IN THE SUPREME COURT
STATE OF MISSOURI

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

RESPONDENT'S OPENING BRIEF

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JURISDICTION

Appellant agrees that jurisdiction over attorney disciplinary matters is established pursuant to Art 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5 (§5.19) V.A.M.R. and Section 484. R.S.Mo.

STATEMENT OF FACTS

I. PRELIMINARY STATEMENT

Respondent, James M. Martin is a member of a three (3) person firm in St. Louis Missouri. He was licensed to practice law in the State of Missouri in April of 1968, and is also admitted to Federal and State Courts in Missouri and Illinois. T. 151-153. He has also practiced in State Courts in Illinois, Pennsylvania, Florida and New York, pro haec vice.

Respondent represented William Hawkins, one of the complainants herein, in multiple Federal criminal cases prior to the institution of the civil litigation which is the nub of this complaint. *Eckstein v. Chrysler* (T. 125-129, 152, 155, 207, 208). Respondent has tried a minimum of 175 civil jury cases to a verdict, excluding jury waived, equity, domestic and probate; Respondent has also tried approximately 145 criminal cases to a jury verdict in State and Federal Courts in both Missouri and Illinois. Respondent has worked on approximately 10 products cases to a conclusion.

Respondent believes himself to be an experienced attorney and believes he knows how to handle products liability cases, such as those presented by the Complainants Hawkins and Eckstein. (T. 206-210).

The problem throughout this case was the inability of counsel to locate a necessary expert witness, leading to client dissatisfaction and demand for "trial", when the same was not believed to be prudent, by Respondent.

II. FACTS

The case underlying the complaint arises out of a single vehicle accident that occurred in the early morning hours of September 2, 1990 in Texas County Missouri. A 1990 Dodge Daytona driven by Shawn M. Carroll (son of Grace Eckstein) drove off Route 17 in a straight line into contact with a concrete abutment approximately 98 feet off the roadway and about 240 feet from the driver's last position in the right lane. (T. 160-170). The driver, together with two passengers, Jeffrey P. Petroff and Marcus A. Hawkins (son of William Hawkins) were killed in the impact. (Ex. 2, V II-7-31).

Mr. Hawkins' multiple pending criminal matters in the Federal District Courts in Missouri and Illinois subsequently resulted in his convictions (T. 124-128, 207-210). The *Hawkins v Chrysler* matter began shortly thereafter.

In 1992, Mr. Martin was asked by complainant Bill Hawkins, to represent his family and assist attorney Joseph Brown of Edwardsville, Illinois in wrongful death actions arising out of the 9/2/90 automobile accident against Chrysler, Shelby Motors and Goodyear Tire & Rubber. (Exhibit S,T. 259) Respondent subsequently was involved as co-counsel for complainants Hawkins and Eckstein in the case for the wrongful death of their sons, Shawn Carroll and Marcus Hawkins beginning in September, 1992. (T. 159-161, T. 170, 216, 218). Respondent believes there was a contingent fee agreement tied to Mr. Brown, but can't locate his copy.

Problems with Case

The complaining parties were well aware of the problems from the outset. The initial police reports stated that the driver and the passengers had been drinking. The police believed that they had fallen asleep or that inattention was at issue here as opposed to a problem with product liability. These problems were pointed out in a letter to Mr. Hawkins and Ms. Eckstein on March 1, 1996 (Ex. W,T. 259, 261) and earlier letters. (Ex. A, C, D, T. 184-186). The complainants were looking for other explanations.

That letter summarized the first 3 ½ years of the case which culminated in a Madison County, Illinois Judge granting Chrysler's Motion to Dismiss based on "forum non-conveniens" under Illinois Supreme Court Rule 187(c). The Order allowed a new petition to be filed within 6 months, where Judge Matoesian determined the appropriate venue to be Texas County, Missouri. (T. 78-84). The letter also pointed out that a lawsuit would probably have to be refiled in Missouri by July 1997, while the matter concerning the dismissal would be under appeal in Illinois.

Complainants repeatedly rejected offers from Shelby Motors (the dealership that sold the automobile) for $25,000 for each of the parties' decedents. Respondent advised the complaining witnesses that there was little or no evidence to show that the dealership was negligent and that they would be dismissed out. (T. 260-262). Informants' witnesses Mrs. Eckstein and Hawkins, Jr. as well as Respondent's witnesses, Martin and Leopold repeatedly pointed out that the complaining parties

repeatedly and regularly rejected all offers from Shelby Motors despite the fact that they were advised that case could not be made against Shelby, (T. 63-T. 68, Ex. A, C & D) and that the claim was subject to dismissal.

Mrs. Eckstein acknowledged that the Petroff attorneys, after initially investigating the case, chose not to go forward and that she repeatedly objected to all settlement offers with Shelby Motors (T. 69-70). William Hawkins Jr. acknowledged that there were multiple letters to his family stating that Shelby would get dismissed out of the case and that Respondent advised the families to take the money from Shelby Motors (T. 143-145).

FEE AGREEMENTS

Mr. Martin first got into the case as co-counsel with the original attorney representing Mr. Hawkins and Mrs. Eckstein, Joe Brown of Lucco, Brown & Mudge in Edwardsville (T. 215-216, T. 165-169). Respondent believes that there was a contingent fee agreement in place with Joe Brown and with himself, but cannot locate his copy. Mrs. Eckstein stated she had a written agreement and all parties understood that there was a one third contingent fee agreement in place. (T 41-43; T 160-162). There is no fee dispute.

LEGAL PROBLEMS WITH CASE

Following the first 3 ½ years after the case was filed in September 1992 in Madison County, Illinois, and as the parties were facing a potential trial date in 1996, Judge Matoesian entered the Order of Dismissal or transfer based on inappropriate forum. (Ex C, T. 78-80) in January, 1996.

The mechanical components necessary to prove a products liability claim against Chrysler had long been removed from complainants' sons' vehicle tested and examined, and were kept at Respondent's law offices and complainants were aware of that fact. (T. 77-78). The vehicle was photographed, measured, and stored. All evidentiary issues were preserved.

EXPERT WITNESS

Mr. Hawkins, Sr., Mr. Hawkins, Jr. and Mrs. Eckstein were all made aware that the testimony of Mr. Rhodes was not sufficient to make the case, as early as 1995 shortly after Rhodes' deposition. (Ex I). The testimony of Dr. Oliver Siebert also was not sufficient without the testimony of an "additional expert" who could testify that the assembly or manufacture of the "tilt-telescoping" steering wheel mechanism (Ex I- T. 82) by Chrysler, was defective. An engineer by the name of Boulter Kelsey was contacted by Respondent for the second time in October 1995, but Kelsey was not willing to testify as to any manufacturing defect (See also T. 130-133). Mr. Kelsey was consulted several more times, to no effect.

Despite the fact that complainants were advised to bring in all the documents and materials allegedly necessary to support their claims to the panel hearing, neither Mrs. Eckstein or William Hawkins Jr. brought in or produced any documents detailing their claims against Respondent (T. 74, T. 136) at the hearing below concerning their allegations of lack of information, lack of due diligence or their other complaints.

The complaining witnesses were well aware of the need to obtain one or more additional "expert witnesses" to bridge the gap to further the theory originally developed by Tony Rhodes, Dr. Siebert and the attorneys for Jeffery Petroff, but chose to follow their own beliefs. The Petroffs and attorney Mendillo subsequently withdrew from their proceedings and chose not to go forward (T. 56, 59, 69-70, 72, 73, 79 Ex J, 8/2/95, T. 81-83 re: Kelsey, T. 131-132, T. 169, 173, 176); See also V. II, T. 22-31, Ex. Y,Z).

Respondent described contact with potential experts Kelsey, Briem, Larks, Haines, Diboll, and many others, and advised complainants of his lack of success.

DAMAGE FROM IMPACT OR MANUFACTURING DEFECT

Complainants knew about the problem concerning the experts' dilemma of distinguishing between damage caused by the impact to the steering mechanism and possible manufacturing defects that would support a claim against Chrysler Motors (T. 180-181).

1996 – Transfer to Missouri

Following the dismissal/transfer order by Judge Matoesian, Joe Brown, the primary counsel for Mr. Hawkins continued until approximately 1998 or 1999 although he continued to correspond with Respondent concerning the estate of Marcus Hawkins and Shawn Carroll (T. 118). Mr. Brown subsequently fades away in 1999.

Respondent and Joe Brown were involved in resisting the change from Madison County Illinois to Texas County Missouri and there was a "stay order" in

place concerning the Missouri case while the Illinois appeal was pending from approximately March 1996 through April 8, 1997 (T. 216-220; Ex 1).

Shortly after the stay order was lifted in April 1997, the Missouri proceedings in Texas County restarted.

SETTLEMENTS REJECTED BY COMPLAINANTS

Shelby again made offers to settle the case, this time at a reduced price of $10,000 for each decedent. Complainants were notified of the same on 4/10/97 (Ex A – T. 78) and were repeatedly told that Shelby could not be "held" in the case.

Thereafter, Shelby Motors filed a Motion for Summary Judgment on August 26, 1997 and continued their offer to settle the Shelby Motors case. Claimants rejected those offers.

Subsequently on April 19th, 1999, (Ex 1) the trial court dismissed the claim against Shelby Motors because they were a "manufacturer in the stream of commerce". This fact was made known repeatedly to complainants and thus any hope of settling against Shelby was shut down by claimants' repeated refusal to accept any settlement offers. (T. 68-272).

Chrysler had also discussed possibilities of a "nuisance cost of defense" settlement, but complainants would not consider the same.

The products liability theory developed by Mr. Brown and Mr. Mendillo was in place by the time Respondent became involved in the case in 1992 (T. 214-217). The complaining parties, Mr. Brown, and Mr. Mendillo contacted Tony Rhodes, our expert, a blacksmith, who was hired to investigate the accident and develop a theory

of a manufacturing defect. Rhodes' theory dealt with the development of a fatigue fracture in the delrin ball which formed the fulcrum for the yoke in the two piece steering column that was the subject of the product liability claim (T. 180-181; Ex. B-T. 78-80; Ex C, T. 78-84, Ex. D-Goodyear Tire). Rhodes believed that the manufacturing process was defective but stopped short of a full *Daubert* type opinion or an opinion that would qualify under Section 490.065 R.S.Mo.; CF: *Daubert*, 509 U.S. 579 (1993). (*Daubert v Merrell Dow Pharm. Inc.)* in the opinion of Respondent. State Board for Registration of *Healing Arts v McDonagh*, MLW 39357.

CHRYSLER SUMMARY JUDGMENT

Shortly after Shelby Motors was dismissed out in April 1999, Chrysler filed their preliminary Summary Judgment Memos for Plaintiff Attorneys' consideration. Thereafter depositions were taken of James Schultz, Chrysler's expert witness, in Long Beach, California on May 6th, 1999 (Exhibit 1; Ex. E, T.78).

Chrysler filed a formal Motion for Summary Judgment on May 10th, 1991 (Ex 1). Respondent's law firm filed lengthy and detailed responses to the Summary Judgment Motion in June 2001 (Ex. 1; docket sheet – Texas County).

Chrysler's Motion for Summary Judgment was denied October 2, 2001; Respondent and Respondent's associate, Heidi L. Leopold were somewhat surprised, particularly considering how "thin" or "slim" the case was (Tr. 22-Ex XYZ, AA, BB, CC and DD), even though the Court indicated it did not generally grant Summary Judgments. (T. 167-168, 185). .

Respondent repeatedly told Mr. Hawkins and Mrs. Eckstein from 2001 to 2005, that the case was "very thin" and that another expert witness was needed to make the case (Ex. X, Y, 2, AA, BB, CC, DD, Vol II; T. 22-31), when Respondent advised he was terminating his representation.

Once the depositions had been taken of the complaining parties, the personnel at Shelby Motors and of Tony Rhodes, analysis of Rhodes testimony and Dr. Siebert's preliminary findings indicated the need for a more qualified expert witness. This was known by the complainants William Hawkins, Sr., Mrs. Eckstein and William Hawkins, Jr. (T. 70-72-73, 82-Kelsey, 59-Charles Haines, Ex I, letter of 11/2/95-T. 82).

Respondent agrees with Informant that the case against Chrysler, despite winning the Summary Judgment Motion, could not effectively proceed unless a mechanical engineering expert was willing to testify that the purported fatigue crack found in the delrin ball was caused by a manufacturing defect, and that it did not occur in the automobile impact. (T. 166-168, 173, 178, 182).

Respondent had contacted multiple experts after Tony Rhoades and Oliver Seibert including Boulter Kelsey (on three occasions), Jack Larks from Houston, Texas, Chuck Haines, X-Prts of California, Jim Briem, and others. (T. 179-181; Vol. II, T. 22-31). Respondent recalled talking to Wally Diboll from Washington University (Vol II, T. 23). Respondent and Mrs. Leopold (268-278) were well aware of the problems with the case, advised complainant that the case could not be "made"

at that time, and would be dismissed out before getting to the jury and counseled delay, while attempting to find an expert.

Respondent believed that the testimony of Mr. Rhoades was just enough to get them past the rather thin Summary Judgment requirements of the Texas County Court (T. 167-168, 171, 185, T. 72-73).

COMPLAINANTS' DEMAND FOR TRIAL

Complainants began demanding a trial date in the face of Mr. Martin's advice that the case was "too thin" (T. 46, 132, 171-173, 256-259) and needed an expert.

Despite Mrs. Eckstein's assertions, Mrs. Leopold stated that in addition to all other documents, she reviewed at least 100 letters solely on the Chrysler products case and acknowledged numerous phone communications with Mrs. Eckstein (T. 275-77). Concerning trial demands and other issues, William Hawkins, Jr. stated that Respondent spoke to him, met with him on a series of occasions and provided information to him that he passed on to his father. (T. 125-128).

Respondent advised complainants that the case would "float" on the Court docket until the parties filed a "certificate of readiness" for trial and that he did not want to go to trial without the necessary expert witness as he would be simply wasting client's time and money and the Court's time (T. 220-222, 224, 236-38). The push for trial was imprudent at that time.

Respondent also believed that venue was much more difficult in Texas County than in Madison County, Illinois (T. 238). Respondent knew that William Hawkins Sr. wanted to run his own case and was very demanding (T. 243-44).

Hawkins made numerous phone calls, proceeded to demand monthly reporting and began writing to the court directly, which prompted a lot of extra wasted time.

BREAKDOWN OF RELATIONSHIP

Respondent described a break down in the relationship with Mrs. Eckstein concerning her demands for trial, and described her as ranting and yelling in a phone call in August 2005, which led Respondent to write her an immediate letter withdrawing from the case (T. 45-46; T. 123-125, 176-175, 246-248).

Respondent describes threats from Bill Hawkins advising that unless he stayed in the case on behalf of Mrs. Eckstein, Hawkins would file a bar complaint (T. 246-248). Respondent withdrew and true to his word, Hawkins filed a detailed Bar complaint from all possible parties beginning in October 2005, including lengthy complaints over the handling of his criminal cases which were long resolved.

Respondent was aware that complainants were thinking about getting another lawyer into the case and counseled them to do so. Complainants were repeatedly advised by Respondent to contact other lawyers or get whatever help they thought was necessary, from 1995 onward. (T. 88-90, 96, 169-171, T. 229, 231).

Testimony of Mark McCloskey

The panel below heard testimony from Mark McCloskey (Vol II-T. 4-18) evaluating the case.

McCloskey stated he was initially contacted to evaluate a claim for legal malpractice (Vol II-T. 4) and felt that complainants' case would not survive the Summary Judgment Motion (Vol II-T. 10).

McCloskey felt the case was reasonably pursued but also felt it would be extremely difficult if not impossible to win. He readily acknowledged the problems with obtaining an expert witness (Vol II-T. 14-17). McCloskey advised that he would have used the same experts used by Respondent.

McCloskey pointed out that the complainants, Hawkins and Eckstein were "hysterical", unreasonably angry and very difficult to deal with (Vol II, T. 12).

McCloskey testified that a review of his material to prepare a preliminary report to Mr. Hawkins would have taken him a full week.

McCloskey's estimate of the time to review the file is consistent with the testimony of Respondent who said it took him 40 plus hours to prepare a review of the file to file a response to the information.

Informants stressed the fact and Respondents agree that it would have been a waste of time and money for the complainants and Respondents to proceed to trial and would cause complainants substantial disappointment if you go into court and lose, knowing you are going to lose (T. 171-173, 178-179, 184-185, 189-190). Respondent believes that this was a more prudent course to take.

This was clearly delineated by Mark McCloskey who felt the case was reasonably pursued, but under the evidence available for him to review could not be won at that time. (Vol. II-T. 11-17).

Informants have suggested that complainants were led on. The evidence clearly indicates otherwise, pursuant to the correspondence, phone calls and the admissions of complainant witnesses that Respondent had repeatedly advised them

that they could not make the case without another expert witness or that the case was extremely thin (V. II-T. 22-24; Ex X, Y, Z, AA, BB, CC and DD).

Mrs. Eckstein and William Hawkins, Jr. stated that they had "records and documents" that would prove their claims, but failed to bring them despite a continuance and an understanding that they would be producing additional records and documents (T. 74-76, T. 136-138) for the Panel. William Hawkins, Jr., (at T. 132) freely admitted that Respondent had previously stated "we need one more expert witness before proceeding…".

William Hawkins, Jr. was completely unaware of the facts of the case and was unaware of the continuing correspondence from Respondent's law office (T. 131-132). Mr. Hawkins could not answer questions about trial settings or trial dates without looking at his notes that he did not bring (T. 129-130) nor could he provide any of the information concerning "conflicting stories". Hawkins stated that he couldn't testify without his notes in front of him and then testified that Chrysler had filed for a change of venue from Texas County. This never occurred (T. 129; CF Ex 1).

Finally, the initial suggestions that complainants had paid in over $50,000.00 soon evaporated, both from the testimony of Mrs. Eckstein and from the evidence produced by Respondent (V. II-T. 31-Ex. X List of Expenses). The list of expenses indicated somewhere around $7,800.00 in costs as against payments of about $4,200.00 leaving Respondent's law firm approximately $3,500.00 or more in the hole. (V. II, T. 27-32).

Respondent and Mrs. Leopold testified that, as the case presently stood prior to Mr. Martin's letter of withdrawal in August 2005, that the case would not get past a Motion for Directed Verdict. That opinion was bolstered by the testimony of Mr. McCloskey. The only independent witness.

Respondent and Respondent's co-counsel, Mrs. Leopold, repeatedly suggested in writing and telephonically that complainants should get other attorneys involved. Subsequently, Mr. Martin made his file available to other attorneys to look at, all of whom declined, primarily because of the lack of the expert tie-in to the liability of Chrysler and the problems with "drinking".

Respondent attaches as part of the Appendix, a chronology and detail of the various proceedings to assist in the Court's review of this matter.

POINTS RELIED ON

I. THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT BECAUSE OF PURPORTED VIOLATIONS OF RULES 4-1.3 (DILIGENCE), BECAUSE OF PURPORTED VIOLATIONS OF SECTION 4-1.4 (B)-PROVIDING MEANINGFUL INFORMATION TO CLIENT, FOR PURPORTED VIOLATIONS OF SECTION 4-1.5 (C)-FAILURE TO HAVE A WRITTEN CONTINGENCY CONTRACT, AND FOR PURPORTED VIOLATIONS OF SECTION 4-8.1 (C) – FAILURE TO RESPOND TO DISCIPLINARY AUTHORITY'S REQUEST FOR INFORMATION

Standard of Proof

The Findings of Fact, Conclusions of Law and Recommendations from the Disciplinary Hearing Panel are advisory and the Court reviews all evidence de novo as to the credibility of witnesses and the weight to be accorded to the evidence. *In Re: Crews*, 159 S.W. 355; *In Re: Snyder*, 35 S.W. 3d 380, 382 (Mo banc-2000).

A. DILIGENCE

This case arises out of a single car, early morning automobile accident on Route 17 in Texas County Missouri when a vehicle driven by Shawn Carroll, son of complainant Eckstein and occupied by Marcus Hawkins, son of complainant William Hawkins, Sr. and also occupied by a young man by the name of Jeffrey Petroff, drove approximately 98 feet from the left edge of the roadway on Route 17 directly into contact with a concrete culvert, literally bending the 1990 Dodge Daytona in half and killing all 3 young men. The decedents' vehicle traveled in a

straight line across the opposite lane on a diagonal before leaving the road for a total distance of about 240 feet.

The initial investigation of this case indicated that it was unclear what led up to or caused the accident. It did not appear that the front wheels were turned or that the brakes were applied prior to impact, which would indicate the possibility that the driver was asleep. (Ex. 2; V. II- T. 27-29).

James Mendillo, an attorney from Illinois, filed an initial discovery proceeding on behalf of decedent Petroff and became involved with examining claims against Chrysler, Shelby Motors and Goodyear Tire & Rubber. Mendillo retained Oliver Siebert to look at deformation failure of the plastic/delrin ball in the universal joint of the two section steering column on the Eckstein vehicle. Mendillo and the complainants in the instant case also contacted Tony Rhodes of Truck & Heavy Equipment claims, St. Charles, Missouri. Mr. Rhodes, a blacksmith by trade was requested to determine whether there was another cause for the accident other than inattention, drinking, or falling asleep at the wheel.

The driver and the passengers had been drinking at the time of the accident, and, although their blood alcohol content was apparently below 0.08%, complainants and Respondent were well aware that evidence of drinking would probably come into the case pursuant to *Rodriguez v Suzuki*, 996 S.W. 2d 73 (Mo banc 1999).

Respondent had represented William Hawkins, Sr. in multiple criminal prosecutions in the United States District Court for the Southern District of Illinois and in the United States District Court for the Eastern District of Missouri. Then,

while appeals were pending in 1992, Respondent was asked to enter his appearance and assist Hawkins' civil attorney, Joe Brown (Lucco, Brown & Mudge) of Edwardsville.

Thereafter, Brown and Respondent filed a lawsuit against Chrysler, Shelby Motors and Goodyear Tire in 6 counts in Madison County Illinois on September 2, 1992 in Case No: 92-L-774, pursuant to oral agreement between all parties.

Respondent believes that there was a contingency agreement in place but has not been able to locate it and readily acknowledges the statement of Mrs. Eckstein that she later obtained a written contingency contract from Respondent.

Neither Respondent nor Mrs. Eckstein were able to locate the written contingency agreement although all parties acted as if there was a contingency agreement in place. *Tobin v Jerry*, No. ED88255, ED88257, 2007 WL 4165657, (Mo. App. E.D., November 27, 2007). There is no fee dispute.

Respondent and Mr. Brown proceeded to conduct discovery, interviewed witnesses and ended up taking depositions from various parties, including Tony Rhodes.

Following preliminary discovery, Respondent's office advised complainants that they needed to dismiss Defendant Goodyear Tire and Rubber, as they had not been able to find any product liability or defect in the tires. Goodyear Tire & Rubber was dismissed from the case in 1995.

Thereafter, and pursuant to a previous Motion to Dismiss or to transfer filed by Chrysler and based on "forum non conveniens", Judge Matoesian of Madison

County granted the "Motion to Transfer/Dismiss" based upon Illinois Supreme Court Rule 187 (c) (2) finding that the appropriate venue would be Texas County, Missouri where the accident occurred.

Respondent and Mr. Brown filed a Motion for Rehearing, Mr. Brown and Respondent filed an appeal which was subsequently dismissed in the Illinois Supreme Court in April of 1997.

Prior to that time, and because of concerns as to whether the 6 month period in a Rule 187 dismissal was "stayed", Respondent and Mr. Brown filed a law suit in Texas County, Missouri on July 5, 1996 in Cause No: CV8-96-231 (See Exhibit 1).

The "stay order" issued in Texas County was lifted on April 8th, 1997 following the dismissal of all Appellate proceedings in Illinois. (See Exhibit 1).

Shelby Motors had initially offered $25,000.00 to each party plaintiff to settle the claims against Shelby, even though there was an end manufacturer in existence in the case. All parties knew that Shelby would ultimately be dismissed out (T. 77-82, Ex C).

Despite this, complaintants and their families repeatedly refused to accept the offers from Shelby Motors when they knew that there was a strong likelihood that Shelby would be dismissed out, as can be seen from the repeated correspondence and the admissions of complaintants. The offers went from $25,000.00 each to $15,000.00 to $10,000.00 to $5,000.00 each to $5,000.00 for both parties and then subsequently all offers were withdrawn.

Respondent's office took the deposition of all the relevant employees from Shelby Motors and obtained all the documents and materials necessary but inasmuch as there was a manufacturer "in the chain of commerce" a lawsuit could not be maintained under Missouri law against the selling agent.

Shelby Motors was dismissed out of the case in Texas County on or about April 19, 1999 (Ex. 1) and complainants received nothing.

In March 2001 Chrysler filed a lengthy and detailed Motion for Summary Judgment.

Respondent had in the meantime recontacted multiple expert witnesses including Boulter Kelsey, Mr. Briem, Wally Diboll, and Charles Haines, but could not obtain any opinions that would assist in rendering the necessary opinion to tie up the previously preserved testimony and information from Tony Rhodes and Oliver Siebert to prove defective manufacture of the steering column and the fatigue failure of the delrin ball.

The Texas County Circuit Court denied Chrysler's Motion for Summary Judgment on or about October 2, 2001 (Ex. 1). Respondent immediately contacted complainants (Ex. H-T. 80-83).

Thereafter, during the period from October 2001 through August 2005, the matter "rode the docket" in Texas County. Respondent counsel did not file a "Certificate of Readiness" and repeatedly advised complainants that they did not have the necessary expert witness to make the case. This was acknowledged by all of the complainants.

Nevertheless, complainants still wanted to proceed to trial. Respondent advised them that would be a waste of time and energy unless they could obtain the necessary expert witness, and that there was no harm in taking time to try to locate such a witness.

A substantial break down in the attorney/client relationship began to develop and continued up through 8/24-25/05, when Respondent advised Mrs. Eckstein following a nasty phone call, that he would have to withdraw, since there was a complete breakdown of the attorney client relationship. Respondent believes that her attitude was irrational and hysterical and that it was imprudent to proceed to trial, when you know you can't make the case. This attitude was perceived by Mr. McCloskey. (V. II, T-12).

Informants have cited the Court to *In Re: Crews*, where the general concept of "sanction analysis", suggested a problem with due diligence.

In the instant case, as can be seen in the attached chronology, Respondent pursued this case for complainants through multiple proceedings.
The initial problems never went away, despite multiple efforts to obtain another "expert".

The problem was not lack of due diligence, but whether a case could be made, considering the expert witnesses that had been contacted, as expressed by Mr. McCloskey, who testified before the Panel below.

McCloskey indicated that he was satisfied that everything that could be done was done and that all the experts contacted by Respondent would have also been contacted by him.

McCloskey believed that Respondent did everything that was required, and that based on the status of the case at the time of his review in 2006-2007, the case could not be made.

Informants have ignored the complainants' "lemming-like" desire to jump off the cliff and go to trial when, considering all of the evidence before the Panel, there was insufficient evidence and Respondent's belief that delay was the correct course of action, was, on reflection, also the most prudent. CF: Rule 4-1.2 V.A.M.R.

This explosion of anger and hysterical activity on the part of Mrs. Eckstein and subsequently on the part of Mr. Hawkins made it impossible for Respondent to continue to represent complainants.

Respondent advised Mrs. Eckstein by letter of August 26, 2005 (Ex. F, T. 93-97) that he was withdrawing and she needed to retain other counsel.

Complainants failed to retain other counsel and Respondent was subsequently given leave to withdraw. He again advised complainants that they needed to retain separate counsel (Ex. M-T. 98-100).

Respondent also testified that the breakdown in relationship led him to be unable to work with either of the complainants, particularly after Hawkins threatened him and stated that "if Respondent did not continue with the case, he would file a Bar complaint".

CONTROL OF CASE

Respondent believes that Section 4-1.7 V.A.M.R. dealing with conflicts, although not clearly in point, is implicated here, particularly where the conflicts are between and among Respondent attorneys' concept of how the case should be handled and whether the complainant client should be allowed to dictate the manner in which the case should proceed.

Informant is suggesting that Respondent should have taken the next step, told the clients they had no case and put that in writing, despite the numerous "thin case" memos and the acknowledged telephone conversations between Respondent and Complainants.

Such a memo in case files could well lead to claims for abuse of process against complainants and poses a risk of sanctions. Rule 55.03 V.A.M.R. and implicates Rule 4-3.1 dealing with meritorious claims.

Therefore, no attorney would take any position in a case where his client was allowed to dictate and determine whether the case should go to trial even if the evidence is lacking.

Respondent believes that he followed Rule 4-1.2, V.A.M.R. dealing with scope of representation by both assisting clients to make good faith efforts to determine the best course of action, and then also followed the same rule when he counseled complainants not to proceed to trial, knowing that the case could not be made.

The very result predicted by him and caused by his withdrawal, came about when Chrysler came forward with a Motion to Dismiss after he was permitted to withdraw in February 2006 (Ex 1).

Respondent and his law firm not only maintained this slender case in a "live" context, hoping to develop some further information, but also diligently represented complainants and kept them informed through multiple Motions to Dismiss, depositions and summary judgments.

There is no evidence of deceitful or wrongful conduct but simply evidence of an attempt to keep a case alive against almost insurmountable odds (CF: *McCloskey Vol. II, T. 12-18).*

Respondent notes that there is clearly a conflict with proceeding with a thin case when considering the requirements of Rule 4-3.1 dealing with meritorious claims and contentions. In short, if attorneys do not "stretch" or look for a reasonable extension of the law to attempt to make a case, we would have the same set of facts as confronted Respondent here. The rules say you can't bring any claim at all if it turns out to have little or no merit. That contrasts directly with complainants' demands that Respondent go to trial with a thin case. *CF: Taylor v Belger Cartage Service, Inc.* 102 F.R.D. 172 (D.C.-1984).

The *Taylor* case further notes that if lawyers pursue a wholly frivolous and a wholly meritless cases that both they and their clients can be subjected to liability. *Taylor v Belger, Supra*.

Left with the horns of this dilemma, Respondent chose to keep the case alive while attempting to obtain expert witnesses and solicited the attention of fellow lawyers, colleagues, professional journals and other expert witnesses in an attempt to bridge the gap and make the case for Hawkins and Eckstein.

B. Rule 4-1.4 (b) – Meaningful Communication

Respondent believes and asserts to this day as borne out both by his testimony, the testimony of Mrs. Leopold and the testimony of complainants that they were always aware of the various proceedings that had gone on, were aware of the problems with rejecting Shelby Motors' offers, were aware of the problems with reference to the Summary Judgment motions and were made repeatedly aware of the problems with proceeding without that necessary "expert" (V. II-T. 22-31, Ex. X, Y, Z, AA, BB, CC and DD).

The transcript and record before the Panel below clearly indicates numerous telephonic and written communications between the parties from approximately October 1992 through well after Respondent had withdrawn, in 2007.

Furthermore, and more significant to all of the issues in this case is the fact that complainants could have proceeded with their case and obtained additional experts and attorneys, as agreed to and suggested by Mr. Martin from 1995 on, but were unsuccessful in obtaining anybody who would take over this difficult case. The problems of this case were ignored by Informants in their Brief.

Mrs. Eckstein testified that she always felt there was a valid case against both Shelby Motors and against Chrysler, despite the repeated assertions, correspondence

and phone calls with Respondent that the case was “thin” and that the case against Shelby Motors was non-existent (T. 47-53).

Respondent has never suggested that there was “no case”, but simply that it was “thin”, Respondent got by Summary Judgment Motions, but it would be a waste of the Court’s time to further proceed without making that necessary hook-up with another expert.

Respondent believes he has a different duty which does not mandate him automatically going to trial.

Respondent believes he has a duty and obligation to advise his clients of the continuing quality of their case, which was done, and to continue to advise them of the best course of action, unless and until there is a breakdown in client relationships, as happened here.

If one reviews Mr. McCloskey’s testimony and the testimony of Mrs. Eckstein, it is clear that they were determined to proceed with trial and get their “day in Court”, even if Respondent did not believe that was warranted at the time.

Respondent suggests that the communications were more than adequate, that complainants refused to follow Respondent’s advice and wanted to force the case to trial.

Respondent felt that time was on the side of the complainants, as he was well aware that court positions have changed, been modified or matured over the years in both issues of constitutional law and evidence.

Respondent complied with the requirements of Rule 4-1.4(b) by providing the necessary information in order to allow complainants to make informed decisions.

In short, "You can lead a horse to water but you cannot make him drink…" anon.

C. Rule 4-1.5(c) Contingency Contracts in Writing

This is not a fee dispute and Respondent notes that this was a matter that came up at the opening of the hearing before the Disciplinary Panel.

The attorney for the informants moved for the first time to amend the information to file a charged violation of Rule 1.5, in particular, that section that provides that contingent fee agreements must be in writing. (T.6-7).

Respondent's counsel immediately objected and advised the panel that Respondent was working with complainants' first counsel, Lucco & Brown under their contract, and that we do not have a copy of that contract. Respondent has not been able to locate such a contract, although he believes one existed.

That problem is more readily resolved with reference to Mrs. Eckstein, who acknowledges that all parties acted as if there was a contingent fee agreement (T.26, 41). Mrs. Eckstein also acknowledged that complainants had an obligation to pay, and did pay, expenses or costs on the case when billed. (T.53-55).

Rule 4-.15 states that a contingent fee agreement shall be in writing. There is no question that although written agreements could not be located, the parties acted in reliance on a valid and enforceable fee agreement. Complainants' actions manifested their assent to the agreement by accepting continuing

representation, which all parties agreed would be done only on a contingency basis with the exception of the payment of costs and expenses. *Tobin v Jerry*, No. ED88255, ED88257, 2007 WL 4165657, (Mo. App. E.D., November 27, 2007) (interpreting Rule 4-1.5(c)).

Rule 4-8.1(c) – Failure to Respond to Disciplinary Authorities.

Respondent notes at the outset that, although he filed a brief response to the request for information from disciplinary authorities. The response was not only long overdue but was minimal and did not constitute a substantial response. Exs. 4, 5, 6, 7 & 8 (T.152-156). Respondent also notes that subsection (c) apparently is not adopted until July 1, 2007, since Respondent could not locate subparagraph (c) in his last copy for court rules from 2006 and notes that the last amendment is dated "effective 7/1/07" (See appendix).

Respondent notes that shortly after Respondent wrote to Mrs. Eckstein, following the heated phone conversation of 8/24-25/2005 (Ex. F – T.93-94), he received communication from Mr. Hawkins threatening to file bar complaints, and shortly thereafter, Mr. Hawkins did file complaints on behalf of himself, his wife, Mrs. Eckstein and William Hawkins, Jr., in succession, under Complaint #05-662-X1, #05-882-X1, #05-883-X1 (Exs. 5, 6, 7 & 8).

This complaint was shortly thereafter followed by a complaint concerning the long resolved matters in the criminal case of *U.S. v. William Hawkins*, which complaints were dismissed and which Respondent fully responded to.

Respondent notes that he spent in excess of 40 hours reviewing the documents and assembling the materials was required to simply to file the answer to the information. (T.215-218). Witness McCloskey indicated that it would have taken him at least a full week simply to review and evaluate the case. (V.II, T.4-6).

Respondent testified that just before the heated conversation with Mrs. Eckstein on 8/25/06, he had been hospitalized for approximately ten days with severe blood clotting problems and pre-stroke medical conditions, which subsequently caused him to reduce his trial and work schedule for 4-5 months.

Respondent was also faced with extremely difficult trial and pre-trial proceedings that he could not withdraw from and which he could not defer, despite his medical condition, which continued up through November 2005, at the time the complaints were coming in from Hawkins.

Respondent notes that the documents attached to the complaint came in successive waves and included well in excess of 100 pages, for each wave, plus reference to numerous other documents and records.

Informants suggest that the file was not fully organized and that it should have been capable of review in a very brief manner. This is directly contrary to the only evidence offered by an independent witness, Mr. McCloskey. Mr. McCloskey was presented with a file that was fully organized and detailed, and he stated it would have taken him in excess of a week to review the documents.

Respondent notes further that the letter from the Disciplinary Committee appeared to leave open the option of not responding to its first letter, stating “should

you fail to respond to the complaint within the required time period, the complaint will be submitted to the Committee for review and a decision without your response." Ex. 3,4). It further states that Respondent "may" be subject to separate discipline pursuant to Missouri Supreme Court Rule 4-8.1(b). The subsequent letters dated December 23, 2005 and February 21, 2006 furthered this belief stating that if no response by Respondent was received, "the Committee may issue a subpoena requiring" Respondent to testify before the Committee.

Respondent admits he did not properly respond to the request for information from the disciplinary authorities.

In mitigation, Respondent notes that he advised the authorities that they could look through the entire file at any time.

Respondent believes the complaints from Hawkins were not only without merit, but were also vindictive because of his withdrawal from the lawsuit, Respondent should have properly responded to the authorities, despite the demands it would have placed upon his available time. Respondent confesses error in that regard, and further submits himself to discipline in that matter.

As to the other issues set forth in Argument I, Respondent submits that he has readily complied with all diligence rules, expended substantial amounts of his own time, argued and briefed numerous motions, and is currently out of pocket well in excess of $3,500.00, after reimbursement from claimants.

Finally, claimants had and retained a viable cause of action at the time of his notice of withdrawal on 8/26/2005, (Ex. F) but complainants failed to follow through

with new counsel, despite repeated admonition from Respondent. This failure may be simply due to the inability to locate that "expert" necessary to complainants' case, or may be attributable to their attitudes as "difficult clients", pointed out by Mr. McCloskey. (V.II, T.10-14).

II

THE SUPREME COURT SHOULD NOT SUSPEND RESPONDENT'S LICENSE IN THAT HE DID NOT KNOWINGLY VIOLATE DUTIES OF THE PROFESSION, AND DID NOT TIMELY RESPOND TO THE COMPLAINTS FILED IN THE INSTANT CASE, HOWEVER RULE 4-8.1 (C) WAS APPARENTLY ADOPTED AND EFFECTIVE WELL AFTER THE DEMANDS MADE BY DISCIPLINARY AUTHORITIES (EXHIBITS 2-7), AND THEREFORE RESPONDENT DID NOT VIOLATE RULE 4-8.1 (C).

Standard of Proof

The Findings of Fact, Conclusions of Law and Recommendations from the Disciplinary Hearing Panel are advisory and the Court reviews all evidence de novo as to the credibility of witnesses and the weight to be accorded to the evidence. *In Re: Cruz*, 159 S.W. 355; *In Re: Snyder*, 35 S.W. 3d 380, 382 (Mo banc-2000).

In attorney disciplinary cases, the hearing panel's findings and conclusions below are advisory to the Curt and this Court reviews the evidence de novo, making its own determination as to credibility of witnesses and the weight to be given to the evidence. *In Re: Crews*, 159 S.W.3d 355 (Mo. 2005).

ARGUMENT

Informants in the instant case have propounded a unique theory, which would subject complainants and lawyers to discipline for pursuing cases when the case is "thin" and then by requiring a written statement from attorneys specifically detailing the bad elements.

This poses the problem of complying with the rules concerning declining or terminating representation as set forth in 4-1.16 (b) (3) V.A.M.R., particularly that section that points a lawyer can withdraw, where "a client insists upon pursuing an objective that the lawyer considers imprudent…"

This is particularly true in this case.

The panel below seems to indicate that a client has a right to demand that a case go to trial, even when the attorney does not believe that it is prudent to do so, and that doing so would result in a complete loss of the case. This could result in fees and costs assessed against the complainant, and possibly submit complainants to sanctions or damages.

This rule also implicates Rule 4-3.1 V.A.M.R., dealing with meritorious claims and contentions. Rule 4-3.1 requires a lawyer to act in good faith and not pursue claims that are frivolous or wholly meritless. *Taylor v. Belger Cartage Service*, 102 F.R.D. 172 (D.C. 1984).

This case was already in progress when Respondent was brought into the case by complainant Hawkins to assist the Lucco, Brown & Mudge law firm. Photographs, documents, investigation and experts had already been obtained. Respondent's firm continued with depositions and additional investigation, part of which resulted in the determination that the driver had been drinking at the time of the accident which, coupled with the evidence of sleepiness and inattention, constituted substantial problems for the case.

Respondent's firm did not neglect its duties, and pursued all depositions, sought additional expert witnesses, exchanged substantial discovery, traveled out of state for depositions, and preserved the testimony of the only possible Plaintiffs' expert in this case.

Respondent did not feel that the expert, Tony Rhodes, would pass a *Daubert* analysis or meet the necessary qualifications under either Illinois or Missouri rules, in that Mr. Rhodes lacked an engineering background. Nevertheless, Rhodes' testimony was preserved by deposition. *Daubert v Merrell Dow Pharm*, 509 U.S. 759 Supra; §490.065 R.S.Mo.; *McDonash*, Supra.

Informants suggest that Respondent and his firm should have more forcefully advised complainants <u>in writing</u> of the lack of merit of the case being successful.

Respondent suggests that no reasonably experienced plaintiff's attorney would commit such information in writing since it would expose his clients to claims for abuse of process or claims for attorney's fees and costs in a sanction motion under Rule 55. Rule 55.03 V.A.M.R.

Respondent notes that the remaining defendant, Chrysler Motors, never pursued a "sanction" motion claiming lack of merit, possibly because of the slender thread of liability developed by Tony Rhodes.

In any event, Respondent did provide numerous documents, telephonic advice, and information to complainants. Respondent repeatedly advised complainants that it was not prudent to proceed in the absence of a necessary expert

witness, and when complainants persisted, that persistence broke into a heated argument, and Respondent withdrew in accordance with Rule 4-1.16(B) V.A.M.R...

When Respondent sent notice of withdrawal on 8/26/2005 (Ex. F, T-93-95), he fully protected clients' interest by giving notice, making all the papers, documents and materials available, by subsequently delivering those documents and materials to proposed new counsel, and by providing continuing information to complainants of the need to protect their rights. (Ex. L, M, N, O & P, T-93-99).

Therefore, Respondent terminated his representation in the manner required by the Rules of Professional Conduct.

Informants' suggestion that the failure to try the case, in the face of substantial evidence of the lack of a necessary expert witness nexus is simply wrong.

Respondent has been trying cases long enough to see the changes in rules, substantive law and interpretations are all subject to change. Witness the recent changes in the hearsay rules and rights to confrontation, beginning with *Booker*, *Blakely* and *Crawford*. *Crawford v Washington*, 541 U.S. 36 (2004). Note also this Court's change of the rules allowing proof of intoxication, even though below the statutory 0.08% threshold, to come into civil cases. *Rodriguez v Suzuki*, 996 S.W.2d. 73 (Mo. banc 1999)

Respondent, despite substantial efforts and contact with numerous potential experts, was unable to locate one that would bridge the necessary gap, up through the time of his termination of representation in August 2005. That, however, is not the same thing as saying that there is no expert out there who could not, at some point in

time, review all the evidence which was preserved, and arrive at a conclusion helpful to complainants.

Respondent exercised his best judgment and advised complainants Hawkins and Eckstein that it was not prudent to proceed. They were not satisfied. This course of action left Respondent with no choice, coupled with the substantial animosity, but to seek leave to withdraw and to advise claimants of the same.

Informants further suggest that no one will ever know whether the complainants' case could have survived a motion for directed verdict. That flies in the face of the evidence before the panel.

Mark McCloskey, who has specialized in the area of product liability, contacted Joe McGlynn, opposing counsel for Chrysler, reviewed the material and documents made available to him, including all depositions, and concluded that complainants would not have got to the jury and would never get their day in court, based on the evidence available to him when he reviewed the file in 2007. (V.II, T.12-17).

PROPOSED SANCTIONS

Informants cite *In Re: Crews*, for the proposition that the cases have some thing in common with the instant case. 159 S.W.3d 355 (Mo. 2005). In Crews, the respondent failed to respond to discovery, failed to respond to Motion for Summary Judgment, failed to properly pursue an appeal, and failed to keep his clients informed, or misled them.

In this case, Respondent did everything necessary to preserve the case but could not locate an "expert witness", and repeatedly advised complainants of that glaring defect in the case, further advising that it was not prudent to proceed at that time, by virtue of numerous notices. (Exs. X, Y, Z, AA, BB, CC, DD, V.II; T.22-31).

This case clearly poses the conflict an attorney faces when the evidence is simply not sufficient to make a case and the client refuses to accept settlement offers.

Under the circumstances, and considering that Respondent did no harm, preserved all complainants' rights, and diligently pursued the case up to the point where an expert could not be located, Respondent submits that he has not violated the Rules of Diligence or notice to his clients and that complainants still had an active cause of action.

Respondent admits that he failed to file a timely response to the complaints of Mr. Hawkins and Mrs. Eckstein, and that Respondent offered to "open the files". Respondent was unaware of the requirements of Rule 4-8.1 (c) but notes by way of response that subsection (c) was not adopted, apparently until July 1, 2007 and therefore, Respondent did not violate this Rule. The information should more properly refer to subsection (b).

Respondent's preliminary research indicates, as we have noted, that subsection (c) was not adopted until after the investigative demands had been made by the Disciplinary authorities. Respondent notes that the section apparently referred

to as 4-8.1 (c) was apparently part of subsection (b) in the Rule in effect at the time Respondent was subject to disciplinary authority requests.

Respondent submits himself to the jurisdiction of this Court.

CONCLUSION

Respondent suggests that this Court determine the appropriate sanction, if any.

Respectfully submitted,

MARTIN, MALEC & LEOPOLD, P.C.

_____

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that two copies of Respondent's Brief and a diskette containing the Brief in Microsoft Word format was sent by Federal Express overnight mail to opposing counsel of record, Sharon K. Weedin, Staff Counsel for Chief Disciplinary Counsel, and via regular U.S. Mail to Alan Pratzel, 3335 American Avenue, Jefferson City, MO 65109, and sent by fax to 573-635-2240 and by e-mail to sharon.weedin@courts.mo.gov on March 6th, 2008.

_____

CERTIFICATION: RULE 84.06 (C)

I certify that 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 8,917 words according to Microsoft Word which is the word processing system used to prepare this Brief; and
4. That anti virus software was used to scan the disk for viruses and that to the best of Respondent's knowledge, the same is virus free.

_____

John Malec

IN THE SUPREME COURT
STATE OF MISSOURI

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

APPENDIX

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* In possession of Reporter, presently unavailable.