IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
JAMES M. MARTIN	**)**	**Supreme Court #SC89000**
	)	
Respondent.	**)**	

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters 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 2000.

STATEMENT OF FACTS

Background and Disciplinary History

Respondent James M. Martin was licensed to practice law in April of 1968. **App. 40 (T. 151)**. Respondent practices law in St. Louis, Missouri. Approximately 75% of his practice involves litigation. He has tried 175-200 civil cases and 170-200 criminal cases. Mr. Martin has handled from 10-12 products liability cases to conclusion, i.e., the cases were not settled. Respondent considers himself a very experienced personal injury trial attorney, one who knew how to handle a case like the Complainants'. **App. 54 (T. 206-207), 67 (T. 257)**.

In December of 1989, Respondent was admonished by a regional disciplinary committee regarding his lack of diligence (4-1.3) and failure to communicate adequately (4-1.4) with a client named Steidle. The letter admonished Mr. Martin for agreeing in October of 1985 to represent Ms. Steidle with regard to several legal matters that developed upon the death of her fiancé, including seeking to reform a deed and to recover burial expenses she had incurred on his behalf. The claim for recovery of burial expenses was not filed in a timely manner, and no action regarding the deed was taken until after March of 1987, when Ms. Steidle was served with pleadings in a partition action filed by her fiancé's heirs. **App. 90-91**. The letter also admonished Respondent for not keeping Ms. Steidle sufficiently informed about her case to make informed decisions regarding the representation. **App. 91**.

On September 6, 1988, the Missouri Supreme Court issued an order of private reprimand against Respondent in *In re Martin*, SC70002. The order does not recite what rules Mr. Martin violated as the basis for the reprimand. **App. 93**.

Rule 4-8.1(c) -- Knowingly Fail to Respond to Lawful Demands for Information from Disciplinary Authorities

By letter dated October 26, 2005, Mr. Martin was notified that Grace Eckstein and William Hawkins had filed a complaint against him. The complaint had been designated file number 05-662. Respondent was asked to respond to the complaint within three weeks. **App. 94**. On December 23, 2005, a follow-up letter was sent to Respondent advising that no response had been received and again asking for one, this time within seven days. **App. 95**. As no response from Respondent was forthcoming, a third letter, dated February 21, 2006, was sent to Mr. Martin demanding a response to the Eckstein/Hawkins complaint. **App. 98**.

By letter dated December 5, 2005, disciplinary authorities advised Mr. Martin that a complaint had been filed against him by Patricia Hawkins. The complaint file was designated 05-882. Mr. Martin was asked to respond to the complaint within three weeks. **App. 96**. Because no response was forthcoming, a follow-up letter dated February 21, 2006, was directed to Mr. Martin, asking again for a response to Ms. Hawkins' complaint. **App. 97**.

On December 5, 2005, a letter from disciplinary authorities advised Mr. Martin that William Hawkins, Jr., had filed a complaint against him and asked for his response to the complaint. The complaint file was designated number 05-883. **App. 99**. When no

response was received, a letter dated February 21, 2006, was sent to Respondent, asking for a response within the week. **App. 98**.

Although he made one request for additional time to respond to the complaints, Mr. Martin provided disciplinary authorities with no substantive response to complaint files 05-662, 05-882, or 05-883. **App. 55-56 (T. 212-213), 65 (T. 250)**. Respondent "put off" responding; he "laid down on it." **App. 41 (T. 155), 56 (T. 213)**.

An information charging Mr. Martin with professional misconduct, as had been alleged in the three complaints, was served on Respondent in June of 2007. **App. 85-88**. Mr. Martin's answer to the information, filed with the Advisory Committee on July 16, 2007, was his first substantive response to the complaints raised by Mr. Hawkins, Ms. Eckstein, Ms. Hawkins, and Mr. Hawkins, Jr. **App. 65 (T. 250), 100-109**. Twenty months passed from the time notice of the earliest complaint was sent to Mr. Martin and his first response to the complaints. **App. 65 (T. 250)**.

Respondent's reasons for why he failed to respond to the complaints are several. He was hospitalized in August of 2005. **App. 55 (T. 212)**. After that, Respondent tried several cases, though he was attempting at that time to cut back on his practice. **App. 55 (T. 212)**. He had to spend some time in Pennsylvania attending to his mother. **App. 55 (T. 212)**. The file that the Complainants were upset about was large, and it took Respondent a long time to put things together and review it. **App. 56 (T. 213)**. There were a couple of occasions when other lawyers were reviewing the file, but Mr. Martin concedes that their review did not interfere with his ability to respond to the complaints. **App. 65 (T. 250-251)**.

The disciplinary hearing panel concluded that Respondent did violate Rule 4-8.1 by not responding to multiple letters requesting information. **App. 116**.

Rule 4-1.3 -- Failure to Act with Reasonable Diligence and Promptness in Representing Client,

Rule 4-1.4 -- Explain Matter so as to Permit Client to Make Informed Decisions, and

Rule 4-1.5(c) -- Contingent Fee Contracts Shall Be in Writing

In the summer of 1992, Mr. Martin agreed to serve as co-counsel for William Hawkins, Sr. and Grace Eckstein and her husband in a case for the wrongful death of their sons, Shawn Carroll and Marcus Hawkins. **App. 42 (T. 160), 45 (T. 170)**. The 19 and 20 year old victims, along with a third passenger named Petroff, were all killed on September 2, 1990, in a one vehicle accident that occurred in Texas County, Missouri. **App. 9 (T. 25)**. Mr. Martin represented the Ecksteins and Mr. Hawkins in the wrongful death matter until a judge granted him leave to withdraw from the case on February 7, 2006, nearly 14 years later. **App. 123-125**.

Respondent Martin, who previously had represented Mr. Hawkins against federal criminal charges unrelated to the wrongful death case, became involved in the wrongful death litigation after much of the initial investigation had been done by other lawyers. **App. 13 (T. 41), 15 (T. 52), 54 (T. 207-208)**. Mr. Martin may have entered into a written contingency fee contract with the Ecksteins, but believes, as he stated in his answer to the

information, that his contingency agreement with Mr. Hawkins was oral. **App. 13 (T. 41), 42-43 (T. 160-161), 100-101**.

The case was filed in the summer of 1992 in Madison County, Illinois (Complainants lived in Illinois), on a theory of products liability against Chrysler Corporation and others. The initial investigation of the accident was done, and the products liability theory pled against Chrysler was developed, by a lawyer representing one of the other decedents. **App. 56-57 (T. 216-217)**. The theory, in a nutshell, was that a manufacturing defect in the Delrin ball, a component in the steering column of the involved vehicle, caused the driver to be unable to control the vehicle's direction; hence it went off the Texas County road and head on into a concrete abutment. **App. 59 (T. 226)**. The lawyers who initially developed the theory found a witness named Terry Rhodes, a blacksmith, who could articulate the theory as a gradual fatigue fracture (manufacturing defect) in the Delrin ball. **App. 47-48 (T. 180-181)**.

Complainants' initial concern was whether they had a valid case against Chrysler. **App. 16 (T. 53), 37-38 (T. 140-141)**. After Mr. Martin explained to them their expert's theory about how the accident happened, Mrs. Eckstein wanted to pursue the case. **App. 15-16 (T. 52-53)**. She is convinced that a manufacturing defect caused the accident. **App. 21 (T. 73-74)**.

The case, pending in a Madison County, Illinois, court, was to go to trial in April of 1996. **App. 9 (T. 27)**. The Illinois court, however, dismissed the case in late 1995 or early 1996 on the theory of forum non-conveniens. **App. 121**. Lawyers representing the wrongful death plaintiffs appealed the dismissal in Illinois, but refiled the case in Texas

County, Missouri, in July of 1996 to preserve it. **App. 126**. The Missouri action was stayed until April of 1997, when plaintiffs lost the Illinois appeal on the venue question. **App. 45 (T. 171), 57 (T. 219-220)**. Respondent's Illinois co-counsel withdrew from the case in 1998 or 1999. **App. 57 (T. 218)**.

Respondent Martin came to believe the case against Chrysler was not worth taking to trial unless he could find an expert, preferably a mechanical engineer, who was willing to testify that the crack found in the Delrin ball was a manufacturing defect, and did not occur when the front of the car impacted the concrete abutment at a very high rate of speed. **App. 44 (T. 166-167), 46 (T. 173), 47-48 (T. 179-181)**. Respondent consulted with at least four engineers, three of them before the case was refiled in Missouri, but none was willing to provide the testimony Respondent considered critical to the case. **App. 44 (T. 167-168), 47-48 (T. 179-181), 69 (T. 266)**. Without the additional expert testimony, Respondent believed going to trial would waste both his and the clients' time and money. **App. 45 (T. 171-172), 47 (T. 178-179), 48 (T. 184)**.

Complainants Eckstein and Hawkins believed that Terry Rhodes was a sufficient expert to take their case to trial. **App. 21 (T. 73), 38 (T. 143)**. It had been their understanding that the case was ready to be tried in April of 1996, before it had to be refiled in Missouri. **App. 10 (T. 30), 35 (T. 132)**. It was their belief, based on what they believed Respondent told them, that additional experts would serve only to "shore up" the case, or that having another expert would only serve to make Respondent "more comfortable" about going to trial. **App. 20 (T. 71), 38 (T. 143-144)**.

In 2001, Chrysler filed a motion for summary judgment. **App. 44 (T. 167)**. A response to the motion was prepared and filed by Respondent's office. **App. 71 (T. 273)**. Respondent was surprised, or a better word would be shocked, when the judge denied Chrysler's motion for summary judgment in October of 2001. Mr. Martin concluded that their expert's, Mr. Rhodes', testimony provided just enough evidence to get them past summary judgment. **App. 44 (T. 167-168), 45 (T. 171), 49 (T. 185)**.

Complainants wanted the case tried, to have their day in court. **App. 14 (T. 46), 36 (T. 134), 45 (T. 171-172), 67 (T. 258)**. Innumerable messages were left for Respondent asking him about a trial date. **App. 11 (T. 33), 45 (T. 169)**. In May of 1999, William Hawkins, Sr., wrote Respondent to get the case off the back burner and get a trial date. **App. 47 (T. 178)**. When he would return calls, Respondent would say he needed another expert, or that he had to find a trial date mutually acceptable to opposing counsel. **App. 11 (T. 34), 12 (T. 40)**. Complainants deny Mr. Martin ever told them he did not think they had a case. **App. 12-13 (T. 40-41), 20 (T. 71)**. Respondent did tell Complainants from 1995 on that the case was "thin" without another expert witness and because of the evidence of the driver's possible contributory negligence. **App. 45 (T. 170), 46 (T. 175-176), 49 (T. 186-187)**. Mr. Martin does not believe that Complainants wanted "closure" regarding their sons' deaths; instead, they wanted to have their day in court. **App. 47 (T. 177-178)**.

Mr. Martin eventually realized that the Texas County case would "float" on the court's docket until one of the parties filed something indicating readiness for trial. **App. 58 (T. 221)**. In his opinion, it was better to leave the case floating on the Texas County

docket in the hopes he would come across an amenable expert witness or hear about another Delrin ball defect case than to try it and lose. **App. 61-62 (T. 236-237), 64 (T. 248), 67 (T. 257)**. He did not want to withdraw from the case because he did not want to let Complainants hang. **App. 60 (T. 229)**.

Mr. Martin decided to file a motion to withdraw from the case after he "had it out" with complainant Eckstein in a late evening phone call in August of 2005. **App. 13-14 (T. 44-45), 133**. Mrs. Eckstein called to express her displeasure with how the body of the wrecked car was being stored. After the phone call, Mr. Martin believed that a breakdown in the attorney/client relationship had occurred. **App. 64 (T. 245)**. Respondent's feeling that he could no longer represent Complainants was cemented after they threatened and then did file complaints against him. **App. 41 (T. 156)**. Respondent's motion to withdraw from the case was granted on February 7, 2006. **App. 123-125**.

With respect to diligence, Mr. Martin concedes he should have told Complainants back in 2002 that they did not have a case. **App. 66 (T. 255)**. Respondent conceded in a letter to Mr. Hawkins dated September 29, 2004, and in his hearing testimony, that the case had languished after they survived the summary judgment motion in 2001. **App. 45 (T. 171), 134-135**. Respondent realizes that at some point, diligence requires a lawyer to advise his clients if he is not willing to take their case to trial. **App. 46 (T. 173)**. Mr. Martin believes, however, that he had a duty not to abandon his clients, at least not until the attorney/client relationship broke down. **App. 67 (T. 257)**.

There was no correspondence from Respondent to Complainants from 2002 to 2004. **App. 50-51 (T. 191-194)**. In retrospect, Mr. Martin does not believe he could have communicated with Complainants any better than he did about the problems he perceived with the merits of the case. **App. 64 (T. 247-248)**.

The disciplinary hearing panel concluded that Respondent violated Rule 4-1.3 by failing to represent Complainants with reasonable diligence and promptness in their case against Chrysler Corporation. **App. 112-115**. The panel also concluded Respondent violated Rule 4-1.5(c) in that his contingency fee contract with Mr. Hawkins was not in writing. **App. 117**. The panel concluded that Respondent was not guilty of violating Rule 4-1.4(a) in that Respondent sent Complainants letters and returned about half of their phone calls. **App. 115-116**.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULES 4-1.3 (DILIGENCE), 4-1.4(b) (MAINTAIN MEANINGFUL COMMUNICATION WITH CLIENTS), 4-1.5(c) (CONTINGENCY CONTRACTS MUST BE IN WRITING), AND 4-8.1(c) (RESPOND TO DISCIPLINARY AUTHORITIES) IN THAT HE FAILED TO RESPOND TO DISCIPLINARY AUTHORITIES' MULTIPLE REQUESTS FOR INFORMATION OVER A 20 MONTH PERIOD AND DID NOT COMMUNICATE MEANINGFULLY WITH NOR ACT DILIGENTLY TOWARD HIS CLIENTS ABOUT HIS HANDLING OF THEIR CASE AND DID NOT MEMORIALIZE HIS CONTINGENCY FEE CONTRACT WITH HAWKINS.

In re Shelhorse, 147 S.W.3d 79 (Mo. banc 2004)

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

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

Rule 4-1.3

Rule 4-1.4(b)

Rule 4-1.5(c)

Rule 4-8.1(c)

G. Hazard and W. Hodes, The Law of Lawyering, (1991 supp)

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE FOR SIX MONTHS AND STAY THE SUSPENSION FOR A ONE YEAR PERIOD OF PROBATION BECAUSE HE KNOWINGLY VIOLATED DUTIES TO THE PROFESSION AND HIS CLIENTS OVER AN EXTENDED PERIOD OF TIME, HE IS GUILTY OF MULTIPLE RULE VIOLATIONS, HE HAS DISCIPLINARY HISTORY, AND HE HAS SUBSTANTIAL EXPERIENCE IN THE PRACTICE OF LAW.

In re Crews, 159 S.W.3d 355 (Mo. banc 2005) (per curiam)

In re Shelhorse, 147 S.W.3d 79 (Mo. banc 2004)

Rule 4-8.1

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULES 4-1.3 (DILIGENCE), 4-1.4(b) (MAINTAIN MEANINGFUL COMMUNICATION WITH CLIENTS), 4-1.5(c) (CONTINGENCY CONTRACTS MUST BE IN WRITING), AND 4-8.1(c) (RESPOND TO DISCIPLINARY AUTHORITIES) IN THAT HE FAILED TO RESPOND TO DISCIPLINARY AUTHORITIES' MULTIPLE REQUESTS FOR INFORMATION OVER A TWENTY MONTH PERIOD AND DID NOT COMMUNICATE MEANINGFULLY WITH NOR ACT DILIGENTLY TOWARD HIS CLIENTS ABOUT HIS HANDLING OF THEIR CASE AND DID NOT MEMORIALIZE HIS CONTINGENCY FEE CONTRACT WITH HAWKINS.

Introduction

In this attorney discipline case, the disciplinary hearing panel's findings of fact and conclusions of rule violations are advisory to the Court. The Court reviews the evidence de novo, making its own determination as to the credibility of witnesses and the weight of the evidence. *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005) (per curiam). Misconduct must be proven by a preponderance of the evidence. Rule 5.15(c).

The disciplinary hearing panel concluded Respondent was guilty of violating the diligence rule (4-1.3), the rule that requires that contingency fee agreements be in writing

(4-1.5), and the rule requiring lawyers to respond to requests for information from disciplinary authorities (4-8.1(c)). The panel concluded Respondent did not violate the communication rule (4-1.4). The panel recommended a one month stayed suspension, accompanied by a one year period of probation, with the terms of the probation being no further violations of the Rules of Professional Conduct. There being no concurrence with the panel's recommendation by either Informant or Respondent, the record was filed with the Court pursuant to Rule 5.19.

Disciplinary counsel's points of agreement and disagreement with the disciplinary hearing panel's recommendation are as follows: disciplinary counsel believes the record substantiates violation of all four charged rules, including violation of the communication rule, and disciplinary counsel would recommend a six month (as opposed to the panel's one month) stayed suspension with a one year period of probation.

Failure to Respond to Requests for Information

Disciplinary authorities wrote the first of seven letters asking Mr. Martin to respond to the Hawkins/Eckstein complaints in October of 2005. Having received no substantive response (the transcript suggests that Respondent wrote one letter requesting additional time to respond) from Respondent in the succeeding 20 months and to the succeeding six letters, disciplinary authorities were left with no option but to file an information charging Respondent with the misconduct, as alleged in the complaints. By failing to respond, Mr. Martin effectively forced the investigation of the complaints, which should have preceded the filing of the information, to the hearing room. The resultant delay in processing the complaints and unnecessary complication of the hearing

underscore the need for lawyers' compliance with Rule 4-8.1. See *In re Harris*, 890 S.W.2d 299, 302 (Mo. banc 1994); *In re Hardge-Harris*, 845 S.W.2d 557, 560 (Mo. banc 1993).

In the fall of 2005, when the Hawkins and Eckstein complaints began to be forwarded to Respondent, Respondent had been practicing law for thirty-seven years. He considered himself an experienced trial lawyer, who certainly knew how to handle a case like *Eckstein v. Chrysler Corporation*. And yet, Mr. Martin provided no substantive response to any of the seven letters he received from disciplinary authorities between October of 2005 and February of 2006.

It had been awhile, but Respondent has had to deal in the past with disciplinary inquiries – he was admonished and given a private reprimand in the late 1980s. As an experienced litigator and with his own disciplinary history as his teacher, there simply is no good excuse for the lack of attention Respondent paid to notice of the Hawkins and Eckstein complaints.

Indeed, Respondent's testimony acknowledges he had no good excuse for not responding. He had been hospitalized before notice of the first complaint was forwarded to him, but testified that after his hospitalization he quickly became involved in trying a couple of different cases. Respondent noted that other lawyers, at Complainants' request, came by to look at the file, but acknowledged that their review in no way hampered his ability to respond. Mr. Martin suggested that the lack of organization and size of the file slowed his response, but surely a lawyer's failure to organize and maintain a client's file in a manner allowing for review is not a valid excuse for failing to respond to disciplinary

authorities. For every excuse Respondent offered for not responding, he eventually conceded the failure was owing to his own failure to devote the time and attention necessary to fulfill his duty.

Lawyers' inattentiveness to requests for information from disciplinary authorities is a recurring problem and one that impedes efficient review of complaints. The Court has repeatedly, and as recently as 2004, stressed to lawyers the importance of responding and cooperating with the disciplinary system. See *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004). Even if a lawyer believes complaints are completely lacking in merit, there is a duty to respond. *In re Stricker*, 808 S.W.2d 356, 358 (Mo. banc 1991). As Judge Blackmar so straightforwardly put it in his concurrence to *Shelhorse*:

> Failure to respond to correspondence from the Chief Disciplinary Counsel about complaints is an even more serious offense. Many members of the public do not have a high opinion of our profession, and there is widespread belief that it is futile to complain to the authorities because "nobody will do anything about it." A lawyer should regard a letter from the Chief Disciplinary Counsel with the respect accorded communications from the Internal Revenue Service.

147 S.W.3d at 81 (Blackmar, J., concurring in part and dissenting in part).

Diligence, Communication, and Fee Contract

Mr. Martin conceded in a September 2004 letter to Mr. Hawkins that his son's wrongful death case had indeed "languished" and "needs to be brought up to speed." **App. 135**. In that September 2004 letter, Mr. Martin reviewed some of the major events

that had occurred in the case's (at that time) 12 year history. Mr. Martin reminded Mr. Hawkins that he was free to hire another attorney, that the case was a "long shot" and "difficult" because of the evidence of contributory fault on the part of the driver. Still, Respondent concluded the 2004 letter by announcing his intention to "fully assemble" the file and get back to them with a "detailed schedul[e]" and an invitation to accompany him on travel to depositions. It never happened. In point of fact, Complainants had been hearing these kind of assurances from Respondent for many, many years. Respondent's failure either to get on with the case and try it with what he had, or tell the clients he was not going to try it, were violations of the diligence and communication rules.

Respondent testified repeatedly in the hearing of this matter that it would have been a waste of his time and money, and the Complainants' time and money, to try the case. **App. 45 (T. 171-172), 47 (T. 178-179), 48 (T. 184)**. "A day in court is wasted if you know you're going to lose." **App. 50 (T. 189)**. Mr. Martin's ethical lapse here is not his negative evaluation of a cause of action that might or might not have survived a motion for directed verdict. The ethical lapse occurred because Respondent led the clients on for, literally, years, allowing them to believe he would eventually gear up and give them their day in court, when Respondent could not bring himself to try the case on the evidence available to him. Respondent's failure to try the case and give the clients their "day in court," especially after Chrysler's motion for summary judgment was denied in 2001, was a failure to "act with reasonable diligence and promptness in representing a client." Rule 4-1.3. And, Respondent's failure to articulate clearly to his clients, not just that he considered their case "thin" and "difficult," which the record agrees that he did

repeatedly tell them, but that he would not try it on the evidence available, was a failure to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 4-1.4(b).

In a moment of clarity, Respondent testified that "Maybe the best thing would have been to fold the tent up and say sorry, folks, there's not enough here, goodbye." **App. 64 (T. 248)**. In point of fact, the Rules of Professional Conduct do require a lawyer to pursue a client's matter diligently, or to explain why you will not do so, giving the client sufficient information to decide what to do next. "Rule 1.4(b) is not merely a prophylactic rule which requires a lawyer to provide 'information for information's sake.' It makes explicit what is implicit in Rule 1.2(a): if the client is to make key decisions about his legal affairs, he must be armed with sufficient knowledge for intelligent decision making." G. Hazard and W. Hodes, The Law of Lawyering, § 1.4: 301 (1991 supp). Communication is essential, even when the information to be communicated, i.e., that Respondent was unwilling to give Complainants their "day in court," is something the client does not want to hear.

Mr. Martin pled in his answer to the information that he believed he had an "oral contingency agreement to be paid," an unexpected admission because contingency fee contracts are required to be in writing. Because such an agreement would violate Rule 4-1.5(c), disciplinary counsel's special representative moved at the beginning of the hearing, pursuant to Rule 5.15(b), to amend the information to include the Rule 4-1.5(c) charge. Permission was granted, with the understanding that the record was going to be held open for several weeks anyway, which would allow Respondent time to meet the

additional charge. The panel subsequently concluded Rule 4-1.5(c) was violated on the basis of Respondent's admission in his answer to the information, and from his subsequent testimony that he believed his contract with Mr. Hawkins was oral. **App. 43 (T. 161)**.

ARGUMENT

II.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE FOR SIX MONTHS AND STAY THE SUSPENSION FOR A ONE YEAR PERIOD OF PROBATION BECAUSE HE KNOWINGLY VIOLATED DUTIES TO THE PROFESSION AND HIS CLIENTS OVER AN EXTENDED PERIOD OF TIME, HE IS GUILTY OF MULTIPLE RULE VIOLATIONS, HE HAS DISCIPLINARY HISTORY, AND HE HAS SUBSTANTIAL EXPERIENCE IN THE PRACTICE OF LAW.

Sanctions in a lawyer discipline case have as their purpose not to punish the lawyer, but to protect the public and preserve the integrity of the profession. *In re Kazanas*, 96 S.W.3d 803, 807-08 (Mo. banc 2003). Consideration of the sanctions model found in the ABA Standards for Imposing Lawyer Sanctions (1991 ed.) and this Court's decisional law lead disciplinary counsel to recommend a six month stayed suspension with a one year period of probation.

The ABA Standards model begins with identification of the duty violated. The duties of diligence and communication, central to Respondent's misconduct, are owed to clients. The duty to respond to disciplinary inquiries is a duty every lawyer owes the profession.

The ABA model next moves to discernment of the lawyer's mental state in violating the duty. Mr. Martin has acknowledged he had a duty to respond to disciplinary

inquiries. He offered no legitimate excuse for not doing so for the 20 months that passed between the mailing of the first letter requesting information and his first substantive response, filed by way of answer to the information. With respect to the Rule 4-8.1 charge, Respondent's violation was at least knowing.

Respondent's mental state with respect to the diligence and communication violations is more difficult to gauge. Respondent's explanation for his failure to try Complainants' case, or explain to them that he would not try it, was that he did not want to abandon them, or leave them hanging – at least not until he felt the attorney/client relationship had broken down. While Respondent's explanation may invoke empathy with anyone who has ever had to tell a client what they do not want to hear, the flip side to Respondent's failure to abide the Rules' directives was evident in Complainants' testimony. Ms. Eckstein described the 17 years of torment she and her family endured not knowing whether they had a valid case for their son's death or whether they would ever get their day in court. **App. 14-15 (T. 47-51)**. Mr. Hawkins, Jr., testified that "if there wasn't a case, then why weren't we informed that there wasn't a case. And if there was a case, why didn't we go to trial?" **App. 38 (T. 141)**. Given Complainants' persistence in pestering Respondent to move the case forward, it is not a stretch to conclude that his failure to do so was knowing.

Injury, or potential injury, is the next factor in the ABA model. Whether Complainants' case would have survived a motion for directed verdict is not knowable with certainty. We do know that Complainants never got their day in court; never got an explanation from their lawyer, a judge, or a jury regarding the validity of their claim.

Finally, the ABA model factors in information that may be considered in mitigation or aggravation of sanction. It should be noted at the outset that the "difficulty" of a client's personality or behavior is not considered a mitigating factor. So called high maintenance clients, which the record suggests is a category Complainants may fall within, are not excepted from the Rules of Professional Conduct. Conversely, Mr. Martin's years of litigation experience should have better equipped him to deal with Complainants and the assessment of their cause of action. Respondent's refusal to acknowledge the wrongfulness of his lack of diligence and lack of candor regarding his handling of the case are also aggravating factors.

A public reprimand was imposed in *In re Shelhorse*, 147 S.W.3d 79 (Mo. banc 2004), where the misconduct was confined to failure to respond to disciplinary inquiries and not complying with continuing legal education requirements. Given the additional serious Rule violations present in this record, coupled with Respondent's disciplinary history, public reprimand is not the appropriate level of discipline.

In re Crews, 159 S.W.3d 355 (Mo. banc 2005) (per curiam), is instructive when considering sanction analysis in this case because the two cases have some important factors in common. Mr. Crews, like Mr. Martin, demonstrated an alarming lack of alacrity in moving a client's case over a period of years and in failing to maintain sufficient communication with his clients to allow them to follow the progress (or lack thereof) of their case. Like the *Crews* case, this matter implicates violation of duties owed the profession and clients. Unlike Mr. Crews, Mr. Martin did file a timely, and successful, response to a dispositive motion, but then did nothing to move the clients'

case forward for the next three years. There is also similarity between the cases in Mr. Martin's refusal to acknowledge the possibility of wrongdoing (at least with respect to diligence and communication), his substantial experience practicing law, and the existence of disciplinary history.

There is a significant dissimilarity between *Crews* and the case at bar. Mr. Crews dissembled to the Court and his clients about his failure to defend against a summary judgment motion and his failure to remedy a defective appellate brief. Rule 4-8.4(c) (dishonest, deceitful conduct) is not a factor in this case.

The Court suspended Mr. Crews' license with no leave to apply for reinstatement for one year and imposed special conditions for reinstatement. Given the absence in this case of a Rule 4-8.4(c) (dishonesty) violation, disciplinary counsel is recommending a six month stayed suspension, with a one year period of probation. The recommended conditions of probation are found in the Appendix at **143-146**.

CONCLUSION

Stayed suspension with a period of probation, particularly in view of Respondent's disciplinary history, is the appropriate sanction to address Respondent's prolonged refusal to deal with the disciplinary case that arose from his long term failure to exercise diligence and meaningful communication with his clients.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2008, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

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Sharon K. Weedin

CERTIFICATION: RULE 84.06(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 Rule 84.06(b);

3. Contains 5,729 words, according to Microsoft Word, 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.

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Sharon K. Weedin

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