IN THE SUPREME COURT
STATE OF MISSOURI

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

INFORMANT'S REPLY BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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STATEMENT OF FACTS

Rule 84.04(c), applicable to disciplinary cases by reference to Rule 84.24, requires that a statement of facts be a 'fair and concise statement of the facts relevant to the questions presented for determination without argument." Rul3 84.04(f) states that if the "respondent is dissatisfied with the accuracy or completeness of the . . . statement of facts in the appellant's brief, the respondent's brief may include a . . . statement of facts." Informant takes issue with Respondent's prefatory statement in his statement of facts that Informant, though bearing the burden of proof, "fails to present essentially any evidence supporting [Respondent's] defenses." While Informant bears the burden of proving its case, the briefing Rules do not require Informant to also carry the burden of proving that Respondent is not guilty of professional misconduct. The burden of proof is not shifted, although Informant is required to fairly state the facts the case. Informant included in its statement of facts a good deal of evidence not favorable to Respondent's case in order to present a fair statement of the case. Any suggestion otherwise, apparently to justify Respondent's forty page statement of facts, is not supported by the record.

The Rule specifically proscribes argument in the statement of facts. Additionally, the Rule requires that "[a]ll statements of fact . . . shall have specific page references to the legal file or the transcript." Respondent's brief recites long sentences of so-called "facts" without citation to the transcript or legal file, with a token citation, typically covering large numbers of pages, at the end of the paragraph. Indeed, many paragraphs bear no citation to the record whatsoever. And, the citations to Respondent's deposition

in the *Chrysler* case, as is more fully explained in Informant's suggestions in opposition to Respondent's motion to open the record are to evidence not admitted to this record. Informant respectfully suggests that Respondent's statement of facts is not in compliance with the Rules in several respects.

Citing broadly to 24 pages of transcript for support, Respondent Carey states on page 50 of his statement of facts that "Mr. Carey did not recall receiving any of the 42 documents" (produced after Chrysler was permitted to subpoena third parties to refute Respondent's interrogatory and request for production of documents responses). Respondent Carey admitted in his testimony, on pages 443 and 444 of the hearing transcript, that he "think[s] I recall getting a couple," and he "definitely recall[s] receiving some documents." It is a misstatement of the testimony to state as a fact that Carey did not remember getting any of the documents in question.

POINT 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 (Mo. banc 1997), cert den. 524 U.S. 940

Chrysler Corp. v. Carey, 186 F.3d 1016 (8th Cir. 1999)

Rule 4-3.4(a)(d)

Rule 4-8.4(a)(c)

POINT 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.

State v. Smith, 32 S.W.3d 532 (Mo. banc 2000)

Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation, 518 F.2d 75 (2d Cir. 1975)

Chrysler Corp. v. Carey, 186 F.3d 1016 (8th Cir. 1999)

Rule 4-1.9(a)(b)

Rule 4-1.6

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

POINT 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).

In re Disney, 922 S.W.2d 12 (Mo. banc 1996)

In re Littleton, 719 S.W.2d 772 (Mo. banc 1986)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

Rule 4-1.9(a)

Rule 4-3.4(a)(d)

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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.

Respondents separate the substance of Informant's first Point Relied On into three separate Points, which they number II, III, and IV. Informant will nonetheless follow the outline of Informant's brief in this Reply Brief.

Informant is cognizant that only the factual findings of the federal district court and the eighth circuit are subject to the preclusive effect of offensive non-mutual collateral estoppel. *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997), cert den. 524 U.S. 940. Whether those factual findings amount to violations of Rules 4-3.4(a)(d) and 4-8.4(c)(d) is entirely up to this Court's judgment.

The federal district court found, after reviewing the discovery requests and Respondents' answers thereto, that exhibit 260 in this disciplinary case was "covered by a variety of document requests," **Ex.** 259, p. 808, and was never produced by Respondents. The district court found that Respondents were requested in discovery and in the court's discovery order to produce "documents referring or relating to fee sharing or joint representation agreements," and that exhibit 260, which Respondents failed to produce,

"is directly covered by that order." **Ex.** 259, p. 811-812. The district court expressed concern that exhibit 260 was just the tip of the iceberg, in that Respondents had been asked by interrogatory and request for production of documents to identify "documents that pertained or referred to actual or anticipated litigation against Chrysler corporation regarding any anti-lock brakes, heater cores or vehicle latches," **Ex.** 259, p. 812, and Respondents said that there were "no communications regarding this litigation," **Ex.** 259, p. 814, and "No such documents exist." **Ex.** 259, p. 815; *Chrysler Corp. v. Carey*, 186 F.3d at 1019. During the civil *Chrysler* trial, Chrysler introduced forty-two documents which, the federal court found, "had been sent to or from Carey & Danis that involved class action litigation against Chrysler." Id.

The foregoing factual findings of the district court and the eighth circuit are part of this record both by the courts' written opinions and as exhibits (because Illinois did not have the *Caranchini* case on which to rely, a full evidentiary record was created). As was emphasized in Informant's brief, the Court can make the necessary factual findings either by applying *Caranchini* or by reference to the record itself. What Respondents should not be permitted to do is rehash the same arguments against application of offensive non-mutual collateral estoppel in disciplinary cases made by the respondent in *Caranchini* and rejected therein by this Court.

As for Respondents' earnest attempt to divert the Court's attention from the misleading and false nature of their interrogatory and request for document production responses by referring to their depositions taken in the *Chrysler* case, Informant makes two responses. First, assuming arguendo that complete and truthful responses to the

discovery at issue were given in the deposition testimony, that alone does not absolve a litigant, moreover a lawyer/litigant, from the obligation thereafter to give full and truthful responses to subsequent inquiry. Second, to argue otherwise is really to argue that Chrysler was not surprised or prejudiced by Respondents' misleading and untruthful responses. This is the "no harm, no foul" argument Informant anticipated Respondents would make. And, as already pointed out in Informant's brief, failure to produce the Grossman letter was not the sole source of Respondents' misconduct. It was Respondents' overall misleading and cavalier treatment of the discovery process that so offended the federal courts and should likewise offend this Court.

The factual findings of the federal courts and the full and complete record in this disciplinary case provide an abundant basis for concluding Respondents obstructed access to material having potential evidentiary value and failed to make reasonably diligent efforts to comply with proper discovery requests (Rules 4-3.4(a)(d)). That Respondents did so with respect to forty-three known documents provides a basis for concluding their conduct involved dishonesty, deceit, and misrepresentation, and was prejudicial to the administration of justice. Rules 4-8.4(a)(c).

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.

Respondent cites *State v. Smith*, 32 S.W.3d 532 (Mo. banc 2000), for the proposition that the heater core/latch consumer product class action cases he defended for Chrysler were not matters substantially related to the ABS brake consumer product class action case Respondent pursued against Chrysler. Smith had argued that because the prosecutor in his first degree murder case had represented Smith 18 years previously in a work permit revocation matter and 16 years previously on a felony stealing charge, the prosecutor should have been disqualified from prosecuting him. This Court found no abuse of discretion in the trial court's refusal to disqualify the prosecutor, stating that "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." 32 S.W.3d at 543.

Informant's position is not contrary to the Court's enunciation of the law in *State v. Smith*. Of course the Court must examine the relevant facts in order to determine whether

Respondents' side switching violated Rule 4-1.9(a). But, unlike the situation in *State v. Smith*, the cases here are "connected by something substantially more than" the identity of the lawyers. Respondents were privy, a mere nine months before entering their appearance in the class action case filed against Chrysler, to the full panoply of information available to Chrysler's class action product liability defense team. Had the prosecuting attorney in *State v. Smith* defended Smith in a first degree murder case nine months before prosecuting him for the same offense, albeit in a case involving a different victim, the result in *State v. Smith* would, Informant suggests, have been very different. The result would have been very different due to the freshness of the lawyer's duty of loyalty to his former client, the public's perception of that duty, and because the lawyer would have been privy to all sorts of information useful to the prosecution in the subsequent murder case, whether it could be shown that the lawyer used the information to the defendant's disadvantage (a Rule 4-1.9(b) case) or not.

Respondent's heavy reliance on *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation*, 518 F.2d 75 (2d Cir. 1975), which Respondent says is "particularly on point," is curious. The second circuit, in affirming the district court's refusal to disqualify an attorney representing a car dealership against Chrysler, was careful to note that the attorney, who had previously worked as an associate in a large firm that represented Chrysler, had worked principally on an antitrust case for Chrysler, a matter not substantially related to the breach of contract and dealer's day in court case being pursued by the lawyer against Chrysler. Antitrust and breach of contract cases are not analogous

to the cases at bar -- consumer product class action cases coattailing NHTSA investigations, with the only difference being the particular defect.

The evidence in *Silver Chrysler* showed that in other Chrysler matters in which the lawyer had any involvement while at the large firm, the lawyer's involvement was, "at most, limited to brief, informal discussions on a procedural matter or research on a specific point of law." The second circuit found "reason to differentiate for disqualification purposes between lawyers who become heavily involved in the facts of a particular matter and those who enter briefly on the periphery for a limited and specific purpose relating solely to legal questions." 518 F.2d at 756.

Respondents clearly were more than "only peripherally involved" in the defense of Chrysler against class action product liability cases filed concurrently with NHTSA investigations. The overwhelming weight of the evidence, not merely a preponderance of evidence, discredits any such notion. The hearing record includes Respondents' time records showing that Respondent Carey billed 1,314.6 hours to Chrysler over four years (27% of his billed time in 1993 and 1994), and Respondent Danis billed 513.5 hours to Chrysler over a shorter time frame (23% of his billed time in 1994). See *Chrysler Corp. v. Carey*, 186 F.3d 1016, 1018 (8th Cir. 1999). The testimony of Respondents' supervisor for Chrysler work at Thompson & Mitchell detailed the work they did for Chrysler in class action product cases, as did the testimony of two in-house Chrysler attorneys. Approximately 70 Informant's exhibits exemplify the work done by or circulated to Respondents regarding Chrysler class action product defect work. There is simply no merit to the argument that Respondents were only peripherally involved in the defense of

Chrysler against class action product cases, or that Informant failed to prove with particularity the commonality of Respondents' work for and against Chrysler.

Respondents persist in failing to distinguish between Rule 4-1.9(a) and 4-1.9(b). Informant did not charge Respondent with violating Rule 4-1.9(b), which would have required Informant to prove Respondent used confidential information against Chrysler to its disadvantage. (Informant did charge Respondents with violating the confidentiality rule, 4-1.6, but as Respondents recognize in their briefs, Informant is not pursuing that charge in this Court). What must be proven to establish a 4-1.9(a) violation is very different from what must be proven to establish a 4-1.9(b) case. A Rule 4-1.9(a) case, as this is, can be made by proving by a preponderance of evidence that the lawyer represented a client in a matter materially adverse to the interests of a former client without the former client's consent, if the matter is the "same or substantially related." Informant did not have to prove specifically what confidential information was imparted to Respondents or that they used information to Chrysler's disadvantage.

Silver Chrysler does nothing to advance Respondents' cause inasmuch as antitrust and breach of contract are not anywhere close to the type of cases Informant posits herein as "substantially related." Had Respondents brought a breach of contract or statutory dealer's day in court case against Chrysler, we would not be writing these briefs. Instead, the common sense inference one gets from reviewing this record is that the information to which Respondents had access as Chrysler's class action defense attorneys would be very useful to them as lawyers representing plaintiffs in consumer products class actions filed against Chrysler. The common sense inference, which the Court can arrive at after

undertaking the "focused approach, where the court examines the relevant facts of the case in order to determine whether the various matters are substantially related," 32 S.W.2d at 543, is that consumer product class actions filed concurrently with NHTSA investigations are substantially related for purposes of Rule 4-1.9(a).

The Comment to Rule 4-1.9 is not so helpful to Respondent's position as his brief supposes. One consumer product case is not "wholly distinct" from another, as the evidence previously recited in Informant's brief, and the testimony of numerous witnesses at the hearing, established. Further, the evidence is overwhelming that Respondents were "so involved in the matter" (defense of Chrysler class action product defect litigation) that they can be "justly regarded" as having switched sides against their former client.

The "focused approach" to analyzing Rule 4-1.9(a) enunciated by the Court in *State v. Smith* may be another way of saying that courts should ascertain whether there is a "good deal of similarity" between the matter handled by the lawyer for the former client and the matter subsequently pursued adversely to the former client without its consent. The fundamental idea is whether the information made available to the lawyer could be used against his former client. ABA/BNA Lawyer's Manual on Professional Conduct 51:215 (1992). Informant is confident that the public (already distrustful of lawyers), if presented with the facts of this case, would share Informant's common sense belief that what Respondents did violated the ethics rule and was wrong.

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).

In considering what sanction is appropriate, it is important to bear in mind both tenets underlying lawyer discipline: protection of the public and preservation of the profession's integrity. *In re Littleton*, 719 S.W.2d 772, 777 (Mo. banc 1986). By educating lawyers how to file a class action product case against their former client only seven months after the representation ceased, telling the lawyers what to expect from the former client once suit was filed, and then directly entering an appearance against the former client nine months after the representation ended, Respondents egregiously violated their duty of ongoing fidelity and loyalty to the former client. Further, as Respondents candidly acknowledge in their briefs, this case received some notoriety in the press, bringing disrepute on an already embattled profession. The injury to the public's perception that it can trust in and confide openly with their lawyers should not be discounted. Regardless of Respondents' obvious dislike for their former client, and despite the opportunity to make a good deal of money by getting involved in class action

cases against Chrysler, Respondents were constrained by the ethics rules from cashing in quite so soon as they did.

Respondents advance the argument that any lapses by them in any of the involved conduct were "honest mistakes" or negligence. This contention is contrary to the conclusions reached by both states' hearing panels, a federal district court, and a federal court of appeals. Indeed, Respondents' refusal to acknowledge wrongdoing is an aggravating factor recognized in the Standards. Rule 9.2(g), ABA Standards for Imposing Lawyer Sanctions (1991 ed.). Once again, Respondents were responsible as both litigants, and as lawyers, to see to the complete, accurate, and truthful filing of discovery responses, a responsibility they willfully failed to fulfill.

The sanction imposed by this Court will most likely turn, in the final analysis, on whether the Court believes Respondents' discovery responses and conduct toward their former client was negligent and attributable to honest mistake, or knowing and willing. Only rarely is there ever direct evidence of a person's mental state. But in assessing Respondents' motivations, Informant points out the following: it was conceded that plaintiff's lawyers in consumer product class action litigation stand to reap a substantial financial benefit, highlighting the financial motivation in this case; Respondent Danis, though consistently downplaying his involvement in Chrysler work while at Thompson & Mitchell, took more than 70 documents pertaining to Chrysler as part of his "form file" when he left (fewer than 20 of the documents in Carey's "form file" were Chrysler documents); after Respondents were made aware through discovery requests that Chrysler wanted information about any documents or communications regarding

Chrysler litigation, Respondents failed to acknowledge communications had "mistakenly" been directed to them in the past and failed to implement policies within the office to intercept any future communications subject to the pending discovery requests; and forty-three communications the federal courts found to be responsive to Chrysler's discovery requests were revealed during the course of the Chrysler litigation. Respondents did not produce or identify any of the forty-three documents. Indeed, Respondents had affirmatively stated that no such communications existed.

No disciplinary cases involving the combination of Rule 4-1.9(a), 4-3.4, and 4-8.4(a)(c) were found. *In re Disney*, 922 S.W.2d 12 (Mo. banc 1996), however, is analogous to this case because it involved a lawyer who played off a former client's trust for his personal and financial advantage. As here, there was no attorney-client relationship between the lawyer and his former client at the time of the conduct at issue, yet the lawyer's dishonesty and subterfuge earned him the "intermediate sanction" of suspension. 922 S.W.2d at 15. Informant likewise urges the Court to impose a suspension in the case at bar so the public can be assured of protection from like conduct in the future and members of the bar will be reminded that even former clients are deserving of a modicum of loyalty.

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 _____, 2002, two copies of Informant's Reply Brief have been sent via UPS overnight to Respondent's attorney:

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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 3,817 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