IN THE SUPREME COURT
STATE OF MISSOURI

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

INFORMANT'S REPLY BRIEF

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I.

RESPONDENT'S MISREPRESENTATION OF FACT BEFORE THIS COURT SUPPORTS THE DISCIPLINARY HEARING PANEL'S FINDING THAT RESPONDENT IS NOT CREDIBLE.

Respondent has asserted in his Brief that on November 8, 2008, Respondent terminated his representation of Mr. Guerra by letter and that Respondent should not, therefore, be held accountable for the dismissal of Mr. Guerra's *Public Safety Concepts, Inc.* petition that occurred six months later on April 14, 2009. **Resp. Brief p. 37-40**. What Respondent fails to acknowledge before this Court is that Respondent continued to represent Mr. Guerra in the *Public Safety Concepts, Inc.* case and the dismissal of Mr. Guerra's petition occurred because Respondent, himself, filed an insufficient motion for default judgment in February, 2009. **App. 940-941**. Respondent never sought leave to withdraw from the *Public Safety Concepts, Inc.* case and therefore remained Mr. Guerra's attorney of record. **App. 919-941**. On January 30, 2009, the Court ordered that Mr. Guerra file "appropriate motions for default judgments against defendants Public Safety Concepts, Inc. and Lisa Dulaney, supported by all necessary affidavits and documentation" lest the action be dismissed. **App. 940**. On February 20, 2009, it was Respondent who filed the motion for default judgment, without affidavits and supporting documentation, resulting in the dismissal of Mr. Guerra's action. **App. 940**. To argue before this Court that Respondent had nothing to do with actions that occurred after

November, 2008 is a clear misrepresentation of fact that supports Informant's assertion that Respondent has repeatedly engaged in acts of dishonesty.

Pages one through 68 of Respondent's Brief constitutes Respondent's "Counter Statement of Facts." **Resp. Brief p. 1-68**. The record filed by the Informant contained a transcript of the hearing, as well as all exhibits offered and accepted by both Informant and Respondent. Respondent attempts to infer that Informant was negligent in not including every piece of evidence contained in the record into Informant's Appendix to its Brief. Respondent appears to misunderstand the difference between an Appendix and the formal record. Nevertheless, having not asked the Court to supplement the record, Respondent's Statement of Facts and assertions contained in his Brief should be contained to the record in this case. Much of Respondent's "Counter Statement of Facts" contains unsupported opinions, accusations and references to materials that were not part of the disciplinary record.[1] Some of the documents referenced in Respondent's Brief, such as the letter from disciplinary counsel to Louis Younger, were not even offered by

[1] On or about July 30, 2014, Informant filed before this Court a Motion to Require Respondent to Provide Specific Page References to the Record in Respondent's Brief, to Amend the Brief to Withdraw Assertions not Supported by the Record, or, in the Alternative, to Strike Respondent's Brief. Because Respondent's Brief was filed on July 28, 2014, Informant's Reply Brief was due on August 7, 2014. To date, Informant's motion has not been ruled on, thus Informant proceeded to file its Reply Brief as scheduled.

Respondent at hearing. **Resp. Brief p. 2-3**. The Disciplinary Hearing Panel made a specific finding that Respondent's testimony at hearing was not credible. **App. 1716**. Likewise, Respondent's "Counter Statement of Fact," as asserted in his Brief, is not credible and not accurately reflective of the facts in this case.

II.

ANY DELAY IN PROSECUTING RESPONDENT'S DISCIPLINARY ACTION WAS LARGELY DUE TO THE CONTINUED RECEIPT OF CLIENT COMPLAINTS AGAINST RESPONDENT AND DOES NOT OVERCOME THE EVIDENCE THAT RESPONDENT ENGAGED IN SERIOUS MISCONDUCT IN THAT THE ABA STANDARDS CONSIDER A DELAY IN PROSECUTION TO BE A MITIGATING FACTOR AT SANCTIONING AND NOT A FACTOR IN DETERMINING CULPABILITY.

Chief Disciplinary Counsel, Alan Pratzel, testified at hearing that the time taken to complete an investigation is affected by the number of complaints being investigated at the same time, the documents required for review, the cooperation of the Respondent and any pending matters before the Court. **App. 109-110**. In the present action, even when one investigation was completed and even when Informant had determined that it would be proceeding to Information against Respondent, there were other investigations that were not concluded. **App. 76**. Respondent takes issue with the fact that this was communicated to one complainant and not to Respondent. **Resp. Brief p. 2-3**. However, investigations at this stage were confidential and it was not possible to explain to one complainant that there were other complaints being investigated concurrently, which were holding up the filing of an Information. Respondent obviously knew that there were multiple complaints being investigated at the same time.

Nevertheless, were the Court to determine that delay in prosecuting this matter was attributable to the Office of Chief Disciplinary Counsel, ABA Standard 9.32 provides that delay in disciplinary proceedings is to be considered a mitigating factor and not a factor to be considered when determining Respondent's culpability under the Rules. ABA Standards for Imposing Lawyer Sanctions (1991 ed.) p. 50. Though the ABA Standards provide that delay in disciplinary proceedings can be considered a mitigating factor, other state courts have determined that delay is not a mitigating factor unless the attorney in question can demonstrate that he was unfairly prejudiced. See *In re Disciplinary Proceeding Against Preszler*, 232 P.3d 1118, 1133 (WA en banc, 2010); *In re Peasley*, 90 P.3d 764, 778 (AZ 2004); and *In re Ponds*, 888 A.2d 234, 244 (District of Columbia.App. 2005). Respondent argues in his Brief that he has been disadvantaged by the amount of time that has passed between when the complainants filed their complaints with the Office of Chief Disciplinary Counsel and the time that the Information was filed. **Resp. Brief p. 1-2**. Respondent does not articulate how he was prejudiced. However, the large majority of the allegations in the Information pertain to the deceit Respondent engaged in with respect to his representation of Mr. Guerra, all of which was captured in recorded telephone calls. Respondent was not expected to recall what he said to Mr. Guerra years ago, as the conversations were preserved and available for Respondent to listen to and review. Similarly, the docket sheets in the underlying litigation reveals Respondent's inaction on his client's cases and the billing records demonstrate that Respondent was billing tens of thousands of dollars for work not produced. Respondent was no more disadvantaged than Informant in attempting to determine what transpired

during these representations, almost all of which was preserved in record form. As such, Respondent has failed to demonstrate that the delay in prosecution has prejudiced the Respondent to such an extent that application of it as a mitigating factor would substantially overcome the evidence supporting Respondent's disbarment.

III.

RESPONDENT'S RELIANCE ON ERRONEOUS PROPOSITIONS OF FACT AND LAW DEMONSTRATE RESPONDENT'S INABILITY TO APPRECIATE HIS RESPONSIBILITIES PURSUANT TO THE RULES OF PROFESSIONAL CONDUCT.

Throughout the disciplinary hearing and replete in Respondent's Brief is Respondent's proposition that because he assisted Mr. Guerra in purchasing a home and because he corresponded with the representatives of Mr. Guerra's father's estate, this work somehow negates the substantial misconduct that occurred with respect to Mr. Guerra's other litigation. **See Resp. Brief p. 15-18; 27-31**. Though Respondent has argued that the Disciplinary Hearing Panel incorrectly refused to consider the work that was done with respect to these estate matters, the Disciplinary Hearing Panel correctly assessed that there were no disciplinary charges regarding this work contained in the Information. As such, the Disciplinary Hearing Panel refused the multiple attempts by Respondent to proffer documents and testimony that had nothing to do with the case before it. Respondent has appeared incapable of discerning that even if the estate work that he did for Mr. Guerra was impeccable and even if his work for other clients was above reproach, the repeated lies to Mr. Guerra, Mr. Younger and Mr. McVeigh, as well as the overbilling for work that was not performed, constitutes serious violations of the Rules of Professional Conduct that cannot be overcome by a showing of having done other work that was "good."

Additionally, Respondent seems to suggest that it was within his purview to determine what was in Mr. Guerra's best interest and to act, unilaterally, with respect to the same. It is well established that an attorney may not dismiss a client's action without the client's consent. See *Iowa Supreme Court Attorney Disciplinary Bd. V. Sotak*, 706 N.W.2d 385 (Ia. 2005); *In re Ballard*, 629 S.E.2d 809 (Ga. 2006); *In re Disciplinary Action against Garcia*, 729 N.W.2d 434 (Minn. 2010); and *Disciplinary Counsel v. Tyack*, 836 N.E.2d 568 (Ohio 2005). Respondent states that "in his judgment it would not have been in Mr. Guerra's interest to continue to aggressively pursue the Civil Right's [sic] litigation..[.]" Respondent postures that in suing the Department of Corrections for monetary damages related to civil rights violations that occurred while Mr. Guerra was incarcerated, the Department of Corrections was likely to be so upset and embarrassed that it would have requested that Mr. Guerra's conditional release date be extended. **Resp. Brief p. 24**. There is no factual support for Respondent's supposition. Nevertheless, what Respondent fails to recognize is that it was not Mr. Guerra's goal to maintain his conditional release date. Mr. Guerra had specifically hired Respondent to pursue action that would have allowed Mr. Guerra to be released *prior* to Mr. Guerra's conditional release date, namely, the writ of habeas corpus. While the likely success of such a motion is certainly questionable, it is unsound for Respondent to argue that the "focus changed" once it was clear that the Department of Corrections was not going to extend Mr. Guerra's conditional release date, while at the same time Respondent continued to lie to Mr. Guerra, telling Mr. Guerra that Respondent had filed a writ of habeas corpus that was never filed. If Respondent felt that it was not in Mr. Guerra's best

interest to pursue his lawsuits against the Department of Corrections, then it was Respondent's responsibility to counsel Mr. Guerra regarding the same and thereafter respect Mr. Guerra's decision as to how to proceed. The law does not permit an attorney to dismiss lawsuits that the attorney determines, without client participation, to be disadvantageous.

Despite Respondent's suggestion that he was acting out of client concern, the facts suggest that Respondent's inaction and overbilling was not born out of a concern for Mr. Guerra's best interests. For instance, when Mr. Guerra called and asked for Respondent to take legal action regarding the denial of Mr. Guerra's pain medication, Respondent told Mr. Guerra that a lawsuit had been filed and that a hearing was scheduled in the coming days. There was no such lawsuit filed and there was no attendant hearing. And the matter had nothing to do with Mr. Guerra's conditional release date. Similarly, if the goal had been to maintain Mr. Guerra's conditional release date, then Respondent would have had no need to lie to Mr. Guerra and tell Mr. Guerra that Respondent had visited with the Probation and Parole Board when no such visit had occurred. This is to say nothing of the misrepresentations that occurred before the Court of Appeals and the Office of Chief Disciplinary Counsel.

Respondent testified at hearing, "I probably handled his case wrong, I understand that, but ultimately he came out okay and I have to say I feel good about that." **Resp. Brief p. 46-47**. Respondent further states that he achieved positive objectives in that "he provided Mr. Guerra a farm" and "he provided $100,000.00" to Mr. Guerra. **Resp. Brief p. 43-44**. Respondent seems not to recognize that the $100,000 and the farm, bought

with Mr. Guerra's inheritance, always belonged to Mr. Guerra and was not "provided" by Respondent. Further, Mr. Guerra does not feel that he came out okay. Mr. Guerra paid Respondent over $45,000.00 for work that was never done. The telephone recordings demonstrate that with every excuse offered by Respondent for why the work wasn't completed, Mr. Guerra became more agitated and desperate, sometimes reduced to tears. Likewise, Mr. McVeigh was demonstrably angry with Respondent at hearing and Mr. Younger has stated that he feels that he is worse off for having paid Respondent $10,000.00 when Respondent produced no discernable work product. Respondent has demonstrated that he does not appreciate the full extent of his responsibilities under the Rules of Professional Conduct.

IV.

THE CIRCUIT COURT'S DETERMINATION IN MR. MCVEIGH'S CIVIL SUIT AGAINST RESPONDENT SHOULD NOT BE DETERMINATIVE OF THE DISCIPLINARY CHARGES PENDING AGAINST RESPONDENT.

Respondent is essentially attempting to invoke non-mutual collateral estoppel in arguing that the Circuit Court's determination in Mr. McVeigh's civil action against Respondent is determinative in Respondent's disciplinary proceeding. **See Resp. Brief p. 59-65**. Not only is the doctrine not permissible under the present circumstances, the Circuit Court's findings do not absolve Respondent of a determination that Respondent engaged in misconduct under the Rules of Professional Conduct.

A party asserting estoppel must establish that the same issues were present in both the present action and earlier litigation; that the issue was actually litigated; that the issue was determined as a critical and necessary part of the prior judgment; and the use of collateral estoppel would not be unfair to the party being estopped. *State v. Daniels*, 789 S.W.2d 243, 244-245 (Mo.App. 1990). In the present action, Mr. McVeigh sued Respondent, amongst other things, for breach of fiduciary duty, conversion of money and unjust enrichment. Mr. McVeigh represented himself *pro se* and the Office of Chief Disciplinary Counsel was not a party to the action. When Mr. McVeigh appealed the Circuit Court's judgment, which was reversed in part and remanded, the Court of Appeals specifically stated that violation of the Rules of Professional Conduct does not necessarily give rise to civil liability and the Court was not determining Respondent's

liability by application of the Rules of Professional Conduct.[2] The disciplinary issues pending before this Court were not litigated in Mr. McVeigh's previous civil litigation, nor was the Office of Chief Disciplinary Counsel a party to that action. As such, it is not appropriate for non-mutual collateral estoppel to be applied in this case.

Irrespective of the estoppel issue, the Circuit Court's findings do not absolve Respondent of misconduct. The Court of Appeals noted that during discovery in the underlying case, Respondent invoked the Fifth Amendment and refused to answer Mr. McVeigh's discovery. Nevertheless, Respondent was permitted to testify and put on evidence at trial. Following a full presentation of evidence by Respondent and Mr. McVeigh, the Court determined that Respondent was not entitled to charge Mr. McVeigh for their initial consultation, document review or attendance at Mr. McVeigh's hearing, in which Mr. McVeigh represented himself. The Disciplinary Hearing Panel also heard a full presentation of evidence and determined that Respondent had violated multiple Rules of Professional Conduct with respect to his representation of Mr. McVeigh. The Disciplinary Hearing Panel was well situated to make findings of fact in Mr. McVeigh's complaint and set forth its detailed findings in its Decision.

[2] The Court of Appeals' rationale was set forth in its Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b), provided only to the parties.

V.

DISBARMENT, AS PROPOSED BY THE INFORMANT AND RECOMMENDED BY THE DISCIPLINARY HEARING PANEL, IS THE APPROPRIATE SANCTION TO ADDRESS RESPONDENT'S MISCONDUCT.

Though Respondent has given considerable attention to discussing the underlying criminal cases of his client, as well as case work not related to the case before this Court, Respondent has almost wholly failed to address the disciplinary charges currently pending against Respondent. Respondent asserts that his client's litigation matters were so complex that neither the Informant nor the Disciplinary Hearing Panel is capable of understanding "what he was trying to do." **See Resp. Brief p. 82-83**. Respondent suggests that a special master need be appointed. However offensive, it takes no special degree of knowledge to recognize that Respondent repeatedly lied to his clients, the Courts and the Office of Chief Disciplinary Counsel.

The purpose of the attorney disciplinary system is to "protect the public and maintain the integrity of the legal profession." *In re Carey*, 89 S.W.3d 477, 483 (Mo. banc 2002). While disbarment is certainly an extraordinary sanction, reserved for the most severe misconduct, *In re Warren*, 888 S.W.2d 334, 337 (Mo. banc. 1994), the public must be protected from an attorney who has a history of deceiving clients for his own personal gain. Respondent is currently suspended from the practice of law, with the suspension stayed, for having told two different clients that their cases were being litigated (in one case, settled) when no such events had occurred. Respondent engaged in

the same conduct in the cases currently before this Court and Respondent's misrepresentations and deceit are undisputed. Respondent held hundreds of thousands of dollars in client money in a non-interest bearing account for over one year while lying and telling his client that the money had been invested in an interest-bearing account. There is no monitoring or continuing legal education program that can compensate for this lack of honesty on the part of Respondent. As such, Informant suggests that sufficient evidence has been adduced to support Respondent's disbarment.

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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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 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:

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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 3,251 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

Shannon L. Briesacher