danis. The letter contains one sentence mentioning Chrysler ABS systems.

Exhibit 120 is a letter from Mr. Phebus to the group, including Carey & Danis, relating to the subject matter of the Chrysler ABS litigation, although it does not mention any of the four specified cases by name.

Exhibit 124 is a letter from Mr. Phebus to the group, including Carey & Danis, regarding Chrysler ABS cases.

VIII. Under the totality of the facts and the circumstances of this case, the proper discipline, if any, to be imposed on Mr. Carey is a public reprimand without suspension of his law license.

"The fundamental purpose of an attorney disciplinary proceeding is to protect the public and maintain the integrity of the legal profession." *In re Snyder*, 35 S.W.3d 380, 384 (Mo. banc 2001). "It is proper to consider mitigating factors, including the attorney's previous record, when determining the appropriate discipline." *Id.*

A key factor supporting the imposition of a suspension of an attorney's license is that the attorney knowingly violates his professional duty. *Snyder*, 35 S.W.2d at 385. In contrast, where an attorney has merely been negligent, "reprimand is the most appropriate sanction." *Accord In re Weier*, 994 S.W.2d 554, 558-59 (Mo banc 1999). "This is a general standard and applies absent aggra-

vating and mitigating circumstances." *In re McBride*, 938 S.W.2d 905, 909 (Mo. banc 1997).

A good reputation, an absence of any prior history or subsequent history of wrongdoing, and full cooperation with and disclosure to the disciplinary authorities are also all mitigating factors to be considered in determining the proper discipline. *Weier*, 994 S.W.2d at 558-59.

Here there are numerous mitigating factors and no aggravating ones.

Per the testimony of Mr. Wells and Mr. Fitzsimmons, two of the most highly respected trial lawyers in St. Louis, Mr. Carey is of upstanding character, with an excellent reputation for honesty and truthfulness. Mr. Wells' testimony is of particular weight. As the head of the litigation department at Thompson & Mitchell, he supervised numerous lawyers including Mr. Carey, who he described as "one of our bright shining stars" at Thompson & Mitchell. [Tr. 778].

Mr. Carey's alleged misconduct occurred not in his role as a lawyer, but as a client embroiled in a massive, frightening and acrimonious lawsuit. Many of the failures in discovery directly resulted from the omissions of his attorneys: the Grossman letter was never produced because Mr. Basso forgot to pass it on to Mr. Wuestling; the discovery responses were never supplemented because Mr. Wuestling forgot to get around to it; the district court imposed sanctions because Mr. Basso gave the court repeated incorrect and inconsistent explan-

ations for the Grossman letter and failed to make a clear and timely request for an evidentiary hearing.

Mr. Carey's professional history pre- and post-Chrysler's lawsuit has been without blemish, and the Informant concedes that he does not pose a threat to the public. He has fully cooperated with the disciplinary authorities of both states in all respects, including agreeing to participate in a joint Missouri-Illinois hearing which effectively waived his right to confidentiality in the Missouri proceedings. There is no suggestion that he has not been forthcoming in his testimony in these proceedings.

Mr. Carey has been involved in providing *pro bono* legal services on a regular basis, and is the primary support of his family, which includes three children.

Finally, Mr. Carey has already been subject to severe sanctions, far beyond those normally experienced by litigants, through the devastating payment of his share of the $854,000 judgment entered in Chrysler's lawsuit and by the destruction of his personal and professional reputation throughout the legal community and the public generally as a result of numerous articles appearing in *The Wall Street Journal, USA Today, The Post-Dispatch*, and other local and national publications.

Mr. Carey was careless in part in his responses to Chrysler's discovery, due to his possible misinterpretation of Chrysler's poorly drafted discovery requests. His carelessness was magnified by the errors of his lawyers. He never willfully or intentionally mislead Chrysler in discovery, as established by his very complete answers to Chrysler's questions in his deposition, where he detailed many of the communications not included in his interrogatory answer.

Under these facts and circumstances, if discipline is to be imposed, it should be in the form of a public reprimand only, without suspension of Mr. Carey's law license.

CONCLUSION

The Court should find that Mr. Carey did not engage in a conflict of interest by representing a client against a former client in a matter substantially related to the former representation.

The Court should find that the great majority of the discovery complaints asserted by the Informant are without merit, and that Mr. Carey's discovery responses were for the most part completely accurate, and that to the extent that they were inaccurate, the inaccuracy was the result of honest misunderstanding, oversight or mistake.

The Court should find that a suspension of Mr. Carey's law license is not required to satisfy the purposes of the attorney discipline process, or to protect

the public, or to maintain the integrity of the legal profession, but that all of these goals could be satisfied by a discipline no more severe than a public reprimand.

Respectfully submitted,

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