IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
RUSSELL E. TLUSCIK,	)	**Supreme Court #SC84096**
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

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

In April of 1995, Janet Pollard and her husband contracted with a builder to have a house built in Maysville, Missouri. **Ex.** C-2 (Contract Agreement). On April 3, 1996, Mrs. Pollard signed a proposal with the builder whereby he would construct a deck for the house for an additional $6,920. **Ex.** 3. The Pollards were dissatisfied with many aspects of the builder's work, so decided not to pay the builder $6,000. **T.** 8-10.

When the builder insisted that the Pollards make the final payment, Mrs. Pollard contacted Respondent for legal help. Mrs. Pollard made initial contact with Respondent by telephone on April 16, 1996, followed by an office visit on April 17, 1996. **Ex.** 9. Mrs. Pollard signed an hourly fee contract with Respondent and paid him an initial retainer of $5,000. **Ex.** 2; **T.** 13. Respondent told Mrs. Pollard he would send her periodic statements showing how the initial $5,000 retainer was being spent, and when the initial retainer was gone, she could decide whether to proceed with the case. **T.** 12-13; 18.

Mrs. Pollard wanted to file suit against the builder, but Respondent counseled her not to pay for the deck and to wait and let the builder sue her. **Ex.** C, p. 10, 25; **T.** 16-17. When a lumber company filed a lien against the Pollard's house, Respondent filed, in August of 1997, an answer and a cross claim against the builder. **Ex.** C-2; **T.** 19. Mrs. Pollard was not aware that Respondent filed these pleadings on her behalf until October of 1999. **Ex.** C-3 (letter dated October 22, 1999); **T.** 27-28. The lumber company eventually dismissed its lien against the house. Mrs. Pollard did not recall getting a copy

of the motion to dismiss the lien filed by Respondent. Mrs. Pollard did not give Respondent much credit for dismissal of the lien, because that was not why she retained Respondent. **T.** 71-72. Mrs. Pollard retained Respondent to litigate her claims against the builder. **Ex.** 2; **T.** 28, 71-72, 85-86.

Before September of 1999, Mrs. Pollard several times verbally requested that Respondent provide her with an accounting for how the $5,000 retainer was being spent. **T.** 70. On September 1, 1999, Mrs. Pollard wrote Respondent asking for an accounting of the retainer fee and for his assessment of her case. She noted in her letter that she had three times previously requested an accounting for how the fee was being spent. **Ex.** J. Respondent wrote Mrs. Pollard on September 14, 1999, noting he had left several telephone messages for her and advising that he needed more information from her before he could give her his evaluation of the case. The letter said nothing about her request for an accounting. **Ex.** C-3 (letter dated September 14, 1999).

On October 11, 1999, Mrs. Pollard sent Respondent a certified letter asking for the return of the $5,000 retainer fee and expressing her frustration with his handling of the case, including her fear that her claims had never been filed in court. She stated she no longer trusted Respondent to represent her and announced her intention to seek other counsel. **Ex.** C-3 (letter dated October 11, 1999). Respondent wrote Mrs. Pollard on October 22, 1999, enclosing copies of the answer and cross claim filed in August of 1997. He advised that he would be getting back in touch with her regarding other concerns. **Ex.** C-3 (letter dated October 22, 1999). Once Mrs. Pollard was apprised that Respondent had filed a cross claim against the builder, she thought the case was finally

moving forward and instructed Respondent to go forward, despite Respondent's concerns about deposition costs. **T.** 27-28. Respondent hand wrote a letter to Mrs. Pollard dated October 25, 1999. In it, he told Mrs. Pollard that he had checked the court file, her case was still active, that he needed a fair market value appraisal of the house if she wanted him to proceed, and that she could make an appointment to pick up her file if that was what she wanted to do. **Ex.** 7. Respondent produced this letter at the bar committee hearing. **Ex.** C, p. 22. Mrs. Pollard did not remember, at the time of the Disciplinary Hearing Panel hearing, ever getting the October 25 letter from Respondent, although she conceded she may have received it. She could not remember ever seeing the docket sheets attached to it. **T.** 88-89, 92.

The next correspondence between Mrs. Pollard and Respondent is dated February 28, 2000. Mrs. Pollard wrote Respondent that she had received his October 22, 1999, letter and that she had heard nothing from him since. Mrs. Pollard asked for the return of her complete file and $4,000 of the retainer fee. Mrs. Pollard believed that Respondent had earned $1,000 of the retainer fee because he had filed a cross claim on her behalf. **Ex.** K. Mrs. Pollard wrote Respondent again on July 19, 2000, reiterating much of what she said in the February 28, 2000, letter. **Ex.** C-3 (letter dated July 19, 2000).

Mrs. Pollard wrote a complaint letter to the Office of Chief Disciplinary Counsel on September 21, 2000. She noted that she still had not received her file from Respondent, nor had she received any kind of accounting for the $5,000 retainer. **Ex.** D.

Region IV's Special Representative, Mr. Gotschall, informed Respondent of the complaint by letter dated October 11, 2000, and requested a response. **Ex.** E.

Respondent wrote back on October 17, 2000, requesting additional time in which to respond. **Ex.** F. When Respondent did not thereafter make a response, Mr. Gotschall wrote again. **Ex.** G. Respondent received the letters from Mr. Gotschall, but made no response. **T.** 114-115; **Ex.** C, p. 8. Respondent did not have his paperwork together and figured it would do more harm than good to respond to Mr. Gotschall's letters. **T.** 125.

On March 16, 2001, a probable cause hearing on Mrs. Pollard's complaint was conducted before Division III of the Region IV Disciplinary Committee. As of the date of that hearing, Respondent had not provided Mrs. Pollard with an accounting for the $5,000 retainer and had not returned Mrs. Pollard's file. **Ex.** C, p. 5-7, 30. Nor had Respondent provided the committee with the materials it needed to assess his case for a probable cause finding. **T.** 16-17. The committee directed Respondent to return Mrs. Pollard's file to her within 10 days, provide a copy of the file to the committee, and provide Mrs. Pollard with an accounting for her retainer. **Ex.** C, p. 20, 23, 29-30. Respondent agreed to do so. **T.** 116.

On March 27, 2001, Mr. Gotschall wrote Respondent requesting information on Mrs. Pollard's behalf. The Special Representative noted in his letter that they were still awaiting Respondent's production of Mrs. Pollard's file. **Ex.** H. While Respondent wrote Mr. Gotschall back to inform him that the enclosure was missing from the March 27 letter, Respondent provided no response to the substantive content of the letter to either Mr. Gotschall or Mrs. Pollard. **Ex.** I; **T.** 116-117.

Respondent did not provide the committee or Mrs. Pollard with an itemized statement or her file before September 5, 2001, which was the date of hearing before the

Disciplinary Hearing Panel. **T.** 18, 38, 100, 104, 116. Respondent relocated his office twice and had computer problems, so he had to recreate the time he put in on Mrs. Pollard's case from his notes. **T.** 108, 122-125. Respondent brought an itemized statement with him to the hearing on September 5. **Ex.** 9. Respondent handed over Mrs. Pollard's file to her at the conclusion of the hearing. **T.** 136-137.

Respondent was licensed to practice law in Missouri in 1984. **T.** 99. His office is located in Gladstone, Missouri. **T.** 100. Respondent has no disciplinary history.

Count I of a two-count information charged Respondent with violating Rules 4-1.1 (competence), 4-1.3 (diligence), 4-1.4 (communication), 4-1.5 (fees), 4-1.16(d) (obligation to return file), and 4-8.4(d) (conduct prejudicial to the administration of justice). Count II charged Respondent with a violation of Rule 4-8.1(b) (failure to provide information to disciplinary authorities). The Disciplinary Hearing Panel concluded that Respondent did violate Rules 4-1.4 and 4-1.16(d) of Count I and Rule 4-8.1(b) of Count II. The Panel recommended that Respondent be suspended with leave to apply for reinstatement after forty-five days. Respondent did not concur in that recommendation, causing the record to be filed with the Court.

POINT RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.4 IN THAT HE FAILED TO KEEP MRS. POLLARD REASONABLY INFORMED ABOUT HER CASE AND FAILED TO COMPLY WITH HER REQUESTS FOR INFORMATION ABOUT HER RETAINER.

Rule 4-1.4

In re Harris, 890 S.W.2d 299 (Mo. banc 1994)

POINT RELIED ON

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.16(d) IN THAT HE FAILED TO RETURN MRS. POLLARD'S FILE TO HER FOR MORE THAN EIGHTEEN MONTHS AFTER SHE REQUESTED IT.

Rule 4-1.16(d)

In re Cupples, 952 S.W.2d 226 (Mo. banc 1997)

POINT RELIED ON

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-8.1(b) IN THAT HE FAILED TO RESPOND TO REGION IV'S REQUESTS FOR INFORMATION AND FAILED TO PROVIDE A BAR COMMITTEE WITH AN ACCOUNTING FOR MRS. POLLARD'S RETAINER AND A COPY OF MRS. POLLARD'S FILE AFTER THE COMMITTEE DIRECTED HIM TO DO SO.

Rule 4-8.1(b)

In re Hardge-Harris, 845 S.W.2d 557 (Mo. banc 1993)

POINT RELIED ON

IV.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE BECAUSE RESPONDENT KNOWINGLY VIOLATED RULE 4-8.1(b) IN THAT HE REPEATEDLY DISREGARDED REQUESTS FOR INFORMATION FROM DISCPILINARY AUTHORITIES AND FAILED TO COMPLY WITH THE BAR COMMITTEE'S DIRECTIONS.

Rule 4-8.1(b)

In re Hardge-Harris, 845 S.W.2d 557 (Mo. banc 1993)

In re Tessler, 783 S.W.2d 906 (Mo. banc 1990)

In re Vails, 768 S.W.2d 78 (Mo. banc 1989)

A.B.A. Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.4 IN THAT HE FAILED TO KEEP MRS. POLLARD REASONABLY INFORMED ABOUT HER CASE AND FAILED TO COMPLY WITH HER REQUESTS FOR INFORMATION ABOUT HER RETAINER.

In contrast to Respondent's testimonial assertion that he and Mrs. Pollard were on the phone "regularly," the correspondence and testimony of the parties show the dearth of meaningful, substantive communication between the two about Mrs. Pollard's case. For example, Mrs. Pollard was unaware that her claims against the builder had been filed until Respondent sent her copies of the pleadings more than two years after their filing, by way of an October 22, 1999, letter. Mrs. Pollard instructed Respondent to go forward with her case, after learning that a cross claim against the builder was on file, despite his concerns about potential litigation costs. While Respondent's file reflects that he wrote Mrs. Pollard on October 25, 1999, requesting additional information from her before he could proceed, Mrs. Pollard did not recall getting that letter, and her next letter to Respondent in February of 2000 substantiates that she had received nothing from him since his October 22, 1999, letter. Respondent made no reply to Mrs. Pollard's February 2000 letter, nor her July 19, 2000, letter, prompting Mrs. Pollard to file her complaint in September of 2000.

If nothing else, had Respondent provided Mrs. Pollard with periodic statements as to how her $5,000 retainer was being spent, as he initially told her he would do, she could have tracked what Respondent was doing for her and could have made an informed decision about proceeding to litigate her claims against the builder. More to the point, Mrs. Pollard would have been in position to assess whether her objectives were being met by Respondent's legal services. "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Comment, Rule 4-1.4. Respondent seems to have concluded that by getting the lien lifted from Mrs. Pollard's house, coupled with the fact that she never paid for the deck, he provided Mrs. Pollard with legal services more than justifying her $5,000 retainer. Yet, it is clear from Mrs. Pollard's testimony that neither of those accomplishments were objectives Mrs. Pollard sought by retaining Respondent. Mrs. Pollard believed she had been sorely wronged by the builder and retained Respondent to litigate those claims. If Respondent had doubts as to the efficacy of her claims or felt he could not proceed because she failed to get him the appraisals and estimates he requested from her, then Rule 4-1.4 made it incumbent on Respondent to so advise Mrs. Pollard.

Respondent's failure to communicate meaningfully with his client, either by providing her with an accounting for her retainer or by explaining where he was going with her case, is a violation of Rule 4-1.4. Mrs. Pollard lacked the information to make an informed decision about whether Respondent was meeting her legal objectives. The Court stressed, in *In re Harris*, 890 S.W.2d 299 (Mo. banc 1994), the importance of

communicating important matters to a client in writing, particularly where a client may have unreasonable expectations. Review of this record leaves one with the clear impression that Respondent and his client had very different ideas about the representation and toward what end Mrs. Pollard's $5,000 was to be spent. In such a case, it was Respondent's professional responsibility to clarify his strategy and what might be accomplished with Mrs. Pollard's legal fees. His failure to do so violated Rule 4-1.4.

ARGUMENT

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.16(d) IN THAT HE FAILED TO RETURN MRS. POLLARD'S FILE TO HER FOR MORE THAN EIGHTEEN MONTHS AFTER SHE REQUESTED IT.

Mrs. Pollard wrote Respondent a certified letter dated October 11, 1999, in which she stated she no longer trusted Respondent to represent her, asked for return of her $5,000 retainer, and expressed her intention to seek other counsel. Mrs. Pollard first specifically requested that Respondent return her "complete file" in February of 2000, and renewed that request by letter dated July 19, 2000. Respondent did not return the file to Mrs. Pollard until the day of the hearing before the Disciplinary Hearing Panel, which was held on September 5, 2001. "The client's files belong to the client, not to the attorney representing the client." *In re Cupples*, 952 S.W.2d 226, 234 (Mo. banc 1997). Rule 4-1.16(d) mandates that a terminated lawyer surrender "papers and property to which the client is entitled."

While a terminated lawyer must also take reasonable steps to protect a client's interests, there is nothing in this record to indicate that that concern explains or excuses Respondent's failure to return Mrs. Pollard's file to her after his services were terminated and after it was requested. Respondent did produce to the bar committee a handwritten

letter dated October 25, 1999, in which he asked Mrs. Pollard to make an appointment if she wished to come pick up her file, but Mrs. Pollard did not recall ever getting that letter. Respondent did not follow-up on the October 25, 1999, letter, nor did he make any response to Mrs. Pollard's February 28 and July 19, 2000, requests for return of the file. Even more egregious, Respondent did not return the file to Mrs. Pollard after much discussion of the issue before the bar committee and after the committee directed him to do so. Only at the conclusion of the hearing before the Disciplinary Hearing Panel did Respondent finally turn the file over to Mrs. Pollard. Respondent's continuing refusal to see to it that Mrs. Pollard's file was returned to her, both after her request and at the bar committee's direction, was a violation of Rule 4-1.16(d).

ARGUMENT

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-8.1(b) IN THAT HE FAILED TO RESPOND TO REGION IV'S REQUESTS FOR INFORMATION AND FAILED TO PROVIDE A BAR COMMITTEE WITH AN ACCOUNTING FOR MRS. POLLARD'S RETAINER AND A COPY OF MRS. POLLARD'S FILE AFTER THE COMMITTEE DIRECTED HIM TO DO SO.

In order for the self-regulating attorney discipline system to work efficiently, lawyers have to comply with Rule 4-8.1(b). From the initial request for information upon notifying Respondent that a complaint against him had been made to Respondent's failure to comply with the bar committee's instructions, Respondent consistently thwarted the disciplinary system's efforts to efficiently process Mrs. Pollard's complaint at a minimum of cost and time to the system and the complainant.

A review of the conduct at issue demonstrates Respondent's obstructive approach to resolving disciplinary issues. Aside from a request for additional time to respond, Respondent made no response to Mr. Gotschall's October 11 and November 6, 2000, letter requests for a written response to the complaint. To the exasperation of bar committee members, Respondent failed to provide the necessary written information for the committee to examine prior to the March 16, 2001, probable cause hearing before that

body. And despite his agreement with the bar committee to do so, Respondent did not send the committee an itemized accounting of how he had earned Mrs. Pollard's retainer fee or a copy of Mrs. Pollard's file. Nor did Respondent respond to a letter from Mr. Gotschall sent eleven days after the committee hearing seeking information for Mrs. Pollard. Respondent did produce the file and the fee statement at the hearing before the Disciplinary Hearing Panel.

The lawyer disciplinary system has as one of its purposes maintenance of the integrity of the legal profession. Respondent trifled with his obligation to the profession by failing to produce the requested items until hearing before the Panel. Respondent testified that he had to go back through his handwritten notes over several years time to recreate the time spent on Mrs. Pollard's case in order to come up with a statement. Undoubtedly this was a time consuming process, and a frustrating one to the extent that the information should have been retrievable from computer records but could not be retrieved, but those excuses are no comfort to a complainant who had been reasonably requesting the information since before September of 1999 and a disciplinary system that was compelled to hearing on what might have conceivably otherwise have been an admonition case.

> Another important feature of this self-regulating system is that we expect the members of the Bar to deal promptly and candidly with any charges that may be brought against them. Prompt responses to a request for documents or other evidence not only expedite the process but also reflect on the willingness of the attorney to resolve any allegations of

> professional wrongdoing. The individual attorney's responsibility to the profession in this respect is no less important than the attorney's ethical responsibility to a client and to the court.

In re Hardge-Harris, 845 S.W.2d 557, 560 (Mo. banc 1993). Respondent's noncompliance with reasonable requests for information constitutes a pattern of contumacious behavior in violation of Rule 4-8.1(b).

ARGUMENT

IV.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE BECAUSE RESPONDENT KNOWINGLY VIOLATED RULE 4-8.1(b) IN THAT HE REPEATEDLY DISREGARDED REQUESTS FOR INFORMATION FROM DISCPILINARY AUTHORITIES AND FAILED TO COMPLY WITH THE BAR COMMITTEE'S DIRECTIONS.

Respondent's willful pattern of making no substantive response to disciplinary authorities, even after he had agreed to do so, is what makes this an appropriate case for suspension. But for Respondent's knowing and repetitive refusal to comply with basic requests for information, much less his flaunting of the bar committee's directions to turn over Mrs. Pollard's file to her and provide the committee a copy of the file to assist it in its probable cause determination, the misconduct infractions at issue would merit a lower level of discipline.

The A.B.A. Standards for Imposing Lawyer Sanctions (1991 ed.) support imposition of suspension under the facts of this case. Rule 7.2 (1992 amendment) reads: Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system." Maintenance of the integrity of the legal

profession is one of the objectives of the disciplinary system. Respondent injured the integrity of the profession by devaluing the work done by Region IV's Special Representative and the Bar Committee. Respondent imposed unnecessary expense and time on the effort to resolve Mrs. Pollard's legitimate complaints. Respondent produced the very file and document on the day of hearing before the Panel that might well have resolved the disciplinary case before the information was filed.

The bar committee is comprised of attorneys and lay people who volunteer their time and expertise to serve on disciplinary committees. "These services require considerable commitments of time and effort for which the members of the committees are not paid. They are entitled to expect courteous and prompt cooperation from all members of the profession including those who are charged with wrongdoing." *In re Hardge-Harris*, 845 S.W.2d 557, 560 (Mo. banc 1993). A lawyer who blatantly disregards the reasonable request of a bar committee laboring to resolve a bar complaint does injury to the integrity of the profession as a whole, especially where, as here, compliance with the committee's directions may have resulted in resolution of the disciplinary complaint short of filing an information. Respondent did eventually produce the file and accounted for the retainer fee, but only after the expense and time of hearing before a Panel.

The Court suspended lawyers in two cases similar to the one at bar in that they combined findings of professional misconduct with a pattern or record of trifling with disciplinary authorities. In *In re Tessler,* 783 S.W.2d 906 (Mo. banc 1990), the lawyer was found to have violated several disciplinary rules and to have engaged in a pattern of

non-cooperation with the committee investigating the complaints against him. The lawyer was suspended with no leave to apply for reinstatement until the end of six months. In *In re Vails*, 768 S.W.2d 78 (Mo. banc 1989), the lawyer was suspended for six months for violations of the disciplinary rules and for "trifling with the disciplinary process." The lawyer consistently failed to respond to letters from the advisory committee and did not show up for hearings scheduled by the committee. At a pretrial conference with the Special Master, the lawyer agreed to submit the case on the record already developed and to return a fee to a client, but returned the money only after a follow-up letter from the Master. The Court noted that the lawyer's persistent failure to appear and procrastination in returning the fee after agreeing to do so warranted a finding of conduct prejudicial to the administration of justice. 768 S.W.2d at 80.

The Disciplinary Hearing Panel recommended a suspension with leave to apply for reinstatement after 45 days. It has been shown by a preponderance of evidence that Respondent failed to communicate important and basic information to his client and disregarded her numerous requests for an accounting of her retainer fee and, ultimately, ignored her requests that he return her file. Respondent made no substantive response to the Special Representative's requests for preliminary information about the complaint, then, after agreeing with a bar committee's directions to do so, did not produce the client's file or an accounting for how her retainer had been spent until five and a half months later, on the day of hearing before the Disciplinary Hearing Panel. The aggravating factors and evidence present in this record warrant indefinite suspension.

CONCLUSION

Respondent's violations of the communication and file return rules (4-1.4 and 4-1.16) would not merit license suspension. Because Respondent repeatedly, knowingly, and contumaciously disregarded reasonable requests for information from disciplinary authorities, which information he finally produced at the eleventh hour, Respondent should receive an indefinite suspension, with no leave to apply for reinstatement for six months in conformity with Rule 5.28.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 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 4,348 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