IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
JOHN J. CAREY,	**)**	**Supreme Court #84189**
	)	
Respondent.	**)**	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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ATTORNEYS FOR INFORMANT

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STATEMENT OF JURISDICTION

Jurisdiction over this attorney discipline matter is established by Article 5, section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 1994.

STATEMENT OF FACTS

Disciplinary Case

A three-count information was filed against Respondents in July of 2000. Count I alleged professional misconduct by violation of the conflict of interest rule (4-1.9(a)), Count II alleged professional misconduct by violation of the client confidences rule (4-1.6(a)), and Count III alleged professional misconduct by violation of the rule against making false statements of material fact or law to a tribunal (4-3.3(a)(1)), engaging in conduct involving dishonesty, misrepresentation, and deceit (4-8.4(c)), making false statements of material fact to third parties (4-4.1(a)), concealing evidence (4-3.4(a)), failing to comply with a legally proper discovery request (4-3.4(d)), and conduct prejudicial to the administration of justice (4-8.4(d)).[1]

The hearing was conducted on March 19, 20, and 21, 2001, with closing arguments made on August 7, 2001. The Disciplinary Hearing Panel issued its decision on November 8, 2001, concluding Respondents intentionally and falsely answered discovery in Chrysler's case against them in violation of Rules 4-3.4(a)(d) and 4-

[1] Illinois attorney disciplinary authorities charged Respondents with analogous violations of the Illinois ethics rules. The case against Respondents was tried concurrently, by stipulation of the parties, before Missouri and Illinois hearing panels.

8.4(c)(d).[2] The Disciplinary Hearing Panel recommended an indefinite suspension for each Respondent, with leave to apply for reinstatement after six months.[3]

Thompson & Mitchell Associates

Respondent John Carey was admitted to Missouri's Bar in 1987 and went to work as an associate at Thompson & Mitchell in August of that year. **T.** 680; **Ex.** 87-1, 2.[4] Mr. Carey performed work for many clients and partners while at Thompson & Mitchell, including a partner named Charles Newman. **T.** 680-681. Mr. Newman had represented Chrysler Corporation since 1974. **T.** 82. Mr. Newman and Thompson & Mitchell were Chrysler's main outside counsel for consumer product class action litigation. **T.** 345. From 1992 to 1995, Carey assisted Mr. Newman in defending Chrysler against consumer

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[2] While Missouri's Hearing Panel did not find violations of the conflict of interest or confidentiality rules, the Illinois Panel concluded Respondents did violate the conflict of interest rule. Both states' Panels concluded Respondents had violated the rules against concealing evidence and not complying with discovery requests.

[3] The Illinois Hearing Board recommended the same sanction. The Illinois disciplinary case is currently pending before the Review Board of the Illinois Attorney Registration and Disciplinary Commission, an intermediate body that reviews disciplinary cases before filing in the Illinois Supreme Court.

[4] Many of the exhibits bear multiple identifying stickers. The stickers marked "ADM. GRP. EX" or "ADM. EX" are the ones to which citations are made in this brief.

class action litigation. **T.** 88, 90-91; **Ex.** 1. From January of 1992 through December of 1995, Mr. Carey reported working 1,314.6 hours for Chrysler. **Ex.** 1-1; **T.** 88.

In the course of his work with Mr. Newman and for the client Chrysler, Mr. Carey performed many legal tasks, including legal research, **Exs.** 3-1, 5, 19, 52, 59; participating in conference calls and communicating directly with Chrysler's in-house counsel, **Exs.** 4, 10, 13, 18, 29, 31, 32, 33, 40, 58; **T.** 93, 97-98, 100, 222, 386; and interviewing and assessing potential expert witnesses. **Exs.** 15, 16, 17, 18, 20, 21, 22. Mr. Carey prepared discovery responses for Chrysler, e.g., **Exs.** 66, 67, 68, 69, 70; and drafted pleadings on the corporation's behalf. E.g., **T.** 134; **Ex.** 168, 185. Mr. Carey assessed Chrysler's potential liability in pending litigation for the company. **Ex.** 10. He met Jim Tracy, one of Chrysler's in-house safety engineers, who testified for Chrysler as an expert witness. **T.** 147, 172, 198-199, 214, 216-217, 684-685. Mr. Carey outlined the topics that a Chrysler expert should cover on a class certification issue. **Ex.** 25. Mr. Carey detailed the work he performed for Chrysler in his billing records, which are found in Exhibit 1.

Respondent Joseph Danis was admitted to Missouri's Bar in 1993 and was hired as an associate at Thompson & Mitchell the same year. **T.** 800; **Ex.** 87-2, 3. Mr. Carey acted as Danis' mentor, both during Danis' summer internship at Thompson & Mitchell and when he was a new associate. **Exs.** 162, 163. Mr. Danis also assisted Mr. Newman in the defense of Chrysler. **T.** 94. Danis, as a lower level associate, sat in on telephone conference calls with Chrysler's in-house counsel and performed legal research. **T.** 94, 802-803, 833. From January of 1992 through December of 1995, Mr. Danis reported

working 513.5 hours for Chrysler. **Ex.** 1-2. Mr. Danis' description of the work he performed for Chrysler can be found in his billing records, which are contained in Exhibit 1.

Mr. Newman's practice was to circulate all information that came to him on a client's matter to everyone working on his litigation team. **T.** 84. Chrysler was aware that Mr. Newman followed this practice and therefore expected loyalty from and preservation of its confidences by everyone on the team. **T.** 358. Respondents were carbon copied on correspondence, memoranda, and other information relating to Thompson & Mitchell's representation of Chrysler. **Exs.** 6, 9, 51, 56, 57, 80; **T.** 228, 834.

Respondents had access to information about Chrysler kept in Thompson & Mitchell's Chrysler room, **T.** 94-95, and in the firm's computer system. **T.** 104-105. Chrysler gave its outside counsel, including Respondents, access to all the information it had related to the representation. **T.** 242, 246. Respondents were aware of how Chrysler set up and maintained its document and data files. **T.** 174, 205, 224. Respondents would have learned about Chrysler's testing practices and its decision-making processes. **T.** 226. Respondents would have become very familiar with Chrysler's settlement strategies. **T.** 353-354; **Exs.** 35, 62, 180. Corporations do not all defend litigation and approach settlement in the same way; Chrysler's methodologies and approach to settlement were unique. **T.** 353-354, 356, 403.

The plaintiffs' legal theories in a consumer class action produce defect case filed while an NHTSA investigation is ongoing are the same regardless of the nature of the defect. **T.** 141-142, 209-210. The defense strategies and legal theories in such cases are

virtually identical, likely involving the same or similar issues, witnesses, and sources of information, regardless of the nature of the specific defect. **T.** 153-154, 234, 244, 352-353, 362, 379, 398.

As Charles Newman's primary associate, Respondent Carey helped formulate Chrysler's overall defense to consumer class actions pending concurrently with National Highway Traffic Safety Administration (hereinafter NHTSA) investigations. **T.** 91, 157, 199, 223, 227, 234-235, 376-377. After extensive discussions among Mr. Carey, Mr. Newman, and William McLellan, Chrysler's in-house counsel, a chart, or matrix, of considerations for Chrysler and its legal counsel to follow in defending consumer class actions filed concurrently with NHTSA investigations was created. **Ex.** 62. Chrysler considered the chart a blueprint Chrysler would follow in defending a class action product defect suit pending concurrently with an NHTSA investigation. **T.** 159-161, 231-235, 376-377. The document provided a road map for the kind of analysis Chrysler undertook in a consumer class action case. **T.** 352.

The specific product defects alleged in the consumer class action cases defended by Respondents for Chrysler were in Renault's heater cores, **T.** 91, and in Chrysler's minivan door latches. **T.** 680-681. The heater core cases are generally referred to in the record as Osley. See **T.** 90-91.

Respondents gave notice they were leaving Thompson & Mitchell in November of 1994. **T.** 130. Carey told Mr. Newman that he and Danis were going to open a workers' compensation and personal injury firm. **T.** 131. Respondents' last day at Thompson & Mitchell was January 13, 1995. **Exs.** A, B. Mr. Carey continued to work on Chrysler

matters until he left. **T.** 131. The head of Thompson & Mitchell's litigation department at the time, David Wells, considered Mr. Carey one of Thompson & Mitchell's bright shining stars. **T.** 778.

Respondents each took with them when they left documents generated during their tenure at Thompson & Mitchell. **T.** 736, 805. The documents Mr. Carey took with him appear in their entirety at Exhibit L. The documents Carey took with him relating only to Chrysler appear at Exhibit 76 and number 195 pages. The documents Mr. Danis took with him appear in their entirety at Exhibit K. The documents Mr. Danis took with him relating to Chrysler number 1,545 pages and appear at Exhibit 90. Neither Respondent asked Mr. Newman if they could take copies of documents relating to Chrysler with them when they left Thompson & Mitchell. **T.** 132. Mr. Wells does not consider it problematic that Respondents took the documents in Exs. K and L. **T.** 782.

Carey & Danis, L.L.C.

In January of 1995, Respondents opened their law practice as Carey & Danis, L.L.C. **Ex.** 258. Respondents' desks were located in the same office suite as that occupied by Danis, Cooper, Cavanagh & Hartweger, L.L.C. in Clayton. **T.** 546, 789-790. David Danis, then a principal in Danis, Cooper, Cavanagh & Hartweger, is Respondent Joseph Danis' father. **T.** 545. Carey & Danis, L.L.C., and Danis, Cooper, Cavanagh & Hartweger shared staff, a bookkeeper, a FAX machine, and unlocked but separate filing cabinets. **T.** 489, 738-739; **Ex.** 194F- 4 through 6. Mr. Carey, Mr. Cooper, and Mr.

Hartweger shared the same secretary. **T.** 790. David and Joseph Danis shared the same secretary. **T.** 834. The office suite comprised about 4,000 square feet. **T.** 546.

Carey & Danis, L.L.C. was involved in from forty to fifty plaintiffs' class action cases in the first year it was in business. **T.** 747; **Exs.** 73, 79. There is a substantial financial benefit to plaintiffs' lawyers in consumer class action litigation. **T.** 85-86. Neither Danis, Cooper, Cavanagh & Hartweger, nor a firm called Blumenfeld, Kaplan & Sandweiss, P. C. was known in St. Louis prior to January of 1995 as a firm having much class action experience, and neither firm in fact had much experience in class action litigation prior to January of 1995. **T.** 137, 547-548, 671. David Danis became interested in plaintiffs' consumer class action litigation after Respondents Carey and Danis moved into his firm's office suite in January of 1995. **T.** 548, 573-574.

On August 6, 1995, the St. Louis Post Dispatch ran an article on Chrysler anti-lock braking system (ABS) failures. **Ex.** Z. The NHTSA was conducting an investigation into the brake system. **Ex.** Z; **T.** 669. The next day, a Thompson & Mitchell secretary phoned Mr. Carey to ask if her brother-in-law, Dennis Beam, could contact Carey because he was having ABS problems with his Chrysler minivan. **T.** 698, 753. Dennis Beam thereafter called Respondent Carey. **T.** 753.

After talking to Mr. Beam, Mr. Carey discussed the potential case with David and Joseph Danis and Richard Cooper. **T.** 756. Richard Cooper was also a principal in Danis, Cooper, Cavanagh & Hartweger, L.L.C. **T.** 702. Mr. Carey spent an hour or two researching whether Carey & Danis would have a conflict of interest in bringing suit against Chrysler on Beam's behalf. **T.** 702-704, 753-756. Respondent Carey typically

does his research on-line. He would have typed in "substantially related" to see what came up. **T.** 754. Because there were no brake failure cases pending against Chrysler at the time Respondents worked for Thompson & Mitchell, **T.** 681, Mr. Carey concluded that he and Mr. Danis would not have a conflict of interest in bringing an ABS case against Chrysler, because he concluded the cases would not be "substantially related." **T.** 702-704, 753-756. Respondents nonetheless decided not to file an ABS class action case against Chrysler because Thompson & Mitchell attorneys and staff were referring business to them and Respondents did not want to embarrass the firm, and because Respondents were too busy at the time to take on a big case like the ABS case. **T.** 701.

Respondents Carey and Danis referred Dennis Beam to David Danis. **T.** 553. They felt another firm should be involved to help the Danis, Cooper firm with the case. **T.** 702. Thereafter, at Cardwell's Restaurant in Clayton, both Respondents met with David Danis and two attorneys from Blumenfeld, Kaplan & Sandweiss named John Young and Evan Buxner. John Young was head of litigation at the Blumenfeld firm. **T.** 658-659. The Blumenfeld firm was deciding whether to participate in the Beam class action against Chrysler. **T.** 659. At the meeting, the lawyers discussed various topics incident to filing a consumer class action against Chrysler, including what could be expected in terms of costs, the anticipated amount of attorney time that would be expended, how the proposed class action could ride the government coattails of the ongoing NHTSA investigation, the effect that a recall would have on the case, the necessity, or lack thereof, of hiring experts, and that plaintiffs could expect a barrage of motions from Chrysler. **T.** 669-670.

Mr. Buxner did some research on the NHTSA investigation and the conflicts issues vis-à-vis Respondents and David Danis given Respondents' prior representation of Chrysler. **T.** 660-661. Mr. Buxner also sent out a conflicts memo to the members of the Blumenfeld firm to insure there were no conflicts within the firm that would preclude the firm's involvement. **T.** 661. Mr. Buxner reported the results of his research to Mr. Young, and the Blumenfeld firm thereafter agreed to join David Danis and his firm in representing Beam in the class action. **T.** 662-663. It was agreed that from that point forward Respondents would not participate in any way in Beam v. Chrysler. **T.** 663.

Mr. Buxner drafted a class action petition for filing in the Beam case. **T.** 675-676. Buxner modeled the Beam petition after a class action petition filed by Carey & Danis, L.L.C., in March of 1995. **T.** 664-665; **Ex.** 73. The Beam petition was also very like a petition Mr. Carey drafted on Chrysler's behalf in the course of settling the Osley case. **T.** 133-134; **Ex.** 168.[5] The draft of the Beam petition had Carey & Danis, L.L.C.'s signature block on it and listed David Danis' firm as co-counsel. **T.** 665; **Ex.** 83. The draft mistakenly showed Respondents as counsel in the case; their signature block would have been mistakenly included on the draft when Buxner's secretary scanned the Carey & Danis petition after which the Beam petition was modeled. **T.** 666.

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[5] As part of the settlement of a consumer class action case, the defendant may draft an amended petition to be filed by plaintiffs' counsel stating plaintiffs' claims in the broadest possible terms in order that the defendant may gain as much res judicata effect from the settlement as possible. **T.** 134.

Beam v. Chrysler was filed in the Circuit Court of the City of St. Louis on August 25, 1995. The petition lists Blumenfeld, Kaplan & Sandweiss, P. C. and Danis, Cooper, Cavanagh & Hartweger, L.L.C., as attorneys for plaintiff and the class. **Ex.** 82A.

Shortly after the Beam petition was filed, Charles Newman called Lewis Goldfarb, a Chrysler vice president and associate general counsel. **T.** 339. Mr. Newman alerted Mr. Goldfarb to the facts that the Beam petition was virtually identical to the Osley petition drafted by Mr. Carey when he was representing Chrysler, and that the lead counsel for plaintiffs in Beam was David Danis, whose firm had the same address as Respondents' firm, and who was not previously known as a class action lawyer. **T.** 137, 363-364. Chrysler thereafter retained the law firm of Bryan, Cave to investigate Respondents' involvement in Beam. **T.** 365-366.

In 1995, Richard Paletta was working for an insurance company that subleased the Clayton office suite to Danis, Cooper, Cavanagh & Hartweger, L.L.C.. **T.** 290. Mr. Paletta's office was fifty to one hundred feet away from the Danis, Cooper and Carey & Danis office suite, so Mr. Paletta, who had graduated from law school in May of 1995, was a frequent visitor to the law firms' office. **T.** 291.

Mr. Paletta was the agent on the Blumenfeld firm's malpractice insurance policy and knew several of the Blumenfeld partners well. **T.** 294, 309. After Beam was filed, someone from either Bryan, Cave or Lewis, Rice called Paletta to say that Respondents' involvement in Beam was being investigated inasmuch as Respondents had represented Chrysler while at Thompson & Mitchell. **T.** 295, 309-310. Mr. Paletta called Phil Kaplan at the Blumenfeld firm to pass on this information. **T.** 294-295. Mr. Kaplan

seemed concerned. **T.** 295. On September 20, 1995, Blumenfeld, Kaplan & Sandweiss, P.C. withdrew from the Beam case, giving as its reason the belated concern of a firm client about Blumenfeld's involvement in the case. **T.** 667; **Exs.** 82D, 157, 158.

In October of 1995, Respondents Carey and Danis entered their appearance on behalf of the Beam plaintiffs. **T.** 689, 707; **Ex.** 82E. Respondents had changed their minds about not being counsel of record in the Beam case because David Danis and Richard Cooper needed their help and there was not enough time to find other co-counsel for them. **T.** 486-487, 707-708. Neither Respondent ever sought or received Chrysler's consent to sue their former client. **T.** 378-379, 382, 764, 832.

Charles Newman and Thompson & Mitchell represented Chrysler in the Beam case. A motion to transfer the case from the City to St. Louis County was filed by the defendants on November 6, 1995. **Ex.** 82F. On December 6, 1995, plaintiffs filed a first amended class action petition. The pleading bears only the signature block of Danis, Cooper. **Ex.** 82G. On December 7, 1995, the circuit court granted defendants' motion to transfer to the County, noting there had been no appearance by plaintiffs at the hearing noticed on the motion. **Ex.** 82H.

About a week before December 13, 1995, Mr. Newman called John Carey and told him that Chrysler believed Respondents had a conflict of interest in representing the Beam plaintiffs against Chrysler. **T.** 139. Newman followed up the call with a letter to Respondents and the Danis, Cooper firm communicating Chrysler's expectation that Respondents and Danis, Cooper, Cavanagh & Hartweger withdraw from the Beam case, preserve Chrysler's confidences, and refrain from participating in similar matters against

Chrysler. **Ex.** 84. On receiving the letter, Mr. Carey called Mr. Newman. Carey expressed concern about the situation, but said that he did not believe his actions were unethical. Carey asked Newman whether, if Carey and Danis withdrew from the case, Chrysler would end it. **T.** 140, 712-713. Mr. Newman advised Mr. Carey to withdraw. Mr. Carey indicated that he and Respondent Danis would be amenable to withdrawing, but that David Danis would be harder to convince. **T.** 140.

On December 1, 1995, a lawyer representing the class action plaintiffs in an ABS case pending against Chrysler in federal court in New Jersey contacted Danis, Cooper about the possibility of joining the Missouri plaintiffs to the New Jersey case. **Ex.** 193S-2, 3. On Sunday, December 10, 1995, Joseph Danis and his father, David Danis, met with attorney Stanley Grossman in New York to discuss their competing ABS class actions. Joseph Danis was aware that an attorney named John Deakle had an ABS case pending against Chrysler in Mississippi and may have sent Deakle a copy of the Beam petition. Grossman and the Danis' discussed joining the Beam plaintiffs and the Mississippi plaintiffs to Grossman's New Jersey suit. **T.** 835-836; **Ex.** 260. When Joseph Danis returned to St. Louis from New York, he found out about the letter from Mr. Newman regarding Chrysler's objection to Respondents' and David Danis' participation in Beam. **T.** 835. In a letter dated December 13, 1995 (the "Grossman letter"), Respondent Danis confirmed to Stanley Grossman the December 10 discussion regarding the ABS class cases. Respondent Danis questioned Mr. Grossman about allocation of attorney's fees if the cases were consolidated, noting there was "plenty of money for all of the

participants. Consequently, we will all be better served working together against Chrysler and not against ourselves." **Ex.** 260.

By letter dated December 22, 1995, Mr. Carey advised Mr. Newman that, while he and Respondent Danis denied any wrongdoing toward Chrysler, they had decided to dismiss without prejudice the Beam suit pending in St. Louis and "have no further involvement in that matter." **Ex.** 86. On December 29, 1995, David Danis mailed a dismissal without prejudice pleading to, among others, Charles Newman. **Ex.** 82I-3. On January 2, 1996, the judge dismissed the case without prejudice. **Ex.** 82-6.

The Dennis Beam plaintiffs were added to an amended class action complaint alleging defects in Chrysler's ABS systems filed on March 8, 1996, in the United States District Court, District of New Jersey (Chin case). David Danis of Danis, Cooper, Cavanagh & Hartweger, L. C., as well as John Deakle of Hattiesburg, Mississippi, were among the attorneys listed for plaintiffs. **Ex.** 193B.

Respondents notified their professional liability insurance carrier, CNA, in January of 1996 that there was a threat of suit against them by Chrysler. **T.** 875-876. Patrice Wilson, a CNA claims adjuster, met with Respondents in their office in January of 1996. **T.** 876. Respondents gave Ms. Wilson copies, not originals, of documents they had in their possession that they thought were relevant to the threatened suit. **T.** 877. Ms. Wilson later met with Lou Basso, the lawyer Respondents initially engaged to represent them. Ms. Wilson gave the documents Respondents had given her to Mr. Basso, who had copies made of them, and returned Ms. Wilson's copies to Ms. Wilson. **T.** 877-878.

Respondents had given the original Grossman letter, along with some other documents, to Mr. Basso when he was initially retained. **T.** 466-467. Mr. Basso had given the documents he obtained from Respondents and from Ms. Wilson, the CNA claims representative, to his paralegal, who had put them in a notebook and indexed them. **T.** 467, 514. None of the documents in Mr. Basso's possession that were marked "CD 01" to "CD 37" were turned over to Mr. Wuestling, the lawyer who subsequently represented Respondents and who later prepared Respondents' discovery responses. **Ex.** 261, p. 37-38. The Grossman letter, **Ex.** 260, was not in the file of materials given to CNA. **T.** 879-880.

On January 9, 1996, Mr. Deakle wrote David Danis and Carey & Danis a letter about a fee agreement among himself, "New York counsel," and "your firm" regarding the Chrysler ABS class action case. **Ex.** 92. On March 18, 1996, Mr. Deakle carbon copied Joseph Danis on a letter he wrote about the Chrysler minivan. **Ex.** 93.

Chrysler v. Carey and Danis

On March 26, 1996, Respondents were served with process in Chrysler v. John Carey, Joseph Danis, and Carey & Danis, L.L.C., a civil action for damages and other relief asserting claims for, inter alia, breach of fiduciary duty, filed in the U.S. District Court for the Eastern District of Missouri. **T.** 409, 713; **Ex.** 194F-7, n. 2. Chrysler alleged in the suit that Respondents Carey and Danis, though not attorneys of record, assisted a "Group" of lawyers in prosecuting ABS class action claims against Chrysler. **T.** 366-367. Respondents acknowledged to their lawyer that they worked with the Group,

but their position with their lawyer and throughout Chrysler v. Carey and Danis was that they had no involvement in any of the Group's litigation against Chrysler. **T.** 717-718; **Ex.** 261, p. 26.

David Danis considered himself part of the Group, as were Respondents Carey and Danis. **T.** 551. The Group were lawyers around the country who had agreed to work together to prosecute class actions against companies. **T.** 150. In addition to John Deakle, who had filed the ABS class action case against Chrysler in Mississippi (Sakalarios v. Chrysler), **Ex.** 195A, other members of the Group included J. L. Chestnut, who filed an ABS class action case against Chrysler in Alabama (Brown v. Chrysler), **Ex.** 196A, and Joseph Phebus of Illinois. **T.** 150. The members of the Group were aware that Chrysler had sued Respondents when they were sending Respondents correspondence regarding cases pending against Chrysler. **T.** 760.

On March 28, 1996, Mr. Carey dictated a memo to file regarding the potential use of a witness named Sheridan in both the "New Jersey ABS case regarding defects in Chrysler's anti-lock braking system" and in Chrysler's suit pending against Respondents Carey and Danis. **Ex.** 94.

Mr. Carey told Richard Paletta about the Alabama Chrysler ABS (Brown) case one day over lunch. **T.** 295. Carey explained the case was filed in Alabama because

David Danis was concerned about getting cut out of the attorneys' fees in the Chrysler ABS case pending in New Jersey (Chin).[6] **T.** 297-298.

Mr. Deakle carbon copied Carey & Danis, Esq. on a June 7, 1996, letter he sent to another lawyer regarding the "Chrysler anti-lock brake client." **Ex.** 95. A June 14, 1996, letter to Carey & Danis, Esq. and others was sent by Mr. Deakle regarding the "Chrysler Brake Litigation." **Ex.** 96. In another June 14, 1996, letter, Deakle requested that Carey & Danis and Mr. Phebus provide him with any suggested corrections on an enclosed motion and order for immediate certification in the Alabama Chrysler brake case (Brown) by 3 p.m. that day. **Ex.** 97. The Group was carbon copied on another June 14, 1996, letter enclosing Chrysler ABS case pleadings on which Carey & Danis appear in the attorney signature block section of the pleading. **Ex.** 98; **T.** 428, 460.

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[6] David Danis' concern about getting "cut out" of the Chin case attorney fees likely arose out of the fact that the New York and New Jersey attorneys representing the plaintiff class dismissed Chin and refiled the case, omitting the Beam plaintiffs and Danis, Cooper, Cavanagh & Hartweger, L.C., from the second amended complaint. **Ex.** 193C. The New York and New Jersey attorneys took this action because of their concern about the negative effect that the conflict of interest issue between the Danis, Cooper firm and Chrysler could have on their clients. **Ex.** 193S. Danis, Cooper hotly opposed the omission of their clients by the Grossman firm from the refiled New Jersey ABS case. See **Exs.** 193K, 193L (note Respondents' letterhead, which appears on page 3 of the pleading filed by Danis, Cooper), 193M.

On July 3, 1996, Mr. Deakle FAXed a letter to Carey & Danis, Esq., among other members of the Group, advising that Chrysler had been personally served in the "GM brake case." **Ex.** 99. A letter was sent on July 8, 1996, to John Carey and Joseph Danis, as well as David Danis and others, regarding several class actions pending, including the ABS case in Alabama against Chrysler. **Ex.** 100. Carey & Danis were carbon copied on a letter dated July 10, 1996, having to do with a case filed in Texas against Chrysler (Oliva v. Chrysler). **Ex.** 101. Mr. Carey and Respondent Danis are listed first in a group of attorneys sent a letter on July 16, 1996, by Mr. Phebus seeking immediate help on the Chrysler ABS case in New Jersey. **Ex.** 102. Respondents were blind copied on a July 16, 1996, letter from Mr. Phebus to an attorney who represented a potential expert witness plaintiffs were interested in retaining to use in a case against Chrysler. **Ex.** 103.

David Danis, in a July 16, 1996, letter to Mssrs. Deakle, Phebus, Chestnut, Campbell, and Sims, confirmed that those gentlemen knew that Mssrs. Carey and Danis had been sued by Chrysler "arising out of the Chrysler anti-lock brake litigation." David Danis wrote that he had discussed with Joe Phebus the "matter of any expenses that are incurred by Carey & Danis in 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." The letter goes on to memorialize an agreement worked out in Selma whereby Richard Cooper 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." **Ex.** 153.

Mr. Phebus replied the same day to David Danis' July 16 letter regarding "Chrysler ABS." Mr. Phebus sent his reply letter to Respondents, among other members of the Group, and confirmed a discussion with "Carey, Danis and Danis" in which the letter's author, Mr. Phebus, agreed that it was "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." **Ex.** 104. Joseph Danis recalls seeing this letter. **T.** 461. Mr. Carey recalls the discussion. **T.** 433.

Mr. Phebus wrote directly and solely to Joseph Danis on July 29, 1996, asking for help on Oliva v. Chrysler, a defective paint case pending against Chrysler. **T.** 430; **Ex.** 105. Respondents were carbon copied on a July 31, 1996, letter from Mr. Phebus regarding the Alabama ABS case. **Ex.** 106. Phebus likewise carbon copied Respondents on a July 31, 1996, letter regarding the New Jersey ABS case against Chrysler, **Ex.** 107, a letter in which Mr. Deakle's firm concurred by separate letter and which also carbon copied Carey & Danis. **Ex.** 108. Respondents were either carbon copied or addressed directly in three more letters related to Chrysler class action litigation between August 7, 1996 and August 13, 1996. **Exs.** 109-111. Mr. Deakle referenced a FAX sent by John Carey to "Joe" concerning the MDL (Multidistrict Litigation Panel) hearing scheduled in the Brown case (Alabama ABS case) in a letter dated August 13, 1996. **Ex.** 112; **T.** 436-437.

Joseph Danis wrote Mssrs. Sanders, Deakle, and Phebus on August 13, 1996, to congratulate them on getting a remand in "your Chrysler case." **Ex.** 113. Between August 15, 1996 and August 23, 1996, Respondents were addressed directly or carbon

copied on four pieces of correspondence having to do with Chrysler cases. **Exs.** 114, 115, 116, 117. Mr. Phebus wrote Joseph Danis and Mr. Horn (at the Phebus firm) on September 10, 1996, asking for "a lot of help" in the Brown ABS case pending against Chrysler. **Ex.** 118. Two more letters were directed to Respondents on September 13, 1996 and October 1, 1996, touching, at least in part, on Chrysler litigation. **Exs.** 119-120. In an October 25, 1996, letter, Mr. Phebus asked John Carey to "prepare the motion [for remand] and memorandum" in the Oliva v. Chrysler case. **Ex.** 121.

On October 28, 1996, defendants/Respondents provided sworn answers to interrogatories in the Chrysler v. Carey and Danis case. **Ex.** 259, p. 809-810. Interrogatory No. 2 read as follows:

> State whether you have communicated with anyone (other than Dennis Beam and Joseph P. 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 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 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 communication;
>
> c. the substance of the communication, providing as much detail as possible;

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

Respondents' identical answers read as follows:

ANSWER:

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

b. David Danis, 8182 Maryland Ave., 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.

Ex. 250-7, 11.

While Respondents had initially retained Lou Basso to represent them in the suit filed against them by Chrysler, Respondents' malpractice carrier retained attorney R. C. (Rick) Wuestling to provide a defense. **Ex.** 261, p. 9. Mr. Wuestling was responsible for preparing Respondents' discovery responses in the Chrysler case. **T.** 414; **Ex.** 261, p. 13-14. Mr. Wuestling prepared the answers to interrogatories after sitting down with John Carey on October 17, 1996. **Ex.** 261, p. 14-19. The answers were formulated after Wuestling interviewed Respondents and looked at the documents they produced to him. **T.** 811, 837. The draft answers were sent to Respondents for their review. **T.** 414. Mr. Carey made some revisions in the draft responses before returning them for filing, but made no changes to the response to interrogatory no. 2. **T.** 415-420. Joseph Danis averred in a September 1998 affidavit that he executed his responses to Chrysler's first set

of interrogatories to him, **Ex.** 255, ¶ 16, but at the time of hearing (March 2001) before the Disciplinary Hearing Panel, could not remember reviewing or signing any Chrysler discovery responses. **T.** 450-451.

Between November 4, 1996, and August 7, 1997, eleven more pieces of correspondence referencing Chrysler litigation were sent to Respondents. **Exs.** 122, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133. On November 4, 1996, Joseph Danis responded to a request for help on a Chrysler case from Mr. Phebus, by saying, "as you know, I am not going to be working on this file." **Ex.** 123.

The lawyers representing Chrysler in the Chrysler v. Carey and Danis case did not believe Respondents' answers to interrogatory no. 2. **Ex.** 259, p. 814. They subpoenaed Mr. Phebus in Illinois, Mr. Deakle in Mississippi, and Danis, Cooper and obtained federal court orders eventually resulting in the production of Exhibits 92 - 133. **Exs.** 205, 207, 214, 215, 216, 218, 219, 220, 221. The forty-two pieces of correspondence were obtained by Chrysler's lawyers through motions to produce on third parties -- they were not produced by Respondents. **T.** 495. After the documents were ordered produced, Joseph Danis wrote a letter to Mssrs. Phebus, Chestnut, Campbell, Deakle, and Sims, asking them not to send Carey and Danis any correspondence involving Chrysler litigation, as neither Respondent had "any involvement in this litigation." **Ex.** I.

It was consistently Respondents' position that they were not involved in litigation against Chrysler after Beam was dismissed by the St. Louis court in January of 1996. **T.** 414; **Ex.** 261, p. 24-25. John Carey recalled getting some of the forty-two documents from the Group that were produced by the third parties. **T.** 443-444. After Chrysler sued

Mr. Carey and Mr. Danis, Joseph Danis told the receptionist shared by Carey & Danis, L.L.C. and Danis, Cooper, Cavanagh & Hartweger not to give Respondents any correspondence or faxes relating to Chrysler ABS cases. The staff was told to give such correspondence to David Danis or Richard Cooper. **T.** 795. If anything related to Chrysler got to Mr. Carey, he threw it away or put it in David Danis' box. **T.** 426-427. The instructions to the office staff not to give Chrysler correspondence to Respondents was not changed, even after Respondents realized such documents might be subject to discovery. **T.** 441-442.

On March 13, 1997, Federal District Judge Perry entered a discovery order in Chrysler v. Carey and Danis. **Ex.** 259, p. 810. Judge Perry ordered Respondents to produce certain documents, including "all documents that pertained or referred to actual or anticipated litigation against Chrysler Corporation regarding any anti-lock brakes, heater cores or vehicle latches," (no. 8), "all documents which refer or relate to fee arrangements with any client in which the fee was shared with any attorney who is not a member of Carey and Danis," (no. 24), and "all documents which refer or relate to fee sharing or joint representation agreements with any attorneys or law firms concerning a client represented by Carey and Danis" (no. 25). **Ex.** 259, p. 811-812. Respondents filed a supplemental response to no. 24, 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." The response to no. 25 referred Chrysler to the response for no. 24. **Ex.** 259, p. 811.

After the forty-two pieces of correspondence connecting Respondents to cases pending against Chrysler came to light, both Respondents explained their failure to identify or acknowledge the existence of the communications by saying they had never seen the documents, or had seen but forgotten about them, thrown them away, or given them to David Danis. **Exs.** 259, p. 813, 261, p. 30, 33; **T.** 422-439, 448, 456-464. Class action litigation is document intensive and Respondents could get fifteen to thirty pieces of correspondence per day when involved in twenty to forty class action cases. **T.** 447. Respondent Carey "overlooked" the meeting at Cardwell's Restaurant, where the potential Beam case was analyzed. **T.** 730.

The trial in Chrysler v. Carey and Danis commenced in early September 1998. **Ex.** 259. Mr. Wuestling had withdrawn as Respondents' attorney in August of 1998, leaving Lou Basso as Respondents' trial attorney. **T.** 468; **Ex.** 261, p. 11. Mr. Basso was Respondents' attorney of record throughout Chrysler v. Carey and Danis. **T.** 499. Early on the morning of the fourth day of trial, Mr. Basso showed the December 13, 1995, letter from Joseph Danis to Stanley Grossman to a paralegal on the Chrysler defense team. **T.** 512. The two pages of the letter were stamped "CD 03 and CD 04." **Ex.** 261, p. 38. Mr. Basso wanted to use the letter to impeach some evidence. **T.** 468, 513. The Chrysler lawyers realized that the letter, **Ex.** 260, had never been produced by Respondents in the course of the Chrysler v. Carey and Danis discovery and brought the issue to the attention of Judge Perry by way of a motion for sanctions. **T.** 466.

Judge Perry, after a recess during which she reviewed interrogatories and document requests and Respondents' answers to them, **Ex.** 257, p. 7, found that the

December 13, 1995, letter from Joseph Danis to Mr. Grossman[7] was "covered by a variety of document requests," **Ex.** 259, p. 808, including interrogatory no. 2 in plaintiff's first set of interrogatories and document requests 8, 24, and 25 in Judge Perry's March 13, 1997, discovery order. **Ex.** 259, p. 809-813. Judge Perry told the lawyers that she was deeply concerned, given the history of discovery and Respondents' failure to produce so many documents that should have been produced, that the Grossman letter was the "tip of the iceberg." **Ex.** 259, p. 813-816. She observed that while "lawyers are busy . . . I don't know how a lawyer could forget a trip to New Jersey to talk about anti-lock brake litigation. . . . Sunday afternoon visits with attorneys in my experience are not something that people inadvertently forget." **Ex.** 259, p. 816.

Judge Perry concluded that sanctions were appropriate for "blatant disregard of the Court's orders and the discovery rules." **Ex.** 259, p. 820. She noted that the situation before her was not just a delay in production of documents, but "a false and misleading statement made under oath regarding the existence of communications." **Ex.** 259, p. 822. She noted that this "is the most egregious abusive [sic] I have seen in my court." **Ex.** 259, p. 823.

Judge Perry clearly identified that there were unresolved factual disputes between Chrysler and Respondents. **Ex.** 259, p. 830. Because Judge Perry concluded that "disclosure in this case has not been done in accordance with the rules of civil

[7] The letter is Exhibit 260 in the instant case. It was Exhibit 287 in Chrysler v. Carey and Danis.

procedure," she no longer had faith in the process. "[W]e're beyond the case on the merits at this point because I no longer have faith in the adversary system being conducted according to the rules." **Ex.** 259, p. 831-832.

Mr. Basso argued that the documents obtained by the Chrysler lawyers did not show that Respondents used or disclosed confidential Chrysler information. **Ex.** 259, p. 832-833. Judge Perry was not persuaded by Mr. Basso's line of reasoning, pointing out that the real problem was that Respondents lied about the existence of the documents and the communications. "I'm speaking very harshly, but I'm sorry, these are lawyers who lied, and that's not something I'm used to seeing." **Ex.** 259, p. 833.

Judge Perry granted Chrysler's motion for sanctions and struck the Respondents' answer, effectively entering a default against them. She did so under her inherent authority and Federal Rule 37. **Ex.** 259, p. 834-835. The following Monday, September 14, 1998, Judge Perry further explained her rationale in striking Respondents' answer. "These men under oath said they didn't know about documents when they themselves had received and written letters. They under oath made statements that were misleading." **Ex.** 259, p. 851. Chrysler provided evidence as to its legal fees and expenses incurred in producing the forty-two documents from the third parties and defending the anti-lock brake cases, **Exs.** 200-204, and judgment was entered against Respondents and for Chrysler in the amount of $850,000. **T.** 369.

Respondents appealed to the Eighth Circuit Court of Appeals, which affirmed. Chrysler Corporation v. Carey, Danis, Carey & Danis, L.L.C. 186 F.3d 1016 (8th Cir. 1999). **Ex.** 257. The judgment has been paid in full. **T.** 828.

Respondent Carey has done some pro bono work over the years, including providing legal counseling through a facility run by the Lutheran Church. He has handled some social security disability claims for people on a pro bono basis, as well as assisted people with consumer debt problems. **T.** 681-682. Neither Respondent has any history of discipline.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULES 4-3.4(a)(d) AND 4-8.4(c)(d) IN THAT HE FALSELY AND MISLEADINGLY DENIED THE EXISTENCE OF COMMUNICATIONS AND DOCUMENTS DURING DISCOVERY IN THE CHRYSLER CASE.

In re Caranchini, 956 S.W.2d 910, 918 (Mo. banc 1997), cert den. 524 U.S. 940

In re Panek, 585 S.W.2d 477, 479 (Mo. banc 1979)

In re Kirtz, 494 S.W.2d 324, 328 (Mo. banc 1973)

Rule 4-3.4(a)(d)

Rule 4-8.4(c)(d)

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.9(a) IN THAT HE REPRESENTED THE BEAM PLAINTIFFS AGAINST CHRYSLER IN A CONSUMER PRODUCT CLASS ACTION CASE FILED CONCURRENTLY WITH AN NHTSA INVESTIGATION WITHOUT CHRYSLER'S CONSENT.

T. C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F.Supp. 265, 268 (S.D.N.Y. 1953)

Cardona v. General Motors Corporation, 942 F.Supp. 968 (D.N.J. 1996)

Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973)

ABA/BNA Lawyer's Manual on Professional Conduct 51:215 (1992)

Rule 4-1.9(a)

POINTS RELIED ON

III.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE LAW WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR SIX MONTHS BECAUSE RESPONDENT KNOWINGLY VIOLATED RULES 4-3.4(a)(d) AND 4-8.4(c)(d) AND WILLFULLY VIOLATED RULE 4-1.9(a).

Rule 4-3.4(a)(d)

Rule 4-8.4(c)(d)

Rule 4-1.9(a)

Standards for Imposing Lawyer Sanctions (1991 ed.)

Conflicts of Interest in the Legal Profession, 94 Harv. L.Rev. 1244, 1500-1501 (1980-1981)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULES 4-3.4(a)(d) AND 4-8.4(c)(d) IN THAT HE FALSELY AND MISLEADINGLY DENIED THE EXISTENCE OF COMMUNICATIONS AND DOCUMENTS DURING DISCOVERY IN THE CHRYSLER CASE.

At Cardwell's Restaurant in August of 1995, Respondents Carey and Danis thoroughly examined the potential ABS case against Chrysler during a luncheon meeting with lawyers David Danis, John Young, and Evan Buxner. Respondents even provided Mr. Buxner a model petition to assist Buxner in drafting the class action petition that was eventually filed against Chrysler. In December of 1995, Mr. Carey discussed with and wrote several letters to Mr. Newman regarding the St. Louis ABS case. There was written communication from Mr. Deakle to Respondents in January of 1996 regarding the fee agreement in the New Jersey ABS case. Mr. Carey dictated a memo to file in March of 1996 about a possible expert witness for the New Jersey ABS case. Mr. Carey discussed the Brown (Alabama) ABS case on at least one occasion with Mr. Paletta. Between June and August of 1996, Respondents were sent approximately 20 letters regarding Chrysler ABS litigation. Mr. Carey faxed a memorandum in August of 1996 to members of the group regarding the upcoming MDL hearing in Brown. At a minimum, these are the "communications" and "documents" Respondent Carey should have identified to Chrysler when he responded to interrogatory no. 2 in October of 1996.

The false and misleading discovery responses did not end there, however. In March of 1997, in response to what has been described as "protracted and acrimonious" discovery, Judge Perry entered a discovery order asking for revelation of any documents pertaining to ABS litigation and all documents that "refer or relate" to "fee arrangements" with clients, attorneys, or law firms regarding Chrysler cases. Respondents failed to identify or produce the Grossman letter (**Ex.** 260), the January 9, 1996, Deakle letter regarding fees (**Ex.** 92), the July 1996 letter by David Danis regarding Chrysler fees (**Ex.** 153), or the July 1996 Phebus letter regarding Chrysler fees, which confirms a discussion with "Carey, Danis and Danis" on the subject. (**Ex.** 104). Respondents produced and revealed none of this information; it was obtained by Chrysler's attorneys through subpoena and court orders.

It may be argued that this is a case of "no harm, no foul." Respondents may point to the fact that the substantive information in all of the undisclosed (by Respondents) documents and communications was known by Chrysler prior to commencement of the trial in September of 1998. Respondents may point out that following Chrysler's production from third parties of the forty-two undisclosed written communications, Respondents were redeposed, at length, by Chrysler's attorneys, and the substance of the Grossman meeting on December 10, 1995, if not the letter itself, was therefore known to Chrysler long before trial started. Respondents may pin Judge Perry's striking of their answer on their attorneys' technical failure to file amended discovery responses reflecting what Chrysler had already learned.

While it may be true that the substantive content of the Grossman letter was known, the failure to produce that particular document was not why Judge Perry struck Respondents' answer. Judge Perry articulated her reasoning for imposing the harsh sanction. It was not because Mr. Wuestling or Mr. Basso failed to file amended discovery responses. It was because Judge Perry had lost all faith that the lawsuit, then in its fourth day of trial, had been conducted in accordance with our basic rules of jurisprudence. In order for our adversarial system to function, it is implicit, indeed essential, that parties, much more so lawyer/parties, be forthcoming with legally producible evidence and honor their oaths to be truthful. Revelation of the Grossman letter on the fourth day of trial was, as Judge Perry feared, only the "tip of the iceberg." There had been so many conversations, so many documents, that Respondents had not only not identified or produced, but had denied the very existence of, that Judge Perry felt compelled to call the whole thing off. And the Eighth Circuit Court of Appeals, after briefing and argument, fully concurred with Judge Perry's assessment.

Respondents' discovery conduct in Chrysler's case against them is sanctionable whether the Court finds misconduct by application of offensive mutual collateral estoppel or on the ample evidentiary record. Rule 4-3.4(a) and (d) state a lawyer shall not:

> (a) unlawfully obstruct another party's access to evidence or unlawfully . . . conceal a document or other material having evidentiary value.
>
> (d) in pretrial procedure, . . . fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

Indeed, the Comment to Rule 4-3.4 notes that "The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure and the like."

This Court held that a lawyer's intentional withholding of a name of a potentially helpful witness violated Rule 4-3.4(a). The Court held in the same case that a lawyer's failure to diligently answer an opposing party's interrogatories by failing to disclose the name of a witness whose knowledge could be imputed to the opposing party violated Rule 4-3.4(d). Both instances of conduct were found to be in violation of Rule 4-8.4(d). *In re Caranchini,* 956 S.W.2d 910, 918 (Mo. banc 1997), cert den. 524 U.S. 940.

The fact that the conduct at issue occurred not while Respondents were acting in a representative capacity, but was their own conduct as parties to the litigation, does not release them from the ethical constraints of the Rules of Professional Conduct. The disciplinary powers of the Court extend to conduct committed outside the lawyer's professional practice of law. *In re Panek*, 585 S.W.2d 477, 479 (Mo. banc 1979); *In re Kirtz*, 494 S.W.2d 324, 328 (Mo. banc 1973) (per curiam). Further, any effort by Respondents to hide behind their own attorneys' failure to reveal the information should be given short shrift. Respondents are lawyers. Each had the obligation, both personally and especially as lawyers themselves, to see to it that all the information responsive to the discovery requests was, in fact, produced.

By consistently denying the existence of documents or communications pertaining to class action litigation against Chrysler, Respondents violated both provisions of Rule 4-3.4. Respondents' failure to preserve and produce the Chrysler litigation correspondence that came to or was sent by them after discovery requests for such information were propounded on them is also in violation of the Rule. The conduct likewise violated Rules 8.4(c) and (d), which proscribe conduct involving dishonesty, fraud, deceit, or misrepresentation, and conduct prejudicial to the administration of justice.

Informant reiterates that the factual underpinning for the finding of misconduct in this case can be made either by the application of offensive non-mutual collateral estoppel or from the evidentiary record created in the disciplinary case. Judge Perry found that the Grossman letter produced by Respondents' counsel on the fourth day of trial was "covered by a variety of document requests." **Ex.** 259, p. 808. She found that "These men under oath said that they didn't know about documents when they themselves had received and written letters." **Ex.** 259, p. 851. Respondents appealed Judge Perry's findings, which were affirmed by the United States Court of Appeals, Eighth Circuit. Findings of fact determined in a prior valid judgment may be used preclusively as the basis for disciplinary action. *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997), cert den. 524 U.S. 940. Whether on the basis of Judge Perry's findings or on the abundant record created in the disciplinary case, Informant has shown by much more than a preponderance of evidence that Respondents violated Rules 4-3.4(a)(d) and 4-8.4(c)(d).

ARGUMENT

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.9(a) IN THAT HE REPRESENTED THE BEAM PLAINTIFFS AGAINST CHRYSLER IN A CONSUMER PRODUCT CLASS ACTION CASE FILED CONCURRENTLY WITH AN NHTSA INVESTIGATION WITHOUT CHRYSLER'S CONSENT.

"A lawyer's duty of absolute loyalty to his client's interests does not end with his retainer." *T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F.Supp. 265, 268 (S.D.N.Y. 1953). With that pithy pronouncement, Judge Weinfeld began what became the guidepost opinion in successive representation analysis. The Code of Professional Responsibility, the precursor to the current Rules of Professional Conduct (adopted in Missouri effective January 1, 1986), had no provision expressly addressing the issue of a lawyer's representation adverse to a former client. Courts, primarily recognizing the lead of T. C. Theatre, applied the confidentiality and appearance of impropriety provisions of the old Model Code in enunciating whether a lawyer could represent a client in a matter adverse to a former client. As Judge Weinfeld put it: "where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited." Id.

The current Rules directly address the question of subsequent representation. And, as can be seen, the current Rule bears a close resemblance to Judge Weinfeld's common law statement of it.

> Rule 4-1.9 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;

In order that Informant's position that Respondents violated this Rule may be more clearly understood, the various competing principles underlying the Rule will be examined.

A lawyer must preserve his client's confidences. Rule 4-1.6. A confidence is virtually everything the lawyer learns about the client in the course of the representation -- it is much more inclusive than those matters that might be subject to the evidentiary attorney-client privilege. 1 G. Hazard & W. Hodes The Law of Lawyering § 1.6:103 (1998 Supp.). The rule of confidentiality is an ethical rule binding the lawyer; the attorney-client privilege is a rule addressed to courts. It is a widely held belief that one's lawyer will preserve one's confidences, and this perception is good for society. "[I]t is intuitively obvious that lawyers operating under a binding requirement of confidentiality will have at least some greater ability to gain the trust of some clients, and hence to serve them competently." Id. at §101. By serving individual clients more competently, the greater good is also served. "It's [the attorney-client privilege] purpose is to encourage

full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

In this vein, it was recognized early on that a former client challenging his lawyer's participation in a case adverse to the client (typically by a motion to disqualify) need not reveal what, if any, confidences were or could be violated by the lawyer in the subsequent representation. To require otherwise would be to "tear aside the protective cloak drawn about the lawyer-client relationship." *T. C. Theatre*, 113 F.Supp. at 269.

> [T]he court need not, indeed cannot, inquire whether the lawyer did, in fact, receive confidential information during his previous employment which might be used to the client's disadvantage. Such an inquiry would prove destructive of the weighty policy considerations that serve as the pillars of Canon IV of the Code, for the client's ultimate and compelled response to an attorney's claim of non-access would necessarily be to describe and detail the confidential information previously disclosed . . ..

Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973) (emphasis in original). In recognition of this conundrum, courts may presume confidential information was imparted. "When the prior matter involved litigation, it will be conclusively presumed that the lawyer obtained confidential information about the issues involved in the litigation." Restatement (Third) of the Law Governing Lawyers §132 Comment d(iii) (Vol. 2 2000).

Additionally, the current client has an interest in procuring a vigorous representation from his lawyer. A lawyer who is constrained by his ethical responsibilities not to inadvertently reveal a former client's confidences may thereby fail to meet his obligations to represent vigorously the interests of the current client.

Arrayed against these principles is the current client's right to counsel of his own choice. And, increasingly, in today's legal milieu, a lawyer's job mobility and employment opportunities are implicated.

Before turning to whether Respondents' representation and participation in litigation against Chrysler was the "same or . . . substantially related" to Respondents' previous representation of Chrysler, it is important to identify what this case is not.

This is not a Rule 4-1.9(b) case. Subpart (b) of Rule 4-1.9 proscribes a lawyer's use of information to a former client's disadvantage. Subpart (b) was not pled in the Information. It was manifestly not incumbent on Informant to prove that Respondents used or revealed confidential information to Chrysler's disadvantage.

This is not a disqualification case. Virtually all of the case law in this subject area has arisen in the context of motions to disqualify. There may well be considerations present in a disqualification case, such as an individual's right to counsel of his own choosing, that are not present in a discipline case, where the inquiry is limited to whether Informant has shown by a preponderance of evidence that a lawyer violated an ethical rule.

That said, the question for resolution is: Does a preponderance of evidence show that Mr. Carey represented other persons in the same or a substantially related matter in

which those persons' interests were materially adverse to the interests of a former client without that client's consent. Beyond peradventure, Mr. Carey formerly represented Chrysler. This is not a situation where Respondent was merely in a firm that had Chrysler as a client and on whose matters he worked only peripherally; Mr. Carey was actively Chrysler's litigation lawyer from 1992 to early 1995. Nor is this a case where some screening effort was made by the current lawyers to "wall off" the affected lawyers. Equally beyond doubt, the class action plaintiffs' interests in the later case were materially adverse to Chrysler's. And, there is no question that Respondents neither sought nor received Chrysler's consent to the subsequent representation.

The only question left is whether the Beam case was a "substantially related matter" to the work Respondents previously performed for Chrysler. Some courts have taken a "transactional analysis" approach to analyzing the issue, whereby a conflict exists if the prior representation and the subsequent representation involve interconnected, but not necessarily identical, events that could reveal a pattern of client conduct. See *Ullrich v. Hearst Corp.*, 809 F.Supp. 229 (S.D.N.Y. 1992). Some courts have used a narrow "issues" analysis, whereby the ultimate, litigated issues need be virtually identical before a conflict is found to apply. See *State ex rel. Wal-Mart Stores, Inc. v. Kortum,* 251 Neb. 805, 559 N.W.2d 496 (1997). One writer has synthesized the case law as follows:

> If the former client demonstrates that there is a good deal of similarity between the matter the lawyer handled for him and the matter on which the lawyer is now representing another client, then the former client needn't go further and establish just what confidential information he gave the lawyer

> that will now likely be used against him. The very similarity in the two representations is enough to raise a common-sense inference that what the lawyer learned from his former client will prove useful in his representation of another client whose interests are adverse to those of the former client. . . . [T]he fundamental idea here seems to be information.

ABA/BNA Lawyer's Manual on Professional Conduct 51:215 (1992). And, in *Massey-Ferguson Credit Corp. v. Black*, 764 S.W.2d 137 (Mo. App. E.D. 1989), the court of appeals considered the information the attorney would have acquired in the previous representation before determining it was not substantially related to the issues in the subsequent representation.

Following this approach, and in a case very similar to the one sub judice, the court in *Cardona v. General Motors Corporation*, 942 F.Supp. 968 (D.N.J. 1996), held that a law firm was disqualified from pursuing lemon law cases against General Motors because an associate who had defended GM against lemon law suits while working for two other law firms had gone to work for the disqualified firm (despite the setting up of an "ethics screen"). The court noted that:

> There is no doubt that each lemon law case presents distinct facts concerning the precise defect which is alleged in each instance. . . . It is equally illogical to demand a factual nexus when the facts, i.e., the alleged mechanical or electrical defect in the vehicle, do not "drive" the decision to settle, or litigate a given case. When the facts, as in lemon law cases, "take

the back seat," the absence or presence of a "factual nexus" between the former representation and the current one, cannot be dispositive.

Lemon law cases certainly present almost identical legal issues, regardless of the precise nature of the defect alleged in each case.

942 F.Supp at 973. The court concluded that it is "precisely because GM's claims and litigation philosophy and its methods and procedures for defending claims" were known to the side-switching lawyer, "combined with the fact that lemon law cases, while not factually identical, are undeniably similar," that the lemon law cases pursued by the new firm were deemed a "substantially related" matter to the lemon law cases the side-switching lawyer had handled in his prior employment.

The evidence was overwhelming that consumer product class action cases filed concurrently with NHTSA investigations involve virtually the same issues -- the only difference is the factual nexus underlying the specific defect alleged in each case. Otherwise, one could ask, how could Respondents be involved in excess of forty of these type of cases at a time? Respondents were intimately and directly involved in defending this class of case for Chrysler and were privy to all the information Chrysler could corral on the issue -- Respondent Carey was even one of the three lawyers who developed Chrysler's defense strategy for this type of lawsuit. The common sense inference is that what Respondents learned from directly defending Chrysler against consumer product class action cases filed concurrently with NHTSA investigations proved incredibly useful to Respondents when they switched sides and sued Chrysler. The matters were substantially related, and Respondents violated Rule 4-1.9(a). All of the interests

underlying the formulation of this Rule are served by this conclusion, save the lawyer's economic interest in changing jobs and securing employment opportunities. Surely, when balanced against the lawyer's duty of loyalty to former clients and to preserve their confidences, as well as the public's perception that that is what it can expect from lawyers, these interests should prevail over the individual lawyer's economic interests. The court should conclude that Respondents have violated the Rule.

ARGUMENT

III.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE LAW WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR SIX MONTHS BECAUSE RESPONDENT KNOWINGLY VIOLATED RULES 4-3.4(a)(d) AND 4-8.4(c)(d) AND WILLFULLY VIOLATED RULE 4-1.9(a).

Both Missouri's Disciplinary Hearing Panel and Illinois' Hearing Board, after listening to the same three days of testimony and receiving the same 250 plus exhibits, recommended a license suspension with no leave to apply for reinstatement for six months. Informant recommends the same sanction.

The theoretical framework enunciated in the Standards for Imposing Lawyer Sanctions (1991 ed.) anticipates consideration of to whom the lawyer violated a duty, the lawyer's mental state, the extent of actual or potential injury, and the aggravating and mitigating evidence present in each case. Respondent knowingly withheld information that was clearly helpful to Chrysler's case, thereby compelling Chrysler to seek orders to produce the evidence in several foreign jurisdictions. Respondent knowingly violated a duty to both the public and the legal system by his deception. Additionally, Respondent willfully violated his duty of loyalty to Chrysler by providing copies of pleadings to attorneys intent on suing Chrysler, educating Chrysler's legal adversaries against it, and

actually turning around and suing the former client directly a mere nine months after the representation ceased, in violation of Rule 4-1.9(a).

It is strongly suggested that Respondents knew that getting directly (putting aside for the moment all that Respondents were doing behind the scenes) involved in litigation against Chrysler was wrong. Respondents stayed off the pleadings until the Blumenfeld firm withdrew, then, after entering their appearance, did not thereafter appear in court (at the hearing on the motion to transfer to the county) or sign any of the pleadings filed thereafter by plaintiffs. These are not the actions of lawyers confident in their ethical purity. Further, Respondents consistently denied involvement in any additional litigation against Chrysler, owning up only to the little bit of communication they likely perceived that Chrysler had a reasonable chance of finding out about, when a wealth of evidence existed suggesting that Respondents were far more involved than they were willing to admit.

Respondents[8] paid the substantial judgment in the Chrysler case against them. It could be said that they have been sufficiently sanctioned for their misconduct. In the conflict of interest context, however, disciplinary sanctions may be particularly appropriate.

> It may be important, in many cases, to sanction even an attorney who has already been disqualified or held liable in a malpractice action. Disciplinary sanctions may extend beyond the discreet transaction

[8] The record is not entirely clear who actually paid the judgment -- only that it was paid.

> complained of and serve to protect the public from particularly unscrupulous or incompetent members of the bar. For example, it may be that an attorney who cannot or will not avoid obvious conflicts of interest should be subject to suspension or disbarment. It these cases, disciplinary proceedings offer the only institutional opportunity to act "as a catharsis for the profession and a prophylactic for the public."

Conflicts of Interest in the Legal Profession, 94 Harv. L.Rev. 1244, 1500-1501 (1980-1981).

By way of aggravating and mitigating factors, Respondent Carey offered evidence as to some pro bono legal work he has done. Respondent Danis had been a practicing lawyer only around two years when the Beam case was undertaken. Neither Respondent has any prior disciplinary history. In contrast, the aggravating factors are that the evidence is indicative of a pattern of misconduct inasmuch as the deception in covering up Respondents' communications about Chrysler continued over at least a year's period. Respondents had a strong financial motive to pursue their conflict of interest against Chrysler. Additionally, Respondents are guilty of multiple Rule violations.

In light of the seriousness of the misconduct, as shown by the high level of mental state involved and the duties violated, Informant urges the Court to adopt the Panel's recommendation and suspend the Respondent's license to practice law.

CONCLUSION

Respondent Carey is guilty of multiple violations of Missouri's Rules of Professional Conduct by virtue of his knowing obstruction of Chrysler's access to evidence and his knowing failure to make reasonably diligent efforts to comply with legally proper discovery requests and his willful pursuit of litigation against his former client, all in violation of Rules 4-3.4(a)(d), 4-8.4(c)(d) and Rule 4-1.9(a). Respondent should be suspended from the practice of law with no leave to apply for reinstatement for six months.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of March, 2002, two copies of Informant's Brief have been sent via First Class mail to:

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_____
Sharon K. Weedin

CERTIFICATION: SPECIAL RULE NO. 1(c)

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

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Special Rule No. 1(b);

3. Contains 11,578 words, according to Microsoft Word 97, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

_____
Sharon K. Weedin