IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
LAWRENCE J. FLEMING,	)	**Supreme Court #SC94203**
	)	
Respondent.	)	

INFORMANT'S BRIEF

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ATTORNEYS FOR INFORMANT

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Jurisdiction over lawyer 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, Lawrence J. Fleming ("Respondent"), born November 9, 1942, was licensed to practice law in Missouri on September 2, 1967. The address Respondent designated in his most recent registration with The Missouri Bar is 2001 South Big Bend Boulevard, St. Louis, MO 63117. On or about June 28, 2011, this Court issued an order finding that Respondent had violated Rules of Professional Conduct 4-1.1 (competence), 4-1.3 (diligence), 4-1.8(e) (improper financial assistance to a client), 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 4-8.4(d) (conduct prejudicial to the administration of justice). Respondent was suspended for a period of six months with said suspension stayed and probation imposed for a period of one year. Respondent currently remains on probation.

Conduct Underlying the Information

Tim Guerra-Count I of the Information

On or about January 28, 1997, Complainant, Timothy Guerra, plead guilty to a charge of first degree promoting of child pornography and was sentenced to a term of 15 years in the custody of the Missouri Department of Corrections. **App. 54**. Mr. Guerra came to believe that he was incorrectly sentenced, as his victim was 17 years of age at the time of the crime and the age of majority for such crimes had changed. **App. 54**. In addition, Mr. Guerra felt that he had valid claims against the prison and its sub-contractors regarding his medical care and/or violation of his civil rights while incarcerated. **App. 54**.

In or around June, 2005, Mr. Guerra began corresponding with Respondent regarding a number of claims. **App. 54.** Respondent informed Mr. Guerra that Respondent would like to represent Mr. Guerra, but could not do so without a retainer. **App. 54**. Mr. Guerra, in turn, informed Respondent that Mr. Guerra was expecting a sizeable inheritance from the estate of his father in California and that Mr. Guerra would like for Respondent to represent Mr. Guerra as soon as payment was available. **App. 54**. Respondent continued to correspond with Mr. Guerra during the following year. **App. 54**. In or around May, 2006, Respondent was paid a $1,500.00 retainer to begin formal representation of Mr. Guerra. **App. 54**.

On or about November 24, 2006, Mr. Guerra directed the attorney for his father's estate to send Mr. Guerra's inheritance check directly to Respondent. **App. 54**. In March, 2007, Respondent received a check for $215,158.69 from the estate of Mr. Guerra's father. **App. 54**. Immediately thereafter, Mr. Guerra signed an engagement contract with Respondent, in which Respondent agreed to represent Mr. Guerra in four different matters. **App. 904-908.** On or about April 3, 2007, Respondent deposited a check in the amount of $215,158.69, belonging to Mr. Guerra, into Respondent's trust account. **App. 944-973**. Ten days later, Respondent withdrew $10,000.00 from the trust account. **App. 944-973**. Thirty-five days after the first withdrawal, Respondent withdrew $7,500.00 from the trust account. **App. 944-973**. Nineteen days later, Respondent withdrew $7,500.00 from the trust account. **App 944.973**. Over the course of a five month period, Respondent withdrew $45,650.00 from the trust account. **App. 944-973**.

a. Guerra v. Kempker Appeal

On or about December 12, 2003, Mr. Guerra filed a complaint, *pro se*, against a number of prison officials and sub-contractors alleging violations of Mr. Guerra's civil rights. **App. 90 (Tr. 80); 909-918.** On August 1, 2006, Mr. Guerra's action was dismissed without prejudice for failure to exhaust available administrative appeals**. App. 90-91 (Tr. 80-81); App. 909-918**. Mr. Guerra appealed the dismissal, *pro se*, to the Eighth Circuit Court of Appeals. **App. 909-918**. On November 8, 2006, Mr. Guerra filed a 50-page Appellant's brief in the Eighth Circuit Court of Appeals, which was ultimately stricken for failure to adhere to the 30-page brief limit and failure to include proof of service to the opposing party. **App. 909-918**. The Court then issued a new briefing schedule, ordering Mr. Guerra's brief due January 5, 2007. **App. 909-918**. On January 3, 2007, Mr. Guerra mailed a motion for extension of time to file his brief to the Court. **App. 909-918**. The Court granted Mr. Guerra's *pro se* motion for extension and directed that his brief be filed on February 2, 2007. **App. 909-918**. On January 23, 2007, Respondent informed Mr. Guerra during a taped telephone conversation that Respondent had entered an appearance in the appeal and had been given an extension of 15 days to file the brief. **App. 91 (Tr. 84)**.

By February 2, 2007, the date that Mr. Guerra's brief was due, Respondent had not entered an appearance and had not filed a brief. **App. 909-918**. Three days later, Respondent again told Mr. Guerra in a taped telephone call that Respondent had entered an appearance in the appeal. **App. 93 (Tr. 90)**. Respondent had not entered an appearance. **App. 909-918**. The Court issued a show cause order on March 2, 2007,

directing Mr. Guerra to show cause within 15 days as to why his appeal should not be dismissed for failure to prosecute. **App. 909-918**. Respondent failed to file a response, which Mr. Guerra learned of on April 27, 2007, when he contacted the Court Clerk by telephone and was informed that Respondent had not yet entered an appearance. **App. 95 (Tr. 97)**. When Mr. Guerra confronted Respondent about the issue in a taped telephone conversation on April 30, 2007, Respondent insisted that he had entered an appearance and that it must not have "gotten on file yet." **App. 95 (Tr. 97)**. Respondent had not entered his appearance, but did so on May 4, 2007. **App. 909-918**.

On or about May 10, 2007, Respondent filed a motion for extension of time to file a new brief on behalf of Mr. Guerra. **App. 909-918**. The Court dissolved the show cause order and granted Respondent's motion for extension of time, ordering that the brief be due June 15, 2007. **App. 909-918**. Respondent failed to file a brief on or before June 15, 2007. **App. 909-918**. On July 11, 2007, the Court issued a new show cause order directing Respondent to show cause within 15 days as to why Mr. Guerra's appeal should not be dismissed for failure to prosecute. **App. 909-918**. On July 26, 2007, Respondent filed another motion for extension of time to file a brief on behalf of Mr. Guerra. **App. 909-918**. The next day, the Court dissolved the show cause order and granted Respondent's motion for extension of time, ordering that the brief be due August 7, 2007. **App. 909-918**. On August 7, 2007, Respondent told Mr. Guerra in a taped telephone conversation that the brief was being filed the same day. **App. 95 (Tr. 100)**. Respondent failed to file a brief on or before August 7, 2007. **App. 909-918**. On August 22, 2007, the Court issued a show cause order directing Respondent to show cause within 15 days

as to why Mr. Guerra's appeal should not be dismissed for failure to prosecute. **App. 909-918**. The same day, Respondent assured Mr. Guerra in a taped telephone conversation that the brief was ready to be filed. **App. 96 (Tr. 101)**. Respondent did not file a brief and on August 29, 2007, Respondent assured Mr. Guerra in a taped telephone conversation that the brief would be filed the following week. **App. 96 (Tr. 104).** Respondent did not file a brief, but on September 7, 2007, filed another motion for extension of time to file a brief on behalf of Mr. Guerra. **App. 909-918**. On September 10, 2007, the Court dissolved the show cause order and granted Respondent's motion for extension of time, ordering that the brief be due September 27, 2007. **App. 909-918**. Respondent failed to file a brief on or before September 27, 2007 and never produced a brief and/or a draft of a brief. **App. 97 (Tr. 106)**.

On or about October 9, 2007, the Court issued a show cause order directing Respondent to show cause within 15 days as to why Mr. Guerra's appeal should not be dismissed for failure to prosecute. **App. 909-918**. On October 29, 2007, Respondent filed a Motion to Dismiss the appeal of Mr. Guerra. **App. 909-918**. In the Motion to Dismiss of October 29, 2007, Respondent stated that the civil rights claims contained in *Kempker* were substantially the same as those in Mr. Guerra's case against *Public Safety Concepts, Inc. et al* and that Mr. Guerra intended to consolidate the complaints. **App. 97 (Tr. 108)**. It was not Mr. Guerra's intention to consolidate the claims in his cases, nor did Respondent have the consent of Mr. Guerra to dismiss the appeal. **App. 97 (Tr. 107-108)**. Respondent did not inform Mr. Guerra that Respondent dismissed Mr. Guerra's appeal at the time of its filing and on October 31, 2007, the Court dismissed Mr. Guerra's

appeal. **App. 97 (Tr. 107)**; **909-918**. Mr. Guerra did not learn of the dismissal until months after the case was dismissed. **App. 97 (Tr. 107)**. Respondent billed Mr. Guerra and withdrew from Mr. Guerra's trust funds over $4,000 for time solely related to the *Kempker* appeal. **App. 944-973.**

b. Guerra v. Public Safety Concepts, Inc.

In or around December 12, 2005, Mr. Guerra filed, *pro se*, a complaint against a number of prison officials and prison sub-contractors for violations related to his care while incarcerated. **App. 55**. Between the time of filing and January, 2007, the case proceeded with many parties securing dismissal over the course of the two years. **App. 55**. In a taped telephone conversation on January 12, 2007, Mr. Guerra asked Respondent when Respondent was going to enter an appearance in the *Public Safety Concepts, Inc.* case. **App. 98 (Tr. 112)**. Respondent stated that he was probably going to enter an appearance the following week. **App. 98 (Tr. 112)**.

On or about March 16, 2007, Defendant, Behavioral Health Service, Inc. filed a Motion to Dismiss. **App. 919-941**. Respondent had not entered an appearance on behalf of Mr. Guerra and did not file a response to Behaviorial Health Service's Motion to Dismiss. **App. 919-941**. On or about April 18, 2007, the Court granted Behavioral Health Service's Motion to Dismiss. **App. 919-941**. As of April 19, 2007, the remaining defendants in Mr. Guerra's action were Public Safety Concepts, Inc., Lisa Dulaney, Gerald Hoefline, Norm Stegall, Aida Rodriguez, Correctional Medical Services, Inc., and Ronald Cole. **App. 919-941**. On April 20, 2007, Mr. Guerra again asked Respondent during a taped telephone call whether Respondent had entered an appearance in all of his

cases. **App. 99 (Tr. 113)**. Respondent told Mr. Guerra that he had entered an appearance in all of Mr. Guerra's cases. **App. 99 (Tr. 113)**. On April 30, 2007, Mr. Guerra inquired in a taped telephone conversation as to whether Respondent had filed the motions that Mr. Guerra sent Respondent in the *Public Safety Concepts, Inc.* case. **App. 99 (Tr. 113)**. Respondent responded that he had not filed the motions because he was redrafting the motions and wanted the motions to be filed in Respondent's name. **App. 99 (Tr. 113)**.

On May 3, 2007, Mr. Guerra reminded Respondent in a telephone conversation that defendants, Dulaney and Hoefline were in default and that Respondent needed to file something with the Court. **App. 99 (Tr. 115)**. Respondent assured Mr. Guerra that he would file something with the Court. **App. 99 (Tr. 116)**. Respondent filed nothing with the Court and on May 24, 2007, the Court issued an order stating that Mr. Guerra shall file appropriate motions for entry of default as to Public Safety Concepts, Inc., Lisa Dulaney and Gerald Hoefline, no later than June 25, 2007. **App. 919-941**. On May 28, 2007, Mr. Guerra sent a letter to Respondent in which Mr. Guerra stated that Respondent had previously indicated that Respondent would file the default motion. **App. 942-943**. On June 8, 2007, Respondent assured Mr. Guerra in a telephone conversation that he would file the motions for entry of default judgment. **App. 100 (Tr. 118-119)**. Respondent failed to file motions for entry of default by June 25, 2007. **App. 919-941**.

On or about August 7, 2007, Mr. Guerra learned that Respondent had not entered his appearance on behalf of Mr. Guerra and confronted Respondent in a telephone conversation. **Trans. Pg. 120, lines 13-24 (telephone recording)**. Respondent then

stated that he did not remember if he had actually entered his appearance. **App. 100 (Tr. 120)**. From April 2, 2007 to July 6, 2007, a period of three months, Respondent billed Mr. Guerra and removed from his trust funds, $7,150.00 relating solely to the *Public Safety Concepts, Inc.* case. **App. 944-973**. Respondent had not yet entered an appearance or drafted a response, motion or other document. **App. 919-941**.

On September 6, 2007, Respondent filed an appearance on behalf of Mr. Guerra. **App. 919-941**. Thereafter, from September 6, 2007 to February 20, 2009, Respondent filed no motions, discovery or other documents in furtherance of the case. **App. 919-941**. Though Respondent dismissed Mr. Guerra's *Kempker* appeal on the premise that the claims should be consolidated into the *Public Safety Concepts, Inc.* case, Respondent never filed an amended complaint to include the claims. **App. 919-941**.

On or about October 17, 2008, Defendant Norm Stegall filed a Motion for Summary Judgment. **App. 919-941**. Respondent failed to file a timely response and Defendant Norm Stegall was granted summary judgment on January 12, 2009. **App. 919-941**. On November 3, 2008, Defendants Ronald Cole, Aida Rodriguez, Correctional Medical Services, Inc. and Gerald Hoefline filed a Motion for Summary Judgment. **App. 919-941**. Respondent failed to file a timely response. **App. 919-941**. On January 28, 2009, Defendants Ronald Cole, Aida Rodriguez, Correctional Medical Services, Inc. and Gerald Hoefline were granted summary judgment. **App. 919-941**. By January 30, 2009, the Court ordered that Respondent file appropriate motions of default judgment against the only remaining defendants, Public Safety Concepts, Inc. and Lisa Dulaney, no later than February 20, 2009. **App. 919-941**. The Court's January 30, 2009 order stated that

the motion must be supported by "all necessary affidavits and documentation" and that failure to comply would result in dismissal of the action. **App. 919-941**. On February 20, 2009, Respondent filed a Motion for Default Judgment against the remaining defendants, but included no supporting affidavits or documents. **App. 919-941**. As a result, the Court dismissed Mr. Guerra's action citing Respondent's failure to file accompanying affidavits and support as the cause for dismissal. **App. 919-941**. Respondent did not inform Mr. Guerra that Mr. Guerra's action was dismissed for failure to file a proper Motion for Default Judgment.

c. Guerra Habeas Corpus Filing and Pursuit of Parole

In or around April, 2007, Mr. Guerra was informed by his caseworker that he was scheduled for release from incarceration on March 17, 2008. **App. 56**. Believing that an additional year in prison was too long, Mr. Guerra directed Respondent in the following weeks to file for writ of habeas corpus on his behalf. **App. 103 (Tr. 130)**. Mr. Guerra was incarcerated at the time that he directed Respondent to file the habeas petition and, if successful, the habeas petition would have reversed the conviction and resulted in Mr. Guerra's release from prison prior to his March, 2008 release date. **App. 102-103 (Tr. 128-129)**. Respondent, in turn, indicated that he would file the petition, but also thought that he should set up an appointment with the Board of Probation and Parole for the purpose of getting Mr. Guerra paroled, early. **App. 103 (Tr. 131)**.

On or about April 20, 2007, Respondent told Mr. Guerra in a taped phone conversation that Respondent had corresponded with the Board of Probation and Parole and was scheduled to go to their office the following week. **App. 104 (Tr. 134)**.

Respondent did not visit the Board of Probation and Parole the following week. **App. 106 (Tr. 141)**; **151 (Tr. 324)**. On April 26, 2007, Mr. Guerra asked Respondent if Respondent had spoken with the Board of Probation and Parole. **App. 104 (Tr. 136)**. Again, Respondent stated that he had an appointment to speak with them in person the following week, though Respondent had no such appointment and did not visit the following week. **App. 104 (Tr. 136)**; **106 (Tr. 141)**; **151 (Tr. 324)**. On May 17, 2007, Respondent told Mr. Guerra in a telephone conversation that he called the Board of Probation and Parole and was instructed to send a legal packet to the Board before coming to visit. **App. 105 (Tr. 137)**. Respondent further indicated that he was putting together a legal memorandum to present to the Board, though Respondent produced no legal memorandum or draft of a legal memorandum to present to the Parole Board. **App. 105 (Tr. 137)**; **106 (Tr. 141)**.

On May 25, 2007, Respondent informed Mr. Guerra in a taped telephone call that he had prepared a memo to give the Board of Probation and Parole the following week. **App. 105 (Tr. 138)**. Thereafter, Respondent told Mr. Guerra during a taped telephone call that he had been to Jefferson City to speak with the Board and that a gentleman agreed that Mr. Guerra should not be disqualified from parole. **App. 105 (Tr. 139)**. Respondent further stated that he should receive a "formal decision" sometime in the next several days. **App. 105 (Tr. 140)**. In fact, Respondent did not visit with anyone on the Parole Board and no one at the Board of Probation and Parole informed Respondent that Mr. Guerra had been incorrectly denied parole. **App. 106 (Tr. 141)**; **151 (Tr. 324)**.

Mr. Guerra continued to inquire about filing a habeas petition and on August 7, 2007, Respondent told Mr. Guerra in a taped telephone conversation that the writ for habeas corpus would be filed the following day. **App. 106 (Tr. 143)**. Respondent did not file the writ for habeas corpus the following day. **App. 106-107 (Tr. 144-145)**. On August 22, 2007, Respondent told Mr. Guerra in a taped phone conversation that the writ of habeas corpus had already been filed in Jefferson City, Missouri. **App. 106 (Tr. 144)**. In fact, Respondent had not filed a writ of habeas corpus in any jurisdiction. **App. 106-107 (Tr. 144-145)**. When Mr. Guerra inquired as to the status of the habeas petition in October, 2007, Respondent stated that they should have an order in the next day or two, though Respondent knew that the writ had not been filed. **App. 107 (Tr. 145)**. On October 12, 2007, Respondent told Mr. Guerra during a taped call that Respondent had been contacted by the court to schedule a show cause hearing on the habeas petition. **App. 107 (Tr. 146)**. Thereafter, Respondent informed Mr. Guerra in a taped call that he was "trying to get a hearing date" on the writ of habeas corpus, though nothing had ever been filed. **App. 107 (Tr. 147)**.

In the year 2007, Respondent did not draft a writ of habeas or produce a writ of habeas on behalf of Mr. Guerra. **App. 107 (Tr. 146)**. From April 6, 2007 to August 31, 2007, a period of four months, Respondent billed and withdrew from Mr. Guerra's trust funds over $7,225.00 for pursuit of a writ of habeas and/or parole. **App. 944-973**. On January 18, 2008, Mr. Guerra learned that no habeas action had been filed when he called the clerk in Jefferson City. **App. 108 (Tr. 149)**. Mr. Guerra confronted Respondent in a telephone conversation and though Respondent knew that no action had been filed,

Respondent continued to insist that the habeas action had actually been filed and that he could not understand why the clerk would say otherwise. **App. 108 (Tr. 149)**.

Mr. Guerra was released from prison on the release date he was given in 2007, which was March, 2008. **App. 106 (Tr. 141)**. On May 30, 2008, approximately three months after Mr. Guerra's release from prison, Respondent filed a petition for declaratory judgment and alternatively for writ of habeas corpus wherein Respondent requested declaration that Mr. Guerra be exempted from registering as a sex offender and from completing MOSOP. **App. 152 (Tr. 326)**. The May 30, 2008 petition for declaratory judgment was not the same habeas action that Mr. Guerra had requested in 2007 and was not the same document that Respondent repeatedly represented to Mr. Guerra had been filed in Jefferson City. **App. 152 (Tr. 326-327)**.

On or about August 11, 2008, Mr. Guerra filed a complaint with the Office of Chief Disciplinary Counsel ("OCDC"). **App. 57**. Pursuant to its investigative procedure, the OCDC directed a letter to Respondent in which it asked Respondent to provide a response to Mr. Guerra's complaint. **App. 57**. On October 7, 2008, Respondent provided a response to the OCDC which contained the following statement:

> I had already discussed his potential release dates with officials of the Department of Corrections and I advised him that I believed they would grant him 'conditional release' within a year provided he did not cause any serious disruptions at the prison. I did not tell him that I had visited with anyone from the parole board as he alleges since, at this point it was really not a 'parole' matter.

App. 57.

d. Trust Account

On April 3, 2007, Respondent placed Mr. Guerra's initial inheritance distribution of $215,158.69 in a non-interest bearing client trust account. **App. 57**. In a taped telephone call of April 16, 2007, Mr. Guerra expressed concern that the money was not earning interest. **App. 110 (Tr. 158)**. The parties agreed that Mr. Guerra would open an account with Morgan Stanley and four days later, Respondent informed Mr. Guerra that Respondent was sending paperwork from Morgan Stanley so that Mr. Guerra could establish an account. **App. 110 (Tr. 158-159)**. Mr. Guerra wanted his money invested so that it would earn interest. **App. 110 (Tr. 160)**.

Respondent forwarded to Mr. Guerra paperwork from Morgan Stanley to open a new account. **App. 57**. On April 24, 2007, Mr. Guerra executed the paperwork, giving no other person access to the account or authority to withdraw money, and returned the paperwork to Respondent. **App. 57**; **983-1005**. In a taped telephone conversation of May 7, 2007, Mr. Guerra inquired of Respondent as to whether the Morgan Stanley matter was a "done deal?" **App. 112 (Tr. 165)**. Respondent stated that it was and that he needed to have the money transferred. **App. 112 (Tr. 165)**. In fact, Respondent never submitted the paperwork to establish an account with Morgan Stanley. **App. 112 (Tr. 165)**.

In a telephone conversation of May 17, 2007, Mr. Guerra inquired as to whether his money had been transferred to the Morgan Stanley account. **App. 112 (Tr. 166)**. Respondent told Mr. Guerra that the money had not been transferred because Morgan

Stanley had to do a background check on Mr. Guerra, due to anti-terrorist laws and Mr. Guerra had not yet received approval. **App. 112 (Tr. 166)**. On May 21, 2007, Mr. Guerra expressed to Respondent in a telephone conversation that Mr. Guerra was "in turmoil" over his money and that he wanted to devise a plan B because the Morgan Stanley account was taking too long. **App. 112 (Tr. 168)**. Respondent informed Mr. Guerra that if Morgan Stanley had not contacted Respondent by the following Wednesday, Respondent would place the money in six month T-bills with the bank. **App. 113 (Tr. 169)**.

In a taped telephone conversation of May 25, 2007, Mr. Guerra directed Respondent to put the money in one year T-bills with the bank, as opposed to six months, and expressed concern that the delay was costing him money. **App. 113 (Tr. 170)**. On June 14, 2007, Respondent told Mr. Guerra that his money had been transferred to a T-bill account with the bank, which would earn him interest on his money. **App. 113 (Tr. 171)**. In fact, Respondent had not transferred Mr. Guerra's money to a T-bill account at a bank. **App. 113 (Tr. 172)**; **944-973**. Mr. Guerra's inheritance earned no interest that accrued to Mr. Guerra. **App. 57**.

In or around October, 2007, Mr. Guerra learned he would receive a second distribution from his father's estate, to be sent to Respondent. **App. 57**. In a conversation of October 4, 2007, Respondent told Mr. Guerra that he had received a check for $98,000.00. **App. 57**. In the same conversation, Respondent stated that as soon as Mr. Guerra endorsed the check, Respondent would transfer the entirety of the money into an interest-bearing account. **App. 114 (Tr. 173)**. On or about October 23,

2007, Respondent deposited a check for $98,063.91 into Respondent's non-interest bearing trust account. **App. 57**. Respondent never transferred the money into an interest-bearing account that would accrue to Mr. Guerra. **App. 57**.

In Respondent's response to the OCDC regarding Mr. Guerra's complaint, Respondent stated the following:

> Within a week thereafter I obtained and reviewed additional documents pertaining to the Guerra estate and I visited with financial advisers at Morgan Stanley to discuss options available to Mr. Guerra and obtain the forms for opening one or more accounts there. I sent these documents to Mr. Guerra by letter of April 20, 2007, a copy of which is attached as Exhibit 9. He completed and returned these documents to me, but later decided that he did not trust brokers and did not want to relinquish control of his inheritance. Of course, since Mr. Guerra was incarcerated he did not have any bank accounts or any means to handle the money received from the estate so I agreed to keep the money in the IOLTA account to be used for attorney's fees and otherwise disbursed at his direction.

App. 57.

e. Guerra Injunction re: Administration of Medication

On October 5, 2007, Mr. Guerra left Respondent an urgent voice message in which Mr. Guerra stated that he had just had surgery and was being denied aftercare and pain medication contrary to the treating physician's orders. **App. 114 (Tr. 174-175)**. In

the same message, Mr. Guerra requested that Respondent file for an "Injunction and Order" as soon as possible. **App. 114 (Tr. 174-175)**. Later that day, Respondent returned Mr. Guerra's telephone call and informed Mr. Guerra that Respondent was drafting a Petition for Injunction, which would be filed on Monday. **App. 114-115 (Tr. 176-177)**.

In a taped telephone conversation of October 9, 2007, Mr. Guerra asked if Respondent had filed the Petition. **App. 115 (Tr. 178)**. Respondent told Mr. Guerra that he had filed the Petition, but not on Monday. **App. 115 (Tr. 178)**. Respondent told Mr. Guerra that the Petition for Injunction had been filed that day, October 9, 2007. **App. 115 (Tr. 178)**. Respondent further stated that Respondent expected to have a show cause issue quickly. **App. 115 (Tr. 178)**. In fact, Respondent had filed no such Petition for Injunction. **App. 116 (Tr. 179)**.

On or about October 26, 2007, Respondent told Mr. Guerra during a taped call that he had filed an additional Petition regarding the denial of Mr. Guerra's medication. **App. 115 (Tr. 180)**. Respondent had filed no such petition. **App. 115 (Tr. 179-180)**. In a taped telephone conversation of October 30, 2007, Respondent told Mr. Guerra that the hearing for the case on the medication was set for Monday. **App. 116 (Tr. 181)**. There was no hearing for a case regarding Mr. Guerra's denial of medication. **App. 115 (Tr. 180)**.

Louis Younger-Count II of the Information

In or around the year 1996, Complainant, Louis Younger, went to trial on charges of conspiracy to manufacture, distribute and possess with intent to distribute

methamphetamine. **App. 59**. Respondent served as Mr. Younger's public defender at the 1996 trial. **App. 59**. Though not directly related to the drug charges, an eyewitness testified during the trial that she saw Mr. Younger participate in a murder. **App. 59**. Mr. Younger was found guilty and was sentenced to a life term, without the possibility of parole, in federal prison. **App. 59**.

Mr. Younger and his family believed that Mr. Younger received a harsher sentence on the drug charges because of the eyewitness testimony concerning the murder. **App. 59**. In or around 1997, the United States Court of Appeals, Eighth Circuit, upheld Mr. Younger's conviction and sentence on direct appeal. **App. 59**. On May 3, 1997, Mr. Younger filed a motion to vacate pursuant to 28 U.S.C. §2255, which was denied by the trial court on April 18, 2002. **App. 59**. The denial was not appealed. **App. 59**.

In or around October, 2004, Mr. Younger's sister, Kathleen Jardine, contacted Respondent in the belief that they could save time and money by employing an attorney who was already familiar with Mr. Younger's case. **App. 59**. At the time, Respondent had left the public defender's office and was working as a solo practitioner. **App. 59**. Respondent informed Ms. Jardine that Respondent was prohibited from representing Mr. Younger, due to Respondent's involvement in Mr. Younger's case as a public defender, but that he would nevertheless work on Mr. Younger's behalf. **App. 59**. Respondent agreed to provide Mr. Younger a draft of a successive §2255 motion. **App. 174 (Tr. 405-406)**. Respondent initially collected $5,000.00 from Ms. Jardine and did not produce a written contract. **App. 59**. Respondent did not place the money in a client trust account.

App. 59. At Respondent's request, Ms. Jardine later sent Respondent a cashier's check for an additional $5,000.00. **App. 1395**.

Respondent informed Ms. Jardine that she would need to hire an associate of Respondent's, investigator Joseph Braemer. **App. 59**. Respondent stated that Joseph Braemer would interview witnesses from the 1996 trial, specifically, the eyewitness in question, in an attempt to get the eyewitness to admit that she perjured herself. **App. 59**. The information garnered from the interviews would then be used by Respondent in a pleading for relief. **App. 59**. Ms. Jardine believes she paid Joseph Braemer over $7,000.00. **App. 59**.

From November 17, 2004 to February 27, 2005, Joseph Braemer conducted approximately six witness interviews, in person and via telephone. **App. 59**. Ms. Jardine was satisfied with the work of investigator, Braemer, and believed the information garnered would be beneficial in a pleading for relief. **App. 59**. Respondent told Ms. Jardine and Mr. Younger that he would provide them a draft motion for a successive §2255 filing, to be filed *pro se* by Mr. Younger. **App. 175 (Tr. 410-411)**. A successive §2255 motion would require a showing that new evidence had been obtained or that there had been a change in the law that had been made retroactive to the case in question. **App. 174 (Tr. 406)**. Respondent stated that he that he intended to argue that the case of *Blakely v. Washington* constituted the necessary change in the law. **App. 174 (Tr. 406-407)**. Respondent knew at the time that he took $10,000.00 from Mr. Younger that the case of *Blakely v. Washington* had not been made retroactive. **App. 174 (Tr. 407)**.

The investigator, Mr. Braemer, concluded his witness interviews in 2005. **App. 176 (Tr. 415)**. From 2005-2008, no one filed a successive §2255 motion on behalf of Mr. Younger. **App. 176 (Tr. 415)**. Respondent never presented Mr. Younger a pleading or draft of a pleading. **App. 1020-1092**. Mr. Younger began to believe that he would lose his right to file under time restrictions and because Respondent had not produced a pleading, Mr. Younger drafted his own pleading and filed it *pro se* in 2008. **App. 1020-1092**. Respondent never informed Mr. Younger that a *pro se* filing would preclude further action by Respondent. **App. 1020-1092**.

In or around 2009, Mr. Younger tired of the promises by Respondent and informed Respondent that he no longer wished to correspond. **App. 60**. Over the course of the following six months, Mr. Younger repeatedly requested that Respondent return Mr. Younger's legal file. **App. 60**. Respondent did not release Mr. Younger's legal file until June 24, 2010. **App. 60**.

Michael McVeigh-Count III of the Information

On or about February 24, 2010, Complainant, Michael McVeigh and Respondent met to discuss the possibility of Respondent entering an appearance on behalf of Mr. McVeigh in Mr. McVeigh's pending civil litigation. **App. 60**. Respondent told Mr. McVeigh that there would be no charge for the initial meeting or the review of Mr. McVeigh's documents. **App. 156 (Tr. 341)**. Over the course of the next three days, Respondent requested copies of documents related to the litigation, which were provided

by Mr. McVeigh. **App. 61**. Mr. McVeigh provided Respondent documents contained on CD, as well as hard copy documents. **App. 61**.

Mr. McVeigh and Respondent engaged in an ongoing discussion regarding Respondent's fee. **App. 61**. Mr. McVeigh and Respondent initially agreed that Respondent would bill $200.00 per hour for the first 50 hours of service, with a contingent fee agreement to be implemented, thereafter. **App. 61**. The two parties did not agree on the terms of the contingent portion of the fee agreement. **App. 61**.

Respondent advised Mr. McVeigh that Respondent wished to attend a hearing, which occurred on March 1, 2010, as an observer. **App. 61**. Mr. McVeigh represented himself *pro se* at the hearing. **App. 61**. Respondent did not enter an appearance or otherwise participate in the hearing. **App. 61**. Thereafter, Mr. McVeigh presented Respondent a check in the amount of $5,000.00, with the understanding that Respondent would give Mr. McVeigh a written fee agreement. **App. 61**. Upon receipt of the $5,000.00, Respondent deposited the money in his personal account and not in a client trust account. **App. 61**. On or about March 4, 2010, Respondent directed a letter to Mr. McVeigh which stated, "I expect that the initial $5000 retainer will be consumed within the next several weeks, so it is anticipated that an additional payment will be required before the end of the month." **App. 61**.

On March 4, 2010, Respondent met Mr. McVeigh at Mr. McVeigh's residence and presented Mr. McVeigh a copy the employment contract. **App. 61**. Mr. McVeigh felt that the employment contract, as drafted, did not accurately reflect the terms of the fee agreement. **App. 61**. On March 5, 2010, Mr. McVeigh notified Respondent that Mr.

McVeigh did not wish to employ Respondent because the terms of the employment contract were not accurate. **App. 61**. Mr. McVeigh did not believe that he had ever reached an employment agreement with Respondent as there had been no written agreement, only a general discussion of the fees. **App. 157 (Tr. 346)**. Mr. McVeigh requested the return of his $5,000.00 and the return of his CDs and hard copy documents. **Admitted, Resp. Answer, para. 360**. Respondent returned the CDs, but did not return any hard copy documents. **App. 61**.

On or about March 6, 2010, Respondent directed a letter and bill to Mr. McVeigh in which Respondent charged Mr. McVeigh for the initial client meeting, review of documents, and attendance at the hearing. **App. 61**. Respondent claimed that the $5,000.00 was exhausted over the course of 10 days, between February 24, 2010 and March 5, 2010, and refused to return any of Mr. McVeigh's $5,000.00. **App. 61**.

Disciplinary Case Processing

On August 22, 2008, Mr. Guerra filed a complaint that was assigned to a Regional Disciplinary Committee. **App. 219-220**. The investigation of Mr. Guerra's complaint was closed by the Regional Disciplinary Committee on December 22, 2008. **App. 219-220.** In January, 2009, Robert Goerger and Charles Rogers filed complaints that were also assigned to the Regional Disciplinary Committee. **App. 211-214**; **215-218**. During the investigation of the Goerger and Rogers' complaints, Mr. Guerra requested Advisory Committee Review on March 4, 2009. **App. 219-220**. The Advisory Committee assigned the Guerra complaint to the OCDC for further investigation on September 21, 2009. **App. 219-220**. Three months later, on December 23, 2009, an Information was

filed in the Robert Goerger and Charles Rogers cases. **App. 215-218; 219-220**. Chief Disciplinary Counsel, Alan Pratzel, testified that because the OCDC had only had Mr. Guerra's complaint for three months, it was not possible to include Mr. Guerra's complaint in the Goerger and Rogers' Information. **App. 109 (Tr. 155).**

Shortly thereafter, Michael McVeigh filed a complaint on April 28, 2010, which was assigned to a Regional Disciplinary Committee. **App. 221-222.** The investigation into the McVeigh complaint was closed by the Regional Disciplinary Committee on July 10, 2010 and Mr. McVeigh requested Advisory Committee Review on August 6, 2011. **App. 221-222**. By January 3, 2011, Louis Younger had filed a complaint against Respondent. **App. 223-224**. The next month, Mr. McVeigh's complaint was assigned to the OCDC for further investigation and on March 24, 2011, the Louis Younger complaint was transferred back to the OCDC for primary investigation. On June 28, 2011, the Goerger and Rogers complaints had been fully litigated and this Court ordered Respondent's stayed suspension.

At hearing, Chief Disciplinary Counsel, Alan Pratzel testified that if the OCDC had other complaints against an attorney come in during the time that it was investigating pending complaints, it would affect the time it took to dispose of the attorney's disciplinary case, overall. **App. 76 (Tr. 24)**. Mr. Pratzel testified that where multiple investigations are pending, the OCDC attempts to resolve all of the pending issues for judicial economy, so that the Office is not sending things to the Court in a "piecemeal" fashion. **App. 76 (Tr. 24)**. The Information in this matter was filed March 28, 2013. Mr. Pratzel testified at hearing that the fact that the Office of Chief Disciplinary Counsel

has investigated a matter and made a determination that probable cause exists does not necessarily mean that the matter is ripe for filing of an Information if the Office is also investigating other matters that are likely to be included in the Information. **App. 81.**

Disciplinary Proceeding

An Information was filed with the Advisory Committee on April 13, 2013, setting forth Informant's belief that probable cause existed to establish that Respondent violated multiple Rules of Professional Conduct. **App. 2-46**. Following a request for additional time to answer, Respondent filed his Answer to the Information on June 17, 2013. **App. 54-69**. A hearing panel was appointed, thereafter.

The disciplinary hearing took place on January 30-31, 2014. **App. 70-208**. By order of the Presiding Officer of the Disciplinary Hearing Panel, both Informant and Respondent submitted Proposed Findings of Fact, Conclusions of Law and Recommendations for Sanction at the end of February, 2014. **App. 1549-1609; 1612-1673**. On March 17, 2014, the Disciplinary Hearing Panel issued its Decision. **App. 1675-1720**. The Disciplinary Hearing Panel found Respondent guilty of 53 separate conduct violations, as well as a specific finding that Respondent was not credible. **App. 1675-1720**. The Disciplinary Hearing Panel ultimately recommended that Respondent be disbarred. **App. 1675-1720**. On March 31, 2014, Informant filed its written acceptance of the Disciplinary Hearing Panel's Decision. **App. 1722.** On April 16, 2014, Respondent filed his rejection of the Disciplinary Hearing Panel's Decision, which brings the matter before this Court. **App. 1723.**

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT KNOWINGLY ENGAGED IN REPEATED ACTS OF DISHONESTY IN VIOLATION OF RULES 4-8.1(a), 4-3.3(a) AND 4-8.4(c) IN THAT RESPONDENT:

a. ASSURED MR. GUERRA THAT RESPONDENT HAD ENTERED AN APPEARANCE IN CASES WHERE RESPONDENT HAD NOT ENTERED AN APPEARANCE;

b. REPRESENTED TO THE COURT IN *GUERRA v. KEMPKER* THAT RESPONDENT HAD HIS CLIENT'S PERMISSION TO DISMISS THE APPEAL WHEN RESPONDENT DID NOT HAVE HIS CLIENT'S PERMISSION TO DISMISS THE ACTION;

c. SUBMITTED TO THE OCDC DURING THE COURSE OF ITS DISCIPLINARY INVESTIGATION THAT RESPONDENT HAD NEVER MADE CERTAIN REPRESENTATIONS TO MR. GUERRA WHEN RESPONDENT HAD, IN FACT, MADE SUCH REPRESENTATIONS;

d. STATED TO MR. GUERRA THAT PETITIONS HAD BEEN FILED AND HEARINGS WOULD BE FORTHCOMING IN

MATTERS WHERE RESPONDENT HAD INSTITUTED NO ACTION;

e. PROMISED MR. GUERRA THAT HIS INHERITANCE HAD BEEN DEPOSITED IN AN INTEREST BEARING ACCOUNT WHEN RESPONDENT FAILED TO TRANSFER THE MONEY OUT OF HIS NON-INTEREST BEARING IOLTA ACCOUNT; AND

f. GUARANTEED MR. McVEIGH THAT RESPONDENT WOULD NOT CHARGE FOR SERVICES THAT RESPONDENT LATER BILLED TO MR. McVEIGH.

In re Donaho, 98 S.W.3d 871, 873 (Mo. banc 2003)

In re Caranchini, 956 S.W.2d 910, 919-920 (Mo. banc 1997)

In re Crews, 159 S.W.3d 355, 358 (Mo. banc 2005)

In re Disney, 922 S.W.2d 12, 15 (Mo. banc 1996)

Rule 4-3.3(a)

Rule 4-8.1(a)

Rule 4-8.4(c)

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT CHARGED AND COLLECTED UNREASONABLE FEES IN VIOLATION OF RULE 4-1.5(a) IN THAT RESPONDENT COLLECTED SUBSTANTIAL ATTORNEY'S FEES IN MATTERS WHERE RESPONDENT PERFORMED LITTLE TO NO DISCERNABLE WORK.

In re Gastineau, 857 P.2d 136, 140 (Or. 1993)

Monfried, 794 A.2d 92, 103 (Md. 2002)

Attorney Grievance Com'n v. McLaughlin, 813 A.2d 1145, 1165 (Md. 2002)

Rule 4-1.5(a)

POINTS RELIED ON

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO PROVIDE COMPETENT AND DILIGENT REPRESENTATION AS DIRECTED BY HIS CLIENTS IN VIOLATION OF RULES 4-1.1, 4-1.2 AND 4-1.3 IN THAT RESPONDENT DELAYED IN ENTERING HIS APPEARANCE ON MR. GUERRA'S ACTIONS FOR MONTHS AFTER AGREEING TO DO SO, FAILED TO FILE DOCUMENTS OR INSTITUTE ACTIONS AFTER BEING HIRED AND DIRECTED BY CLIENTS TO DO THE SAME, DISMISSED MR. GUERRA'S APPEAL WITHOUT HIS PERMISSION AND FAILED TO APPROPRIATELY RESPOND TO OPPOSING MOTIONS OR ORDERS OF THE COURT.

In re Richmond's Case, 872 A.2d 1023, 1028 (N.H. 2005)

In re Coleman, 295 S.W.3d 857, 863-864 (Mo. banc 2009)

In re Ehler, 319 S.W.3d 442, 449 (Mo. banc 2010)

Lawyer Disciplinary Bd. v. Hardin, 619 S.E. 2d 172, 176 (W.V. 2005)

Rule 4-1.1

Rule 4-1.2

Rule 4-1.3

ABA/BNA Lawyers Manual On Professional Conduct

POINTS RELIED ON

IV.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO ADEQUATELY COMMUNICATE WITH HIS CLIENTS IN VIOLATION OF RULE 4-1.4(a) IN THAT RESPONDENT FAILED TO PROPERLY ADVISE MR. YOUNGER REGARDING THE LEGAL RAMIFICATIONS OF FILING A *PRO SE* MOTION, FAILED TO INFORM MR. GUERRA THAT HIS CASES HAD BEEN DISMISSED OR THAT RESPONDENT HAD FAILED TO FILE DOCUMENTS THAT THE PARTIES HAD PREVIOUSLY AGREED WOULD BE FILED.

In re Ehler, 319 S.W.3d 442, 449 (Mo. banc 2010)

In re Sims, 994 So.2d 1280, 1282 (La. 2008)

Cleveland Metro. Bar Assn. v. Sherman, 929 N.E.2d 1061, 1063 (Oh. 2010)

Rule 4-1.4(a)

ABA/BNA Lawyers Manual on Professional Conduct

POINTS RELIED ON

V.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO ACT AS AN APPROPRIATE FIDUCIARY IN VIOLATION OF RULE 4-1.15(c) AND (d) IN THAT RESPONDENT:

a. HELD A LARGE SUM OF CLIENT MONEY FOR ALMOST A YEAR IN A NON-INTEREST BEARING IOLTA ACCOUNT; AND

b. DEPOSITED UNEARNED FEES IN HIS PERSONAL ACCOUNT INSTEAD OF A CLIENT TRUST ACCOUNT TO BE WITHDRAWN WHEN EARNED.

In re Forge, 747 S.W.2d 141, 145 (Mo. banc 1988)

In the Matter of St. Onge, 958 A.2d 143, 144 (R.I. 2008)

Rule 4-1.15(c)

Rule 4-1.15(d)

POINTS RELIED ON

VI.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO RETURN CLIENT FILES IN A REASONABLE TIME FRAME FOLLOWING THE TERMINATION OF REPRESENTATION IN VIOLATION OF RULE 4-1.16(d).

In re Disciplinary Action Against Rhodes, 740 N.W.2d 574, 578-579 (Minn. 2007)

Rule 4-1.16(d)

POINTS RELIED ON

VII.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE DISBARMENT IS APPROPRIATE WHEN A LAWYER:

a. KNOWINGLY DECEIVES A CLIENT WITH THE INTENT TO BENEFIT THE LAWYER;

b. INTENTIONALLY MAKES A FALSE STATEMENT TO THE COURT;

c. KNOWINGLY ENGAGES IN CONDUCT THAT IS A VIOLATION OF A DUTY OWED TO THE PROFESSION; AND

d. KNOWINGLY FAILS TO PERFORM SERVICES FOR A CLIENT OR ENGAGES IN A PATTERN OF NEGLECT WITH RESPECT TO CLIENT MATTERS.

In re Shunk, 847 S.W.2d 789, 792 (Mo. banc 1993)

In re Murphy, 732 S.W.2d 895 (Mo. banc 1987)

In re Oberhellmann, 873 S.W.2d 851, 854 (Mo. banc 1994)

Cincinnati Bar Assn. v. Weaver, 809 N.E.2d 1113, 1116 (Oh. 2004)

Rule 4-8.4(c)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT KNOWINGLY ENGAGED IN REPEATED ACTS OF DISHONESTY IN VIOLATION OF RULES 4-8.1(a), 4-3.3(a) AND 4-8.4(c) IN THAT RESPONDENT:

a. ASSURED MR. GUERRA THAT RESPONDENT HAD ENTERED AN APPEARANCE IN CASES WHERE RESPONDENT HAD NOT ENTERED AN APPEARANCE;

b. REPRESENTED TO THE COURT IN *GUERRA v. KEMPKER* THAT RESPONDENT HAD HIS CLIENT'S PERMISSION TO DISMISS THE APPEAL WHEN RESPONDENT DID NOT HAVE HIS CLIENT'S PERMISSION TO DISMISS THE ACTION;

c. SUBMITTED TO THE OCDC DURING THE COURSE OF ITS DISCIPLINARY INVESTIGATION THAT RESPONDENT HAD NEVER MADE CERTAIN REPRESENTATIONS TO MR. GUERRA WHEN RESPONDENT HAD, IN FACT, MADE SUCH REPRESENTATIONS;

d. STATED TO MR. GUERRA THAT PETITIONS HAD BEEN FILED AND HEARINGS WOULD BE FORTHCOMING IN

MATTERS WHERE RESPONDENT HAD INSTITUTED NO ACTION;

e. PROMISED MR. GUERRA THAT HIS INHERITANCE HAD BEEN DEPOSITED IN AN INTEREST BEARING ACCOUNT WHEN RESPONDENT FAILED TO TRANSFER THE MONEY OUT OF HIS NON-INTEREST BEARING IOLTA ACCOUNT; AND

f. GUARANTEED MR. McVEIGH THAT RESPONDENT WOULD NOT CHARGE FOR SERVICES THAT RESPONDENT LATER BILLED TO MR. McVEIGH.

A disciplinary hearing panel's recommendation is advisory in nature. *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). In a disciplinary matter such as this, the Missouri Supreme Court conducts a *de novo* review of the evidence and reaches its own conclusions of law. *Id*. Discipline will not be imposed unless professional misconduct is proven by a preponderance of the evidence. *Id*. Where misconduct is proven by a preponderance of the evidence, violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004).

In 1986, Missouri adopted the American Bar Association's Model Rules of Professional Conduct and though the Rules in Missouri now exist with variation, the Model Rules are used by a majority of other states, making other state disciplinary cases relevant to Missouri disciplinary matters. *State ex rel. Horn v. Ray*, 138 S.W.3d 729 (Mo.App. E.D. 2002) and www.abanet.org/cpr/mrpc/model_rules.html (last visited June,

2014) (indicating that California is the only state that has not adopted professional conduct rules that follow the format of the ABA Model Rules). See also *In re Cupples*, 952 S.W.2d 226 (Mo. banc 1997) and *In re Belz*, 258 S.W.3d 38 (Mo. banc 2008) (where this Court analyzed other state disciplinary law in reaching a conclusion in Missouri).

a. Representing to Mr. Guerra that entries of appearance had been filed when Respondent did not make such entries

When the OCDC receives a complaint wherein a client accuses his or her attorney of lying, it is often difficult to determine which party may be providing the more accurate version of events. In the case of Respondent and Mr. Guerra, however, there is no question as to what transpired. Because Mr. Guerra was incarcerated in a Missouri state penitentiary and his telephone calls to and from Respondent were not conducted through a secure call, the telephone calls were recorded. Review of hundreds of calls between Mr. Guerra and Respondent reveal that Respondent repeatedly lied to Mr. Guerra about the status of his cases. Though the recommendation of the disciplinary hearing panel to the Missouri Supreme Court is advisory in nature, the Court gives considerable weight to the panel's suggestion. *In re Donaho*, 98 S.W.3d 871, 873 (Mo. banc 2003). In the present action, the disciplinary hearing panel listened to relevant portions of the telephone calls between Mr. Guerra and Respondent and made a specific finding that Respondent's testimony at hearing was not credible in light of the conversations recorded via telephone.

This Court has stated that "as members of a self-regulating profession, we must be ever mindful that, at minimum, the public should be able to rely upon 'an attorney's

honesty and devotion to his clients' interests.'" *In re Haggerty*, 661 S.W.2d 8, 10 (Mo. banc 1983). Rule 4-8.4(c) specifically prohibits lying to a client and provides that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." In the present action, Respondent first told Mr. Guerra that Respondent had entered an appearance in Mr. Guerra's *Kempker* appeal on January 23, 2007, though Respondent had entered no such appearance. Respondent continued to assert that he had entered an appearance in the appeal until April 27, 2007, when Mr. Guerra contacted the clerk's office and learned that Respondent had not yet entered an appearance. Confronted with the truth, Respondent did not confess his deceit to Mr. Guerra and instead stated that the clerk "must not have gotten it on file yet." Court records indicate that Respondent did not enter his appearance until May 4, 2007.

Similarly, in Mr. Guerra's *Public Safety Concepts* case, Mr. Guerra first asked Respondent if Respondent would be entering an appearance on January 12, 2007. Respondent stated that he would enter an appearance the following week, but failed to do so. By April 20, 2007, Respondent informed Mr. Guerra that Respondent had entered appearances in all of Mr. Guerra's pending cases, though Respondent knew this not to be true. During the time period that Mr. Guerra believed Respondent to be counsel of record, a number of parties were dismissed from the *Public Safety Concepts* action. Mr. Guerra did not learn that Respondent had not entered an appearance until August 7, 2007, when he again confronted Respondent. Respondent stated that he did not remember if he had actually entered an appearance, a fact Respondent knew to be false. Respondent

entered his appearance on September 6, 2007, some five months after telling Mr. Guerra that the appearance had been entered.

In the case of *Underwood v. Mississippi Bar*, the attorney in question agreed to institute a personal injury action on behalf of his clients, repeatedly telling them that court dates were set and later cancelled, though no action had been instituted by the attorney. *Underwood v. Mississippi Bar*, 618 So.2d 64, 65 (Supreme Court of Mississippi 1993). The attorney continued to perpetuate the lie that work was being completed on the clients' case, though nothing was being done, and the Court found the following:

> Underwood knowingly and intentionally lied to his clients. His was not a slight misrepresentation once or twice, it was activity over a two year period which continually became worse. It was not mere negligence; it involved intentional misrepresentation to cover his negligence. The need to deter attorneys from lying to their clients should be apparent. The public clearly needs to be protected from attorneys who lie to them. This was not passive neglect; it was active misrepresentation without regard for the harm and inconvenience and mental anguish of the client.

Id. at 67. Much as in *Underwood*, Respondent in this case lied to his client to cover the fact that Respondent was performing no discernable work on Mr. Guerra's cases. Each time that an opposing party filed a motion to dismiss or motion for summary judgment, Mr. Guerra believed that Respondent was receiving a copy of the filings and would respond appropriately. Little did Mr. Guerra know that because Respondent had not

entered an appearance on the case, Respondent was not even receiving a copy of the filings. The lies were intentional, harmful to Mr. Guerra and strictly prohibited by Rule 4-8.4(c).

b. Misrepresenting to the Court that Respondent had permission to dismiss his client's appeal

Rule of Professional Conduct 4-3.3(a) provides that a lawyer shall not knowingly make a false statement of fact or law to a tribunal. This Court has recognized that an attorney's knowing misrepresentations to a court are "an affront to the fundamental and indispensable principle that a lawyer must proceed with absolute candor towards the tribunal. In the absence of that candor, the legal system cannot properly function." *In re Caranchini*, 956 S.W.2d 910, 919-920 (Mo. banc 1997).

Respondent entered his appearance in Mr. Guerra's Eighth Circuit Appeal on May 4, 2007, when a show cause order was in place for failure to timely file an appellate brief. Thereafter, Respondent filed a motion for extension of time to file the brief, the Court dissolved the show cause order and issued a new deadline for filing of the brief. This cycle continued for five months, with Respondent requesting three extensions and failing to file a brief on any of the deadlines imposed by the Court. Finally, in October, 2007, Respondent filed a motion to dismiss the appeal. Respondent did not have his client's consent to dismiss the appeal and did not tell his client that he was dismissing the appeal. Mr. Guerra testified that at no time did he give Respondent permission to dismiss the appeal. When Mr. Guerra learned of the dismissal, months after its occurrence, telephone calls between Respondent and Mr. Guerra establish that Mr. Guerra was angry and

repeatedly stated to Respondent that Respondent had acted without Mr. Guerra's permission. Nevertheless, when Respondent dismissed the appeal, Respondent expressly stated to the Eighth Circuit that he had obtained Mr. Guerra's consent to dismiss the appeal and that it was Mr. Guerra's intention to consolidate the claims in the appeal into another pending action. Such was not the case.

In *Florida Bar v. Lathe*, the respondent attorney was found to have violated the rules requiring candor before a tribunal when the attorney intentionally misrepresented to a judge on two occasions that he could not attend a deposition. *Florida Bar v. Lathe*, 774 So.2d 675 (Fla. 2000). In the *Matter of Roy*, an attorney was found to have violated the rules requiring candor before a tribunal when the attorney forged his clients' signatures on a bankruptcy petition form and submitted it to the court without the clients' authority. *Matter of Roy*, 933 P.2d 662 (Supreme Court of Kansas 1997). In the present action, where the client was incarcerated, it is reasonable to believe that the Court of Appeals relied on Respondent's statement that Respondent had his client's permission to dismiss the appeal when the action was dismissed. Respondent's assertion was an intentional misrepresentation of fact before the Court.

c. Dishonesty before the Office of Chief Disciplinary Counsel during its disciplinary investigation

Rule of Professional Conduct 4-8.1(a) provides that a lawyer in connection with a disciplinary matter shall not knowingly make a false statement of material fact. The Missouri Supreme Court regards dishonesty before a disciplinary entity to be especially egregious, stating, "[w]e expect members of the bar to cooperate promptly and candidly

with bar committees. Those who knowingly seek to mislead those committees, and in so doing interfere with their work, do so at their peril." *In re Donaho*, 98 S.W.3d 871, 874 (Mo. banc 2003) (quoting *In re Forge*, 747 S.W.2d 141, 145 (Mo. banc 1988)).

In the present action, Mr. Guerra filed a complaint with the OCDC on August 11, 2008. In his complaint, Mr. Guerra indicated that Respondent had repeatedly told Mr. Guerra that Respondent was visiting with members of the Probation and Parole Board for the purpose of trying to secure Mr. Guerra's early release from prison. In telephone calls between the parties, Respondent told Mr. Guerra that he had visited with the Probation and Parole Board in Jefferson City, that Respondent had been directed to provide a legal memorandum, that a member of the Board of Probation and Parole thought that Mr. Guerra should not be denied parole and that a formal decision would be forthcoming. At the time that Respondent provided his response to Mr. Guerra's disciplinary complaint, Respondent did not know that the OCDC was in possession of the taped telephone recordings between the parties and Respondent stated the following:

> I had already discussed his potential release dates with officials at the Department of Corrections and I advised him that I believed they would grant him 'conditional release' within a year provided he did not cause any serious disruptions at the prison. I did not tell him that I had visited with anyone from the parole board as he alleges since, at this point it was really not a 'parole' matter.

Respondent's statement to the OCDC was patently false, since through the course of the conversations with Mr. Guerra, Respondent repeatedly referred to his interactions with

"Probation and Parole" and the steps being taken to secure Mr. Guerra's early release via parole.

Additionally, Respondent lied to the OCDC when explaining why Respondent had not transferred Mr. Guerra's sizeable inheritance into an interest-bearing account. Evidence verifies that Mr. Guerra executed paperwork to establish an account at Morgan Stanley and returned the paperwork to Respondent. Respondent failed to submit the paperwork to Morgan Stanley. When Mr. Guerra asked why it was taking so long to move the money, Respondent told Mr. Guerra that Morgan Stanley had to complete a terrorist background check on Mr. Guerra. This statement was untrue, since Respondent had failed to submit the paperwork to Morgan Stanley. Thereafter, Mr. Guerra grew impatient with what he perceived to be a lack of action on the part of Morgan Stanley and directed Respondent to move Mr. Guerra's money into a T-bill account at a bank. On June 14, 2007, Respondent told Mr. Guerra in a taped telephone conversation that his money had been transferred to the bank. Respondent knew this statement to be false. When asked by the OCDC to explain why Mr. Guerra's money was never placed in an interest-bearing account, Respondent stated:

> Within a week thereafter I obtained and reviewed additional documents pertaining to the Guerra estate and I visited with financial advisers at Morgan Stanley to discuss options available to Mr. Guerra and obtain the forms for opening one or more accounts there. I sent these documents to Mr. Guerra by letter of April 20, 2007, a copy of which is attached s Exhibit 9. He completed and returned these documents to me, but later

> decided that he did not trust brokers and did not want to relinquish control of his inheritance. Of course, since Mr. Guerra was incarcerated he did not have any bank accounts or any means to handle the money received from the estate so I agreed to keep the money in the IOLTA account to be used for attorney's fees and otherwise disbursed at his direction.

Again, at the time that Respondent provided his response to the OCDC, Respondent was unaware that the OCDC had obtained the taped telephone conversations of Respondent and Mr. Guerra. Mr. Guerra believed that his money had been transferred to a T-bill account because that is what Respondent told him over the telephone. Mr. Guerra did not decide to keep the money in Respondent's IOLTA account. Respondent made that decision, on his own, and then knowingly made a false statement to the OCDC, thereafter.

d. Misrepresenting to Mr. Guerra that briefs, motions and petitions had been filed in court when no such documents had been filed

"Dishonesty toward a client, whose interests are the attorney's duty to protect, is reprehensible." *Lake Cty. Bar Assn. v. Speros*, 652 N.E.2d 681 (Oh. 1995). The Missouri Supreme Court has stated that while an attorney may not have intentionally set out to abuse the professional relationship, the attorney violates Rule of Professional Conduct 4-8.4(c) when attempting to shroud his substandard actions with varying untruths. *In re Crews*, 159 S.W.3d 355, 361 (Mo. banc 2005).

On October 5, 2007, a Friday, Mr. Guerra left Respondent a distressed telephone message indicating that he had just had surgery and was being denied aftercare pain

medication, contrary to the treating physician's orders. By October 9, 2007, the following Tuesday, Respondent told Mr. Guerra that a Petition for Injunction had been filed. Respondent further stated that he expected to have a show cause order issue quickly, though Respondent knew that he had filed no such action for injunction. Increasingly agitated, Mr. Guerra continued to ask Respondent why nothing was being done about his pain medication and on October 26, 2007, Respondent told Mr. Guerra that Respondent had filed an additional petition regarding the denial of the medications. Respondent had filed no such petition. Respondent continued to perpetuate the lie and on October 30, 2007, Respondent told Mr. Guerra that a hearing in the case was set for the following Monday. No injunction petition regarding pain medication was ever filed on Mr. Guerra's behalf.

Similarly, Mr. Guerra had directed Respondent to file a writ of habeas corpus action on Mr. Guerra's behalf. On August 7, 2007, Respondent told Mr. Guerra that the writ would be filed the following day. Respondent filed no such writ. On August 22, 2007, Respondent informed Mr. Guerra that the writ had been filed in Jefferson City, Missouri. In October, 2007, Mr. Guerra inquired about the status of the writ and Respondent stated that he expected to have an order in a day or two. Finally, on October 12, 2007, Respondent told Mr. Guerra that he had been contacted by the court to "schedule a show cause hearing" on the habeas petition. Respondent continued to inform Mr. Guerra that Respondent was trying to schedule a hearing date, though Respondent knew that he had never filed a writ on behalf of Mr. Guerra.

Telephone conversations between Respondent and Mr. Guerra are replete with Respondent's promises to file a brief in Mr. Guerra's appeal, when no brief was ever filed. Additionally, Respondent assured Mr. Guerra that he would file motions for default judgment in the *Public Safety Concepts* case, months before Respondent actually filed the document. In the *Matter of Mays*, a Georgia attorney was disbarred after letting the statute of limitations run on a client case and then lying to the client by telling her that the case had settled. *Matter of Mays*, 495 S.E.2d 30 (Ga. 1998). Similarly, an Ohio attorney was found to have engaged in dishonesty, fraud, deceit or misrepresentation when the attorney lied to his client by advising her that her trial would be continued when the attorney knew that the case had been dismissed on the attorney's failure to respond to summary judgment. *Disciplinary Counsel v. King*, 816 N.E.2d 1040, 1044 (Oh. 2004). In the present case, Respondent repeatedly lied to Mr. Guerra, giving Mr. Guerra false hope that his grievances would be resolved and violating Rule 4-8.4(c) in the process.

e. Falsely assuring Mr. Guerra that his money had been transferred to an interest-bearing account

This Court has stated that "[m]isconduct involving subterfuge, failing to keep promises, and untrustworthiness undermine public confidence in not only the individual but in the bar." *In re Disney*, 922 S.W.2d 12, 15 (Mo. banc 1996). In the present action, Respondent promised to move hundreds of thousands of dollars, belonging to Mr. Guerra, into an interest-bearing account. Respondent failed to do the same. A lawyer, as a fiduciary, must avoid even the appearance of irregularity or any variance from an established course of action when handling client money. *In re Buder*, 217 S.W.2d 563,

570 (Mo. banc 1949). When confronted by Mr. Guerra as to why the money had not been moved to Morgan Stanley, as directed by Mr. Guerra, Respondent told Mr. Guerra that Morgan Stanley was conducting a terrorist background check. In fact, Respondent had failed to submit the necessary paperwork to establish an account at Morgan Stanley. Thereafter, Mr. Guerra directed Respondent to transfer the money to T-bills at a bank. Respondent told Mr. Guerra that the money had been transferred when, in fact, it had not been transferred. Respondent's dishonest statements resulted in pecuniary harm to his client and constitutes a violation of Rule 4-8.4(c).

f. Billing and collecting fees from Mr. McVeigh for introductory services after promising not to bill for the same services

In quoting Rule 8.4(c), which prohibits conduct involving dishonesty, fraud, deceit or misrepresentation, the Supreme Court of Washington stated, "[s]imply put, the question is whether the attorney lied. No ethical duty could be plainer." *Matter of Disciplinary Proceedings Against Dann*, 960 P.2d 416, 419 (Wa. 1998).

When Respondent and Mr. McVeigh began discussions regarding Respondent's potential representation of Mr. McVeigh in a civil action, Respondent told Mr. McVeigh that Respondent would not charge Mr. McVeigh for the initial consultation or document review. Mr. McVeigh was also scheduled to represent himself at an upcoming hearing on March 1, 2010, and Respondent requested to come to the hearing to observe. Respondent did not participate in the hearing. At the March 1, 2010 hearing, Mr. McVeigh gave Respondent at check for $5,000.00 with the understanding that the parties would need to negotiate the remainder of the fee agreement. That Respondent did not intend for the

$5,000.00 to be used towards the initial consultation, document review or attendance at the hearing was reflected in a March 4, 2010 letter from Respondent wherein Respondent stated, "I expect that the initial $5,000 retainer will be consumed within the next several weeks, so it is anticipated that an additional payment will be required before the end of the month." Once the negotiations between Respondent and Mr. McVeigh fell apart, Respondent directed a bill to Mr. McVeigh on March 6, 2010, wherein Respondent asserted that the $5,000.00 retainer had been charged and collected for the initial client meeting, review of documents and attendance at the hearing.

A Maryland attorney was found to have violated Rule 4-8.4(c) when he told his client that he was working on the case, though the attorney had lost the file and was not working on the case at all. *Attorney Grievance Com'n of Maryland v. Reinhardt*, 892 A.2d 533, 540 (Md. 2006). The attorney argued that it was not his intent to be dishonest because the lie was born out of embarrassment and not intent to deceive. *Id*. In response, the Maryland Supreme Court concluded that specific intent is not a necessary ingredient of dishonesty and stated:

> In dealing with his client, respondent exhibited a lack of probity, integrity and straightforwardness, and, therefore, his actions were dishonest in that sense. [citation omitted]. Respondent confuses intent with motive. Although respondent may have acted in a certain manner because he was 'embarrassed,' he unquestionably told the client a lie.

Id. In the present action, the circumstances suggest that Respondent did not set out to lie to Mr. McVeigh. Respondent's March 4, 2010 letter to Mr. McVeigh indicates that it

was not Respondent's intention to bill Mr. McVeigh for the introductory services. Once Mr. McVeigh stated that he did not wish to utilize Respondent's services, however, and Respondent had already deposited Mr. McVeigh's money into Respondent's personal account, Respondent billed Mr. McVeigh for the introductory services, resulting in dishonest conduct that violates Rule 4-8.4(c).

ARGUMENT

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT CHARGED AND COLLECTED UNREASONABLE FEES IN VIOLATION OF RULE 4-1.5(a) IN THAT RESPONDENT COLLECTED SUBSTANTIAL ATTORNEY'S FEES IN MATTERS WHERE RESPONDENT PERFORMED LITTLE TO NO DISCERNABLE WORK.

Rule of Professional Conduct 4-1.5 requires an attorney's fee to be reasonable. Amongst others, factors to be considered in determining the reasonableness of a fee include the time and labor required, the amount involved and the results obtained. *See* Rule 4-1.5. An attorney violates Rule 4-1.5 when he does not perform or complete the professional representation for which a fee was paid, but fails to remit the unearned portion of the fee. *In re Gastineau,* 857 P.2d 136, 140 (Or. 1993). "[A] fee charged for which little or no work performed is an unreasonable fee," *Monfried,* 794 A.2d 92, 103 (Md. 2002).

Respondent filed three motions for extension in Mr. Guerra's Eighth Circuit Court of Appeals case, but never filed an appellate brief or produced a written draft of a brief. Nevertheless, Respondent collected over $4,000.00 for time solely related to the *Kempker* appeal. Respondent was unable to produce any work product to account for the billing and Respondent's billing records have a general notation of "research" with respect to the matter. Similarly, Respondent began telling Mr. Guerra that Respondent had entered an

appearance in the *Public Safety Concepts* case on April 20, 2007. Respondent did not actually enter his appearance until September 6, 2007, but Respondent billed and collected from Mr. Guerra $7,150.00 for the months of April, May, June and July. There was no discernable work product to substantiate the fees. Once Respondent did enter an appearance in the *Public Safety Concepts* case, the case lingered for the next 17 months, where Respondent filed no motions, discovery or other documents in furtherance of the case. On January 30, 2009, the Court ordered Respondent to file a motion for default judgment with supporting affidavits and documentation. Respondent filed a brief motion, but did not attach affidavits or documentation, resulting in the dismissal of his client's petition.

With respect to Mr. Guerra's pursuit of early parole, Respondent began telling Mr. Guerra that Respondent had met with the Board of Probation and Parole in April, 2007. Respondent never met with the Board of Probation and Parole, nor did he pursue early parole on Mr. Guerra's behalf. Simultaneously, Respondent misrepresented to Mr. Guerra that a writ of habeas corpus had been filed in Jefferson City in August, 2007. No writ was ever drafted or filed, nor was Respondent able to articulate any work done in furtherance of this matter beyond a general notation of "research." Respondent collected from Mr. Guerra over $7,225.00 for work related to the pursuit of early parole and filing of a writ.

In the case of Mr. Younger, Respondent was paid $10,000.00 to draft a successive §2255 motion for Mr. Younger. At the time Respondent agreed to draft the motion, Respondent was aware that to be successful, the motion would have to present new

evidence or new law that had been made retroactive to the case in question. Respondent knew that the law in question had not been made retroactive. Rather than wait to see if the investigator discovered new evidence, Respondent agreed to draft the motion and collected $10,000.00 to do so. The investigation did not unearth new evidence. Respondent has insisted that he provided a draft of the §2255 motion to Mr. Younger when Mr. Younger was housed in Terre Haute, Indiana. However, the evidence does not support Respondent's claim. Mr. Younger was clear that Respondent had failed to provide a copy of the motion while Mr. Younger was in Terre Haute because Respondent would have been unable to pass Mr. Younger paper in the facility. Further, becoming concerned that he would miss the filing deadline, Mr. Younger filed a *pro se* successive §2255 motion that was ultimately unsuccessful. If Respondent had provided Mr. Younger a motion, as was paid for, it stands to reason that Mr. Younger would have filed the motion given to him by Respondent. Ultimately, there is no evidence to suggest that Respondent ever provided Mr. Younger the §2255 motion for which Respondent was paid $10,000.00.

In *Attorney Grievance Com'n v. McLaughlin*, the attorney in question charged between $10,000.00 and $12,000.00 for asset protection plans that were not fully provided to the clients. *Attorney Grievance Com'n v. McLaughlin*, 813 A.2d 1145, 1165 (Md. 2002). The Maryland Supreme Court stated that it did not have to consider the reasonableness factors provided in Rule 4-1.5 because a fee collected when little to no work is performed is *per se* unreasonable. *Id*. In the case of Respondent, Respondent was unable to substantiate that any work was performed on the client matters for which

he charged tens of thousands of dollars. Under the standard articulated by the Maryland Supreme Court, Respondent's fee was *per se* unreasonable. Even when the factors set forth in Rule 4-1.5 are applied, however, Respondent's fees in this case were unreasonable. Neither Mr. Guerra nor Mr. Younger received any of the results contemplated by the employment agreement and Respondent was unable to substantiate that any real time was spent working on the matters. These facts alone render the factors regarding skill, reputation, and interference with other cases, inapplicable.

ARGUMENT

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO PROVIDE COMPETENT AND DILIGENT REPRESENTATION AS DIRECTED BY HIS CLIENTS IN VIOLATION OF RULES 4-1.1, 4-1.2 AND 4-1.3 IN THAT RESPONDENT DELAYED IN ENTERING HIS APPEARANCE ON MR. GUERRA'S ACTIONS FOR MONTHS AFTER AGREEING TO DO SO, FAILED TO FILE DOCUMENTS OR INSTITUTE ACTIONS AFTER BEING HIRED AND DIRECTED BY CLIENTS TO DO THE SAME, DISMISSED MR. GUERRA'S APPEAL WITHOUT HIS PERMISSION AND FAILED TO APPROPRIATELY RESPOND TO OPPOSING MOTIONS OR ORDERS OF THE COURT.

Rule 4-1.1 (Competence)

Missouri Supreme Court Rule 4-1.1 requires attorneys to exercise the knowledge, skill, thoroughness and preparation necessary to provide competent representation. Expertise in a specific area of law is generally not required and in many instances, the required proficiency is that of a general practitioner. *In re Richmond's Case*, 872 A.2d 1023, 1028 (N.H. 2005). In the present action, Respondent was ordered by the Court in *Public Safety Concepts* to file a motion for default judgment with attached affidavits and supporting documentation. Respondent filed a brief motion, but failed to attach affidavits

and supporting documentation, resulting in the dismissal of Mr. Guerra's action. Respondent failed to demonstrate the competency necessary to appropriately represent his client, particularly when the opposing parties were in default and a judgment could have been readily attained.

Rule 4-1.2 (Scope of Representation)

Missouri Supreme Court Rule 4-1.2 requires a lawyer to adhere to the client's decisions concerning the objectives of the representation and the means by which they are pursued. This Court has stated:

> 'The client-lawyer relationship itself implies some decisions [are] reserved to the client. Thus, a client and lawyer could not enter into a valid contract that only the lawyer would have the authority to decide what would benefit the client[.]'

In re Coleman, 295 S.W.3d 857, 863-864 (Mo. banc 2009) (quoting REST. OF LAW GOVERNING LAWYERS § 22 cmt. a (2000)).

In the matter at bar, Respondent dismissed Mr. Guerra's appeal without Mr. Guerra's consent. At disciplinary hearing, Respondent suggested in his testimony that a failure to follow the client's directives was not a violation of the Rules if the attorney was acting in the best interest of the client. Not only is Respondent legally incorrect, Respondent misjudged what Mr. Guerra felt was in his own best interest. As Mr. Guerra had, himself, filed an appellate brief, it was clear that Mr. Guerra thought it best to pursue an appeal in the case. Respondent violated Rule 4-1.2 in unilaterally deciding to dismiss the appeal.

Rule 4-1.3 (Diligence)

Missouri Supreme Court Rule 4-1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." At the core of the duty of diligence is a lawyer's obligation to perform in a timely manner the work for which he or she was hired. ABA/BNA Lawyers Manual on Professional Conduct, *Lawyer-Client Relationship* § 31:403 (2005). "The diligent representation of a client is particularly important because 'a client's interests can be adversely affected by the passage of time or the change of conditions[.]'" *In re Ehler*, 319 S.W.3d 442, 449 (Mo. banc 2010).

In the present action, Respondent's lack of diligence adversely affected both Mr. Guerra and Mr. Younger. In the case of Mr. Guerra, Respondent delayed entering his appearance on Mr. Guerra's actions for months after agreeing to do so. As a result, Mr. Guerra believed that Respondent was receiving copies of motions from opposing counsel and responding appropriately. Respondent also told Mr. Guerra that he had filed a writ of habeas corpus action, as well as an injunction regarding the denial of pain medication when Respondent had filed no such action. Respondent's lack of diligence deprived Mr. Guerra of the opportunity to seek redress in the courts. When Respondent failed to respond to multiple motions for summary judgment in the *Public Safety Concepts* case, the opposing parties were dismissed. And though Respondent was hired to produce a successive §2255 motion for Mr. Younger, Respondent never delivered the motion to Mr. Younger, forcing Mr. Younger, he felt, to take matters into his own hands.

In the case of *Hardin*, a respondent attorney was suspended for two years for failing to act with diligence in responding to discovery requests, and failing to make

efforts to expedite litigation. *Lawyer Disciplinary Bd. v. Hardin*, 619 S.E. 2d 172, 176 (W.V. 2005). The Supreme Court of West Virginia said that the attorney's actions not only injured his client, but also provided "reason for the public to lessen their faith and confidence in the legal profession." *Id*. Missouri, too, recognizes the damage caused by dilatory practice. "Perhaps no professional shortcoming is more widely resented than procrastination." Rule 4-1.3, Comment [3].

ARGUMENT

IV.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO ADEQUATELY COMMUNICATE WITH HIS CLIENTS IN VIOLATION OF RULE 4-1.4(a) IN THAT RESPONDENT FAILED TO PROPERLY ADVISE MR. YOUNGER REGARDING THE LEGAL RAMIFICATIONS OF FILING A *PRO SE* MOTION, FAILED TO INFORM MR. GUERRA THAT HIS CASES HAD BEEN DISMISSED OR THAT RESPONDENT HAD FAILED TO FILE DOCUMENTS THAT THE PARTIES HAD PREVIOUSLY AGREED WOULD BE FILED.

Rule 4-1.4(a)(1) states that a lawyer shall keep the client reasonably informed about the status of the matter. Keeping a client informed entails informing the client of court dates, motions and pleadings filed on their behalf, dismissals, and changes in the lawyer's contact information, as well as providing copies of documents and responding to client telephone calls and letters. ABA/BNA Lawyers Manual on Professional Conduct, *Lawyer Client Relationship* § 31:501 (2005). "Reasonable communication between the client and the lawyer is necessary for the client effectively to participate in the representation." Rule 4-1.4, Comment [1].

In one Ohio matter, the Ohio Supreme Court found that an attorney who voluntarily dismissed a case without the client's consent was guilty of failing to keep the client informed about the status of the matter. *Cleveland Metro. Bar Assn. v. Sherman*,

929 N.E.2d 1061, 1063 (Oh. 2010). The Supreme Court of Louisiana made a similar finding in the matter of *Sims*, where an attorney filed a motion to dismiss his clients' insurance case without their knowledge and failed to advise his clients that he had dismissed their case. *In re Sims*, 994 So.2d 1280, 1282 (La. 2008). The Louisiana Court found that the attorney had violated the Rules of Professional Conduct requiring an attorney to appropriately communicate with his or her client. *Id.*

In the present action, Respondent failed to inform Mr. Guerra that Respondent was voluntarily dismissing Mr. Guerra's appeal. Mr. Guerra had already submitted a brief in the case that had been stricken because it exceeded the page requirement. It was clearly Mr. Guerra's intent to pursue the appeal, but he did not learn of the dismissal until months after the fact. Similarly, Respondent never informed Mr. Guerra that Mr. Guerra's *Public Safety Concepts* case was dismissed when Respondent failed to attach proper documentation to a motion for default judgment.

In failing to inform Mr. Guerra that, contrary to Mr. Guerra's belief, no appearances had been filed in his cases, no brief had been filed in his appeal, no responses to summary judgment motions in *Public Safety Concepts* had been tendered and no actions had been instituted in his injunction and habeas cases, Respondent failed to provide Mr. Guerra very basic and pertinent information pertaining to Mr. Guerra's cases.

Respondent has asserted that when Louis Younger filed a *pro se* successive §2255 motion, it prohibited Respondent from taking additional action. At the same time, the testimony is undisputed that Respondent told Mr. Younger to go ahead and file the *pro se*

motion. Even if legally or factually inaccurate, at no time did Respondent advise Mr. Younger that Mr. Younger's filing of a *pro se* motion might interfere with Respondent's ability to file a subsequent motion.

This Court has said that "[c]ommunication with a client is essential to maintain a productive attorney-client relationship." *In re Ehler*, 319 S.W.3d 442, 449 (Mo. banc 2010). Respondent's clients were unable to make meaningful decisions with respect to their cases because Respondent failed to inform them of events, sometimes determinative, that were transpiring in their actions. As such, Respondent repeatedly violated Rule 4-1.4.

ARGUMENT

V.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO ACT AS AN APPROPRIATE FIDUCIARY IN VIOLATION OF RULE 4-1.15(c) and (d), 2007, IN THAT RESPONDENT:

a. HELD A LARGE SUM OF CLIENT MONEY FOR ALMOST A YEAR IN A NON-INTEREST BEARING IOLTA ACCOUNT; AND

b. DEPOSITED UNEARNED FEES IN HIS PERSONAL ACCOUNT INSTEAD OF A CLIENT TRUST ACCOUNT TO BE WITHDRAWN WHEN EARNED.

a. Holding funds in a non-interest bearing account

On April 3, 2007, Respondent deposited $215,158.69, belonging to Mr. Guerra, into Respondent's IOLTA account, for which no interest accrued to Mr. Guerra. Over the course of the next five months, from April 3, 2007 to September 6, 2007, Respondent withdrew $45,650.00 in fees. Respondent's fee withdrawals, as well as two payments to Mr. Guerra's brother, resulted in a balance of $146,508.69. On October 23, 2007, Mr. Guerra received a second inheritance payment of $98,063.91, which was also deposited into Respondents IOLTA account, bringing the total balance to $243,865.55. Several payments to various individuals were made, thereafter, but throughout the course of the 11 months that Respondent held Mr. Guerra's funds, the balance of the account never fell below

$100,000.00. When Mr. Guerra was released from prison in March, 2008, Respondent made one payment to Mr. Guerra's brother and a final refund to Mr. Guerra in the amount of $93,131.30.

Missouri Supreme Court Rule 4-1.15(d), 2007, provided:

> Except as provided in paragraph (e), a lawyer or law firm shall establish and maintain one or more interest-bearing insured depository accounts into which shall be deposited all funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time, but only in compliance with the following provisions:
>
> . . .
>
> (2) only funds of clients that are nominal in amount or are expected to be held for a short period of time and on which interest is not paid to the clients may be deposited in such account, taking into consideration the following factors:
>
> (i) the amount of interest that the funds would earn during the period they are expected to be deposited;
>
> (ii) the cost of establishing and administering the account, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to a client's benefit; and
>
> (iii) the capability of financial institutions to calculate and pay interest to individual clients.

In addition, the Missouri Lawyer's Trust Account Handbook provides:

> Non-IOLTA accounts: These are interest-bearing trust accounts for individual clients and third parties. If a lawyer will be holding a substantial amount of funds or smaller amounts for a long time, the lawyer should deposit those funds in a separate interest-bearing account for the benefit of that client.

In the present action, Respondent held well over $100,000.00 of money belonging to Mr. Guerra for a period of 11 months. The sum was not nominal and the interest that might have accrued over the course of 11 months, likely equates to thousands of dollars. Further, Respondent's motivation to keep Mr. Guerra's money in his firm's trust account is rendered suspect because Mr. Guerra specifically directed Respondent to set up an investment account with Morgan Stanley or a bank and Respondent failed to do the same. By keeping Mr. Guerra's money in his firm's trust account, Respondent maintained available access to withdraw lump sums of fees on a regular basis. Respondent withdrew $10,000, $5,000, $7,500, etc. Respondent admits that these sums were not reflective of accurate billings on his part, but rather an "estimation" of the work that was done. The circumstances create the impression that Respondent kept Mr. Guerra's money in Respondent's trust account for his own personal interest, exacerbating Respondent's violation of Rule 4-1.15(d).

b. Depositing unearned fees in personal account

Respondent and Mr. McVeigh first met on February 24, 2010. It is undisputed that four days later, upon receipt of a $5,000.00 check from Mr. McVeigh on March 1, 2010, Respondent deposited the money into a personal account and not into a client trust account. As discussed, *supra*, evidence supports Mr. McVeigh's contention that Respondent had agreed not to charge Mr. McVeigh for Respondent's initial client consultation, document review, or Respondent's attendance at a hearing where Respondent did not participate. Respondent's letter to Mr. McVeigh, dated March 4, 2010, stated that Respondent expected that the initial $5,000.00 retainer would be consumed within the next several weeks, evidencing Respondent's then-present assertion that the $5,000.00 had not yet been earned. Nevertheless, when negotiations between the two parties later fell apart, Respondent presented Mr. McVeigh with a billing statement. The billing statement reflects that as of March 4, 2010, the same date that Respondent sent a letter to Mr. McVeigh stating that the $5,000.00 would be consumed in the next several weeks, Respondent had billed Mr. McVeigh for 26.3 hours, or $5,260.00 in fees. The evidence would suggest that Respondent manufactured the billing statement after the parties fell into dispute over Respondent's refusal to return the fee.

Were we to assume that Respondent's billing statement was accurate and the work billed was actually performed? Respondent, by his own admission, deposited unearned fees into his personal account. The billing record states that in the four days prior to Mr. McVeigh's tender of the check on March 1, 2010, Respondent spent 8.7 hours on the initial client consultation and review of records. Billed at the agreed upon hourly rate of

$200.00 per hour, Respondent had only earned $1,740.00 of the $5,000.00 that was deposited into Respondent's personal account. Respondent's actions constitute a commingling of funds. Similarly, Respondent deposited $10,000.00 from Mr. Younger into a personal account and not into a client trust account. Having not provided Mr. Younger the successive §2255 motion that Respondent was hired to provide, Respondent had no billing statements setting forth Respondent's assertions as to how or when the money was earned.

Missouri Supreme Court Rule 4-1.15(c), 2010, required that a lawyer hold the property of a client separate from the lawyer's own property and that client funds be kept in a separate client trust account. In the matter of *Forge*, a Missouri attorney was found to have violated the trust accounting rules when he placed $1500.00 of client money into a personal account. *In re Forge*, 747 S.W.2d 141, 144 (Mo. banc 1988). The mandates of Rule 1.15 are strict and failure to abide by their terms is cause for discipline. *In the Matter of St. Onge*, 958 A.2d 143, 144 (R.I. 2008).

ARGUMENT

VI.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO RETURN CLIENT FILES IN A REASONABLE TIME FRAME FOLLOWING THE TERMINATION OF REPRESENTATION IN VIOLATION OF RULE 4-1.16(d).

Missouri Supreme Court Rule 4-1.16(d) requires that upon termination of representation, a lawyer take reasonable steps to surrender papers and property belonging to the client. The Supreme Court of Minnesota has stated that the failure to return client files upon the termination of the attorney-client relationship warrants "serious treatment," particularly when the misconduct caused inconvenience and unnecessary frustration to the client. *In re Disciplinary Action Against Rhodes*, 740 N.W.2d 574, 578-579 (Minn. 2007) (citing *Grzybek II*, 567 N.W.2d 259, 263 (Minn. 1997)).

At disciplinary hearing Respondent admitted that he had not returned Mr. McVeigh's hard copy documents at the termination of representation, despite Mr. McVeigh's repeated requests that Respondent do the same. Following the failure of the parties to come to an agreement over fees, Mr. McVeigh represented himself *pro se* in the civil action and has stated that his job was made more difficult without the hard copy documents in the client file that were of intrinsic value.

ARGUMENT

VII.

THE SUPREME COURT SHOULD DISBAR RESPONDENT BECAUSE DISBARMENT IS APPROPRIATE WHEN A LAWYER:

a. KNOWINGLY DECEIVES A CLIENT WITH THE INTENT TO BENEFIT THE LAWYER;

b. INTENTIONALLY MAKES A FALSE STATEMENT TO THE COURT;

c. KNOWINGLY ENGAGES IN CONDUCT THAT IS A VIOLATION OF A DUTY OWED TO THE PROFESSION; AND

d. KNOWINGLY FAILS TO PERFORM SERVICES FOR A CLIENT OR ENGAGES IN A PATTERN OF NEGLECT WITH RESPECT TO CLIENT MATTERS.

When considering the level of discipline to impose for violation of the Rules of Professional Conduct, this Court relies on the American Bar Association model rules for attorney discipline ("ABA Standards"). *In re Coleman*, 295 S.W.3d 857, 869 (Mo. banc 2009). Under Section II, The Theoretical Framework, the Standards state that each court imposing sanctions must consider the ethical duty and to whom it is owed, the attorney's mental state, the amount of injury caused by the attorney's misconduct and any aggravating or mitigating factors. Standards for Imposing Lawyer Sanctions, American Bar Association, 1991, pg. 5. The Theoretical Framework of the ABA Standards also

provides that when an attorney violates multiple Rules of Professional Responsibility, as is charged in the case of Respondent, the ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct and often should be greater than the sanctions for the most serious misconduct. *Id*.

ABA Standards Applied

a. Knowingly deceives a client with the intent to benefit the lawyer

"Disbarment is reserved only for cases of severe misconduct where it is clear the attorney is not fit to continue in this profession." *In re Shunk*, 847 S.W.2d 789, 792 (Mo. banc 1993). The Disciplinary Hearing Panel in this case found Respondent guilty of 12 separate instances of conduct towards a client involving dishonesty, fraud, misrepresentation or deceit, in violation of Rule 4-8.4(c). American Bar Association Standard 4.6 provides that in cases where an attorney engages in deceit toward a client, "[d]isbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client." Standards for Imposing Lawyer Sanctions, American Bar Association, 1991, pg. 5.

The ABA Standards assume that "the most important ethical duties are those obligations which a lawyer owes to clients." Standards for Imposing Lawyer Sanctions, American Bar Association, 1991, pg. 5. The Standards also provide that disbarment is the appropriate sanction when an attorney "knowingly" deceives a client. *Id*. at 11. Knowledge is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result."

Id. at 17. In the present case, Respondent agreed to represent Mr. Guerra in Mr. Guerra's multiple cases and then failed to take any action to advance Mr. Guerra's causes. When Respondent lied to Mr. Guerra about the status of his matters, Respondent knew that Respondent had not entered his appearance, had not filed discovery responses and had not instituted causes of action that Respondent said he had instituted. Respondent's purpose was clearly to make Mr. Guerra believe that work was being done on the cases when no such work was being accomplished. Respondent's intent was also clearly to benefit himself, and not Mr. Guerra. Mr. Guerra did not benefit from being lied to and kept in the dark about the status of his cases. In deceiving Mr. Guerra, Respondent was able to continue withdrawing large lump sums of attorney's fees from Mr. Guerra's inheritance while Mr. Guerra was being "strung along." Finally, the injury to Mr. Guerra was severe. When Respondent lied to Mr. Guerra about entering appearances in cases where Respondent had not entered an appearance, adverse action was taken by opposing parties with no response from Mr. Guerra. Mr. Guerra wanted to pursue a writ of habeas corpus, but was unable to do so because Respondent lied and said that the writ had been filed when it had not been filed. Mr. Guerra felt that he was improperly denied pain medication and no legal action was taken, though Respondent stated that an injunction action had been instituted. Mr. Guerra testified at hearing that he no longer feels that he can trust anyone and that the despair he felt in prison was compounded by Respondent's deceit.

Where the standards for imposing disbarment as a sanction for dishonest conduct towards a client have been met, Missouri case law further establishes that disbarment is

the appropriate sanction. See *In re Mentrup*, 665 S.W.2d 324 (Mo. banc 1984) (where attorney filed false settlements in connection with an estate and made misrepresentations to clients about letters that were never sent and petitions that were never filed); *In re Storment*, 873 S.W.2d 227 (Mo. banc 1997) (where attorney counseled client to lie on the stand and was disbarred); and *In re Murphy*, 732 S.W.2d 895 (Mo. banc 1987) (where attorney knowingly misrepresented to a client that a lawsuit had been filed.). Respondent has demonstrated that without the ability to behave honestly towards his clients, Respondent is unfit to continue practicing law.

b. Intentionally makes a false statement to the court

American Bar Association Standard 6.1 provides that disbarment is appropriate when a lawyer, with the intent to deceive the court, makes a false statement and causes serious or potentially serious injury to a party or causes significant or potentially significant adverse effect on the legal proceeding. Standards for Imposing Lawyer Sanctions, American Bar Association, 1991, pg. 12. An attorney's duty of candor to the court implicates the attorney's duty to the legal system. "Lawyers are officers of the court, and must abide by the rules of substance and procedure which shape the administration of justice." *Id*. at 5.

In the present action, Respondent intentionally deceived the court when Respondent filed a dismissal of Mr. Guerra's appeal stating that Respondent had Mr. Guerra's consent to dismiss the appeal, though Mr. Guerra had not consented to the dismissal. Intent is the "conscious objective or purpose to accomplish a particular result." *Id*. at 17. Respondent had filed three continuances and had thereafter failed to

file a brief on Mr. Guerra's behalf. With a show cause order in place, Respondent dismissed the appeal and it is clear that Respondent's intent was to make the court believe Respondent had his client's permission to dismiss when Respondent did not have Mr. Guerra's consent. The resulting injury to Mr. Guerra, who did not learn of the dismissal until months after it occurred, was that Mr. Guerra was unable to pursue his cause of action with no real recourse. Mr. Guerra had filed a *pro se* brief in the case, already, and hired Respondent to perfect the appeal. Respondent failed to do the same.

In the case of *Oberhellmann*, a Missouri attorney submitted interrogatories to the court wherein the attorney had misrepresented his client's place of residency for the purpose of manipulating jurisdiction. *In re Oberhellmann*, 873 S.W.2d 851, 854 (Mo. banc 1994). This Court stated that in cases of false statements, fraud or misrepresentation, the Court will only issue a reprimand if the lawyer is negligent in determining if a document is false. *Id*. at 856. This Court went on to state that suspension is only appropriate if a lawyer knows that a false statement is being submitted and takes no remedial action. *Id*. Where an attorney intentionally submits a false document or makes a false statement to the court, disbarment is the appropriate sanction. *Id*.

c. Knowingly engages in conduct that is a violation to the profession

Though Respondent's unreasonable attorney's fees resulted in pecuniary harm to his clients, the duty that Respondent violated was the duty owed to the profession. "These duties do not concern the lawyer's basic responsibilities in representing clients, serving as an officer of the court, or maintaining the public trust, but include other duties

relating to the profession" like advertising, fees and appropriately accepting, declining or terminating representation. Standards for Imposing Lawyer Sanctions, American Bar Association, 1991, pg. 5. The Standards also provide that while the rules developed out of a desire to protect the public, a violation of the duty to the profession is less likely to injure a client and, *in general*, rarely requires a sanction of suspension or disbarment. *Id*. at 45. Unfortunately, the harm to Respondent's clients in this case was substantial and disbarment, as the appropriate sanction, is indicated.

American Bar Association Standard 7.1 provides that disbarment is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer and causes serious or potentially serious injury to a client, the public or the legal system. *Id*. at 45. It is undisputed that Respondent withdrew large lump sums of fees from Mr. Guerra's inheritance and that the fees were not accurate reflections of the time that Respondent was working. In a matter of months, Respondent withdrew over $45,000.00. Clearly when Respondent collected these fees it was with the intent to take Mr. Guerra's money and it was for Respondent's own, personal benefit. Respondent was well aware that when he collected over $7,000.00 to pursue early parole or a writ of habeas corpus on Mr. Guerra's behalf, Respondent had not met or talked to anyone from parole, nor had Respondent drafted or filed a writ.

Similarly, Respondent charged and collected $10,000.00 from Louis Younger, knowing that a successive §2255 motion would have to be predicated on new evidence and refused to return any of the fee when no new evidence was forthcoming. Respondent

never provided Mr. Younger with the motion or a draft of the motion, making the $10,000.00 wholly unreasonable. Mr. Younger testified at deposition that he has no money to hire a new attorney and that the financial impact of Respondent's actions was severe. In the case of Mr. McVeigh, Respondent took $5,000.00 in fees and in a matter of a few days, contends that the retainer was used up for "document review."

In *Cincinnati Bar Assn. v. Weaver*, the Ohio Supreme Court found that where an attorney persistently neglected client matters, failed to perform as promised and could not provide accurate billing statements, the failure to carry out contracts of employment after taking fees was "tantamount to theft of the fee from the client" and warranted the attorney's disbarment. *Cincinnati Bar Assn. v. Weaver*, 809 N.E.2d 1113, 1116 (Oh. 2004). Respondent's behavior mimics that of the attorney in *Weaver*, where Respondent put his own pecuniary interests before that of the representation of his client. As such, disbarment is the appropriate sanction.

d. Knowingly fails to perform services for a client or engages in a pattern of neglect with respect to client matters

American Bar Association Standard 4.4 provides that disbarment is generally appropriate when a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client or when the lawyer engages in a pattern of neglect with respect to client matters. Standards for Imposing Lawyer Sanctions, American Bar Association, 1991, pg. 32. Standard 4.4 encompasses the rules regarding diligence, communication and scope of representation and implicates duties owed to the client.

Telephone recordings between Mr. Guerra and Respondent indicate that the two spoke several times a week. In the majority of the conversations, Mr. Guerra would ask about the status of his pending matters. Respondent not only knew that he had agreed to represent Mr. Guerra in these matters, but Respondent was also consciously aware that he was not performing any of the work requested by Mr. Guerra. Though Respondent's intent may not have been to cause Mr. Guerra's actions to fail, Respondent was reminded by Mr. Guerra several times a week regarding the work that needed to be done on the cases and Respondent knew Respondent was not performing the work requested. Though the harm to Mr. Guerra is clear insomuch as Mr. Guerra was unable to pursue many of his actions, the Supreme Court of Oregon has recognized an attorney's failure to diligently pursue a client's case can result in injury beyond the loss of the client objective:

> From a client's viewpoint, nonperformance by neglect, needless and unexplained delay, and especially failure to communicate or to respond to inquiries no doubt can be as frustrating as outright prevarication or some other disciplinary violations can be even when the neglect does not result in the ultimate loss of the client's objective.

In re Conduct of Knappenberger, 135 P.3d 297, 302 (Or. 2006). Respondent did not engage in an isolated instance of neglect. Respondent failed to achieve any of the objectives for which he was hired when he agreed to represent Mr. Guerra in four actions. Respondent was paid $10,000.00 to produce a motion for Mr. Younger that Respondent

never produced. And the harm to the clients was of such a substantial nature that disbarment is the appropriate sanction.

Aggravating and Mitigating Circumstances

The American Bar Association Standards provide that once misconduct is established, it is appropriate to evaluate the aggravating and mitigating circumstances in considering what sanction to impose. Standards for Imposing Lawyer Sanctions, American Bar Association, 1991, pg. 49. In the case at bar, aggravating factors include Respondent's prior disciplinary offenses, dishonest or selfish motive, pattern of misconduct, multiple offenses, submission of false statements during the disciplinary process, refusal to acknowledge the wrongful nature of his conduct, vulnerability of the victims, substantial experience in the practice of law and indifference to making restitution. *Id*.

On June 28, 2011, Respondent was suspended by this Court for a period of six months with said suspension stayed and probation imposed for a period of one year. In the 2011 disciplinary case, Respondent was hired by a client, Charles Rogers, to institute a lawsuit against Bank of America. Respondent told his client that the lawsuit had been instituted and that the case had settled. After Respondent's failure to turn over the settlement amount, it was discovered by Mr. Rogers' new attorney that Respondent had never filed the action against Bank of America and there was no settlement. Similarly contained in the 2011 discipline was a finding that Respondent had violated Rule 4-8.4(c) with respect to his representation of Robert Goerger. Respondent told Mr. Goerger that his request for post-conviction relief for armed criminal action was ruled upon favorably

by the court and that the matter had been remanded to the circuit court for final disposition. However, Respondent had never filed a motion for post-conviction relief on behalf of Mr. Goerger and lied to Mr. Goerger about the disposition. Not only does Respondent have a past disciplinary history, but it is for the same conduct that is being alleged in this case. Respondent seems incapable of conducting his law practice with the honesty and integrity that we require of Missouri practitioners.

Further aggravating the case at bar is Respondent's complete refusal to acknowledge the wrongfulness of his conduct. At hearing, Respondent repeatedly stressed that he helped Mr. Guerra close on a house in Hickory County and that Respondent's assistance in that matter demonstrated that Respondent acted in Mr. Guerra's best interest and on his behalf. Though the real estate matter was not a part of the disciplinary complaint made against Respondent, Respondent represented that Respondent's assistance in helping Mr. Guerra with the house closing negated the work that Respondent *did not* do on Mr. Guerra's behalf. When confronted with the taped telephone recordings, wherein Respondent repeatedly lied to Mr. Guerra, Respondent was unapologetic and stated, simply, that he could not explain the calls. Throughout the disciplinary hearing, Respondent repeatedly indicated that he believed it was acceptable to act without the input of the client if the attorney felt that he was acting in the client's best interest.

Respondent would contend that a delay in the disciplinary proceedings constitutes a mitigating factor in Respondent's case. Though the evidence supports the conclusion that any delay in the proceedings was caused by the number of complaints received

against Respondent, this mitigating factor is the only one applicable in Respondent's case and is not enough to overcome the overwhelming substantiation that the ABA Standards establish disbarment as the appropriate sanction and that the multitude of aggravating factors only verifies that conclusion.

It is well established that the purpose of attorney discipline is not to punish the attorney, but to "protect the public and maintain the integrity of the legal profession." *In re Carey*, 89 S.W.3d 477, 483 (Mo. banc 2002). Respondent's history establishes that with respect to at least three clients, Respondent has told egregious lies regarding progress in the client matters. There is no reason to believe that Respondent would not continue his pattern of dishonesty were he allowed to continue practicing. This Court applies a progressive disciplinary scheme, which is recommended by the ABA Standards. *In re Ehler*, 319 S.W.3d 442, 452 (Mo. banc 2010). Given Respondent's current status on probation, as well as all of the surrounding circumstances, disbarment is the appropriate sanction in the case of Respondent.

CONCLUSION

For the reasons set forth above, the Chief Disciplinary Counsel respectfully requests this Court:

(a) find that Respondent violated Rules 4-1.1, 4-1.2(a), 4-1.3, 4-1.4(a), 4-1.5(a), 4-1.15(c) and (d), 4-1.16(d), 4-3.3(a), 4-8.1(a) and 4-8.4(c).

(b) disbar Respondent; and

(c) tax all costs in this matter to Respondent, including the $2,000.00 fee for disbarment, pursuant to Rule 5.19(h).

Respectfully submitted,

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ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2014, a true and correct copy of the foregoing was served on Respondent's counsel via the electronic filing system pursuant to Rule 103.08:

Lawrence J. Fleming
2001 South Big Bend Boulevard
St. Louis, MO 63117

Respondent

Shannon L. Briesacher

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 18,392 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

Shannon L. Briesacher