IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
BRIAN C. GREER,	)	**Supreme Court No. SC95512**
	)	
Respondent.	)	

INFORMANT'S BRIEF

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ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

STATEMENT OF JURISDICTION

This action is one in which the Chief Disciplinary Counsel is seeking to discipline an attorney licensed in the State of Missouri for violations of the Missouri Rules of Professional Conduct. Jurisdiction over attorney discipline matters is established by this Court's inherent authority to regulate the practice of law, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

In this attorney disciplinary matter, an Information was initiated against Respondent Brian C. Greer ("Respondent") in February 2015. **App. 4**. The Information alleged multiple violations of the Rules of Professional Conduct, Rules 4-1.1 (competence); 4-1.3 (diligence); 4-1.4 (communication); 4-1.7 (conflict of interest); 4-8.4(c) (conduct involving dishonesty); 4-8.4(d) (conduct prejudicial to the administration of justice); and 4-3.4 (fairness to opposing party).[1] **App. 6–8**. The matter was heard by a disciplinary hearing panel in June 2015 upon the Information. **App. 400**.

On the record at the hearing, Respondent admitted the misconduct in all respects except for the allegations regarding dishonesty, obstruction of evidence, and falsification of evidence. **App. 32 (Tr. 10); App. 65 (Tr. 142)**. At the conclusion of the evidence at the hearing, Informant and OCDC requested an actual suspension of six months to one year. **App. 72-73 (Tr. 169-175)**. Respondent sought either a reprimand or probation. **App. 56 (Tr. 108)**. A written decision of the Disciplinary Hearing Panel was issued in December 2015, sustaining the evidence on all matters presented at the hearing. **App. 400-407**. The panel recommended disbarment. **App. 405**. OCDC accepted the panel's

[1]The Information alleged violations of Rule 4-3.4(a) (obstruction of evidence), 4-3.4(b) (falsification of evidence), and 4-3.4(d) (failure to comply with discovery). **App. 8**. At the conclusion of the disciplinary hearing, these violations were submitted to the panel in the alternative. **App. 71 (Tr. 166-167)**.

recommendation, but the Respondent rejected it. **App. 408-410**.

At various times in 2006 and 2007, OCDC received seven complaints on Respondent. **App. 314**. Respondent failed to respond to these complaints in violation of Rules 4-8.1 and 4-8.4(d). **App. 314**. Upon an Information and Notice of Default, an Order of Disbarment was entered against Respondent on July 23, 2008 by this Court in Case No. SC89463. **App. 391**. However, the Order of Disbarment was set aside a few days later. **App. 391**. From March 2008 to August 2008, Respondent was suspended from the practice of law in Missouri due to non-payment of bar dues. **App. 49 (Tr. 77-78); App. 315**. Respondent engaged in the unauthorized practice of law during this time in violation of Rules 6.05 and 4-5.5(a). **App. 315**.

After the disbarment was set aside by this Court in July 2008, four of the seven complaints mentioned above ultimately resulted in admonitions issued by a disciplinary hearing panel in February 2009. **App. 129-133**. The admonition in File No. 06-2256-IV involved violations of Rules 4-1.3 (diligence) and 4-1.4 (communication). **App. 130**. The admonition in File No. 07-0234-IV involved violations of Rules 4-1.3 (diligence) and 4-1.4 (communication). **App. 130**. The admonition in File No. 07-1476-IV involved a violation of Rule 4-1.16(d) in failing to return a client file upon termination of representation. **App. 131**. The admonition in File No. 07-1714-IV involved violations of Rule 4-1.3 (diligence) and Rule 4-1.16(d) in that Respondent abandoned the representation of a client and failed to return the client's money and file upon termination of the representation. **App. 131**.

In connection with these four admonitions issued by a hearing panel, Respondent

also agreed to participate in a diversionary program offered to him by OCDC. **App. 312–323**. Among other goals, the purpose of the diversion was to "(a) help ensure compliance with the applicable Rules of Professional Conduct; [and] (b) improve the management of Respondent's law practice through better communication with clients . . . ." **App. 313**. The diversion period was to last for twelve months, from March 2009 to March 2010. **App. 316; App. 322**. The diversion agreement executed by Respondent contained standard terms, including oversight by OCDC, additional CLE requirements, malpractice insurance, and implementation of systems to improve case management, calendaring, and client communications. **App. 316-320**.

On September 24, 2008, within weeks after Respondent's Order of Disbarment was set aside in late July 2008 and after the enrollment fee suspension was removed, Respondent filed a written Entry of Appearance for Delores Marra in a case captioned as *Hengehold d/b/a Able One v. Marra*, Case No. 0816-CV17332, in the Circuit Court of Jackson County, Missouri (Associate Circuit Division). **App. 141.** The case was an associate circuit court matter brought by a contractor against a homeowner seeking to collect a principal balance of approximately $6,000 for services performed. **App. 6; App. 26; App. 155-161.** The defendant was Delores Marra, an elderly widow in her seventies. **App. 6; App. 26**. Ms. Marra lives by herself and has to rely upon others for household matters. **App. 38 (Tr. 36)**.

Respondent testified at the disciplinary hearing that he did not have any communication with Ms. Marra prior to entering an appearance on her behalf. **App. 49 (Tr. 78)**. Respondent did not have any verbal communication with Ms. Marra at any time

during the pendency of the case. **App. 49 (Tr. 78).** Respondent did not have a written fee agreement with Ms. Marra. **App. 65 (Tr. 142)**. Respondent admitted to a violation of Rule 4-1.4 with respect to his lack of communication with Ms. Marra. **App. 32 (Tr. 10)**.

Ms. Marra did not testify at the disciplinary hearing due to her age and physical condition. **App. 38 (Tr. 35)**. However, her attorney, Gina Chiala, was called as a witness. **App. 37 (Tr. 31)**. Ms. Chiala filed a legal malpractice action against Respondent on behalf of Ms. Marra, based in part upon the theory that Respondent failed to notify Ms. Marra that he would be representing her in the *Hengehold / Able One* matter and that such representation created a conflict of interest. **App. 40 (Tr. 41)**. Respondent acknowledged at the disciplinary hearing that his representation of Ms. Marra was a "complete conflict" of interest. **App. 63 (Tr. 134)**.

Respondent was hired and paid $500 to represent the defendant in a lawsuit by making arrangements with an affiliate of the plaintiff. **App. 65 (Tr. 141-142)**. Respondent testified that he never should have "gotten involved" in the *Hengehold / Able One* lawsuit. **App. 63 (Tr. 134)**. Respondent admitted that his representation of Ms. Marra violated Rule 4-1.7 in that making arrangements (including acceptance of a $500 payment) with the plaintiff to represent a defendant in a lawsuit constituted a conflict of interest. **App. 32 (Tr. 10); App. 7 (Information ¶ 14)**.

The collection lawsuit against Ms. Marra resulted in a default judgment for $8,682 on April 17, 2009 because Ms. Marra was not present for trial. **App. 142**. Respondent admitted that he did not exercise a required level of competence in violation of Rule 4-1.1 (a) in not presenting a defense witness at trial; (b) in failing to notify the client of the

adverse judgment; (c) in failing to seek a modification of the judgment; and (d) in failing to preserve Ms. Marra's appeal rights. **App. 65 (Tr. 142-143)**. Respondent admitted to failing to exercise the required level of diligence in representing Ms. Marra in violation of Rule 4-1.3. **App. 32 (Tr. 10)**.

Ms. Marra did not become aware of the judgment against her until shortly after May 4, 2009 when all of her savings (about $5,000) had been drained from her bank account through a garnishment served on behalf of the judgment creditor. **App. 44 (Tr. 58-59); App. 151-154**. On May 21, 2009, Respondent received a letter from a new attorney (Dale Irwin, Esq., a partner in the same firm as Ms. Chiala) representing Ms. Marra inquiring about the circumstances of the lawsuit, judgment and garnishment. **App. 168.**

Respondent was not covered by malpractice insurance at any time during his representation of Ms. Marra in the *Hengehold / Able One* matter, including April 17, 2009, when the judgment was entered, May 4, 2009, when the garnishment was served and May 21, 2009, when Ms. Marra's new attorney began his investigation as to Respondent's representation of Ms. Marra. **App. 48 (Tr. 73 – 75)**. Respondent had agreed to maintain malpractice insurance from March 2009 to March 2010 during the course of the diversionary period. **App. 319**. Respondent failed to maintain malpractice insurance, which resulted in an admonition from OCDC in December 2010 (prior to the receipt of the disciplinary complaints which are the subject of this proceeding). **App. 134; App. 48 (Tr. 73-75)**. As of the hearing in June 2015, Respondent still had not procured malpractice insurance. **App. 67 (Tr. 149)**.

In August 2011, Respondent was sued for legal malpractice in a civil action

captioned as *Marra v. Lititz Mutual Insurance Company*, Case No. 1116-CV20478, in the Circuit Court of Jackson County, Missouri. **App. 170-179**. Respondent was served with a summons and petition on September 15, 2011. **App. 170**. Among other matters, the petition alleged that "Although Greer entered his appearance in the above suit on Ms. Marra's behalf on September 24, 2008, he never . . . contacted Ms. Marra, even to inform her of her trial date." **App. 174**.

In November 2011, Respondent's trust account was overdrawn. **App. 136**. OCDC commenced an investigation. **App. 136**. On February 1, 2012, Respondent advised OCDC that he did not maintain ledgers and trust account information requested by OCDC. **App. 136**. Respondent was admonished for violation of Rule 4-1.15 in March 2012. **App. 136-138.** The March 2012 admonition was the sixth admonition issued to Respondent. **App. 127-128**.

Since Respondent was not covered by insurance, he represented himself *pro se* in the malpractice action. **App. 260**; **App. 304**. On February 2, 2012, Respondent filed a counterclaim for defamation against Ms. Marra in the legal malpractice action based upon the allegations made by Ms. Marra in the petition. **App. 298-305**. The counterclaim sought actual damages against Ms. Marra (an elderly widow whose entire savings of $5,000 had already been drained from her bank account by a garnishment) in excess of $200,000.00[2]

[2]The counterclaim was filed **the day after** Respondent advised OCDC that he did not have the trust account records requested by OCDC following an overdraft notice for his client trust account. **App. 305; App. 136**. The counterclaim alleged that the legal malpractice

and punitive damages in excess of $500,000.00. **App. 298-305**.

The counterclaim was accompanied by a letter from Respondent to Ms. Marra's attorney (Gina Chiala, Esq.) offering to dismiss the counterclaim if Ms. Marra would dismiss the malpractice claim within seven days. **App. 297**. Otherwise, Respondent stated that he "will go all the way to trial" and "proceed full force" including garnishment against Ms. Marra until a judgment is satisfied. **App. 297**. Respondent's counterclaim against Ms. Marra was involuntarily dismissed with prejudice based upon the trial court's ruling that the allegations in the lawsuit were privileged and not actionable. **App. 306; App. 40 (Tr. 43)**.

In 2007, Amy Byerly, a former client, advised Respondent that she intended to file a disciplinary complaint against him. **App. 314**. Respondent told Ms. Byerly that if she filed a disciplinary complaint, that he would pursue legal action against her. **App. 314**. Respondent admitted in the Diversion Agreement signed in March 2009 that such conduct violated Rule 4-8.4(d) (conduct prejudicial to the administration of justice) and was contrary to the protection afforded complainants in Mo.Sup.Ct.R. 5.315. **App. 314-315**.

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petition "tended to expose Defendant Greer to hatred, contempt, ridicule, loss of business, possible future loss of employment, the possibility of not obtaining a job in the future, and lack of confidence." **App. 302**. The counterclaim further alleged that Ms. Marra had damaged Respondent's reputation and that Respondent "relies upon his image on getting clients and to get paid for his services." **App. 303**. Respondent alleged that Ms. Marra caused a "domino effect of lost income." **App. 303**.

When asked whether any lesson from his prior acknowledgement to OCDC that it was improper to threaten retaliatory action against Ms. Byerly could be applied to his decision to file a counterclaim for defamation against Ms. Marra, Respondent testified that the two situations were different because Ms. Marra made her complaint in a public forum. **App. 51 (Tr. 85)**. Respondent testified that he probably would not sue a former client in the future. **App. 51 (Tr. 85)**. In retrospect with the benefit of hindsight, Respondent testified that it was not an appropriate procedural tactic to sue a former client for $700,000 on a libel claim in response to a lawsuit petition for legal malpractice. **App. 50 (Tr. 82-83)**.

In November 2011, Respondent appeared at a case management conference in the legal malpractice action. **App. 39 (Tr. 39-40)**. At the conference, Respondent handed Ms. Chiala (Ms. Marra's attorney) six documents purporting to be letters from Respondent to Ms. Marra sent during the pendency of the *Hengehold / Able One* lawsuit. **App. 39-40 (Tr. 39-41)**. The six letters are identified in the record as Exhibit 16. **App. 161-167**. The content of the letters were pertinent to the legal malpractice action because they tended to rebut Ms. Marra's claim that she had never received any communication from Respondent during the entire course of the *Hengehold / Able One* matter. **App. 40 (Tr. 41-42)**.

In January 2012 and again in April 2012, Ms. Chiala submitted a request under Mo.R.Civ.P. 58.01 for production of documents to Respondent in the legal malpractice action. **App. 183; App. 308-310**. Among other documents, the request sought all correspondence exchanged between Respondent and Ms. Marra related to the *Hengehold / Able One* matter. **App. 308**. Ms. Chiala testified that under her interpretation of Mo.R.Civ.P. 58.01, her written request for production of documents encompassed

electronic records. **App. 42 (Tr. 51); App. 399**.

Respondent did not respond to the request for documents. **App. 184**. In May 2012, Ms. Chiala filed a motion for enforcement of discovery against Respondent. **App. 180-189**. The trial court granted the motion and ordered all responsive documents to be produced by June 1, 2012. **App. 190**. The same six letters (Exhibit 16; **App. 161-167**) that were provided by Respondent to Ms. Chiala at the scheduling conference in November 2011 were again produced by Respondent in formal discovery in May 2012. **App. 41 (Tr. 48)**.

While on diversion in February 2010, Respondent advised the OCDC diversion monitor that he was "embarking on a complete overhaul of my computer system" that will include a "new backup system." **App. 326**. On July 5, 2012, Respondent purchased a computer. **App. 286**. Respondent testified that "never got into a backup system" and "never did end up backing up" electronic files. **App. 51 (Tr. 87)**.

In September 2012, Ms. Chiala noticed up Respondent's deposition. **App. 191 – 192**. Respondent was deposed on October 11, 2012. **App. 196-257**. At the time of the deposition, Ms. Chiala was skeptical and suspicious of the authenticity of the six letters provided by Respondent identified herein as Exhibit 16. **App. 41-42 (Tr. 47-49)**. At his deposition in October 2012, Respondent testified that he still had the Microsoft digital files for the six letters of correspondence purportedly sent to Ms. Marra. **App. 258**. Respondent further testified at his deposition in October 2012 that, in connection with the document production in May 2012, he had checked his computer files to determine if he had any other responsive documents stored on his computer not contained within the paper file. **App.**

259. At his deposition, Respondent promised to check his electronic records to make sure all responsive documents had been produced. **App 243-244 (Tr. 185-186)**. Respondent did not mention at this deposition that he had thrown the computer and all electronic files away. **App. 196-257**. At the disciplinary hearing, Respondent suggested there was a misunderstanding on his part about the specific questions related to computer files. **App. 52 (Tr. 92)**.

Two weeks after Respondent's deposition, Ms. Chiala submitted a formal discovery request to have Respondent's computer inspected by a computer technician for purposes of inspecting the electronic versions of the six letters (Exhibit 16) purportedly sent by Respondent to Ms. Marra. **App. 288-291**. The inspection was scheduled to occur on November 29, 2012. **App. 288**. On November 28, 2012 Respondent advised Ms. Chiala in writing that the requested computer inspection was not possible because all of his previous computers "were sent to the dump." **App. 280**.

Respondent provided a formal response to the discovery request on December 31, 2012 in the form of a sworn statement that all the computers Respondent previously used in his private practice of law were "destroyed after a new personal computer was purchased in July 2012." **App. 292-293**. Respondent's response did not address whether he had separately retained digital files of his correspondence to Ms. Marra before taking the computers to the dump. **App. 277; App 292-293**. Ms. Chiala testified that Respondent had been evasive on this issue. **App. 43 (Tr. 55)**.

On behalf of Ms. Marra, Ms. Chiala filed a motion for discovery sanctions against Respondent as a result of Respondent's failure to allow an inspection of the digital files

mentioned in his deposition testimony. **App. 260-285**. In her motion, Ms. Chiala claimed that "Either Greer has the digital file and is resisting its disclosure or he destroyed the digital file while the present litigation was in full swing, raising the spoliation doctrine." **App. 262**. The trial judge granted the motion on March 29, 2013. **App 294-295**. Respondent was ordered to produce the digital files or state specifically whether the evidence at issue had been destroyed. **App. 294-295**. Respondent was also sanctioned $800. **App. 296**. Respondent has never paid the $800 sanction. **App. 44 (Tr. 57)**.

Ms. Chiala testified that the six letters, if authentic and actually mailed to Ms. Marra contemporaneous with the respective dates of the letters, would have had potential evidentiary value in the malpractice lawsuit, including the allegations as to lack of communication between Respondent and Ms. Marra. **App. 46 (Tr. 67); App 174**. Ms. Chiala testified that her access to evidence was obstructed by Respondent in the course of the legal malpractice case. **App. 46 (Tr. 67)**. On the record at the disciplinary hearing, Respondent admitted to a violation of Rules 4-8.4(d) and 4-3.4(d) in failing to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party. **App. 32 (Tr. 10)**.

The six documents were never submitted to a judge or used as evidence in the malpractice case. **App. 46 (Tr. 67)**. The legal malpractice lawsuit was dismissed against Respondent without prejudice. **App. 55 (Tr. 102)**. Respondent did not pay any settlement money to Ms. Marra and he did not replenish the money garnished from her bank account. **App. 46 (Tr. 68)**.

Ms. Chiala[3] testified as to the reasons why she concluded that the six letters (Exhibit 16, **App. 161-167**) had been fabricated by Respondent after the fact in response to the malpractice lawsuit. **App. 45-46 (Tr. 61-66); App. 142-150; App. 307**. Ms. Chiala testified that it was her belief and opinion that the six letters (Exhibit 16, **App. 161-167**) had been reconstructed by Respondent, assisted with reference to case.net docket entries, much later in time than the respective dates of the letters. **App. 46 (Tr. 66)**.

Respondent testified that he had no written proof of disposing of the computers. **App. 51 (Tr. 87-88)**. He said "You just pay a fee at the dump and you don't get a receipt." **App. 51 (Tr. 88)**. Respondent testified that he knew the exact computer he used to create the six letters to Ms. Marra. **App. 51 (Tr. 88)**. He testified that he no longer had that specific computer nor any digital files from the computer. **App. 51 (Tr. 88)**.

Respondent testified that within six weeks of responding to the request for production of documents in May 2012 (which included a review of computer files for responsive documents; **App. 259**), and after having been ordered by the trial judge on May 24, 2012 to produce documents, in July 2012 he destroyed the exact computer containing the electronic versions of the six letters to Ms. Marra. **App. 52 (Tr. 89)**. He acknowledged that at the time he destroyed the computer in July 2012, he was still engaged in a discovery

[3]At the time of her testimony, Ms. Chiala had practiced law for nine years, all primarily in Jackson County, Missouri. She had handled four criminal jury trials and four civil jury trials (including obtaining a plaintiff's verdict of over $82,000,000). Ms. Chiala has also handed associate circuit court cases. **App. 37-38 (Tr. 32-34)**.

dispute over production of documents. **App. 52 (Tr. 90)**. Respondent also acknowledged that the destruction of the computer took place less than five months after he had been admonished by OCDC for inadequate trust account recordkeeping. **App. 52 (Tr. 91)**.

Respondent denied any fraudulent conduct with regard to the production of documents or destruction of evidence in the legal malpractice case. **App. 58 (Tr. 114)**. Respondent's testimony was that the six letters were "legit" and that he will "100 percent swear and stand behind" each letter. **App. 58 (Tr. 114)**. He testified that Exhibit 16 (**App. 161-167**) were true and correct copies of letters he actually sent out to Ms. Marra. **App. 59 (Tr. 120)**. With respect to the destruction of his computer without preserving client information contained on the computer, Respondent testified that he is not a "computer wizard" and did not understand that computer files could be as important as paper files. **App. 62 (Tr. 130-131)**. Respondent claimed that the decision to destroy the computer coincided with his decision to shut down his solo law practice to go work for another sole practitioner where he would not need his own computer. **App. 62 (Tr. 130-131)**; **App. 65-66 (Tr. 144 – 145); App. 292; App 280**. The computer at issue was six years old, and contained six years of client information and data. **App. 65 (Tr. 144); App 62 (Tr. 130)**.

In addition to the complaint arising out of Respondent's representation of Ms. Marra and the subsequent legal malpractice action, the disciplinary hearing also involved a complaint by a client, Theresa Gorajewski, concerning a 2012 municipal court matter involving a minor traffic citation. **App. 34-37 (Tr. 19-30)**. Respondent admitted that he failed to provide adequate communication to that client in violation of Rule 4-1.4 and that he had abandoned the representation of the client after entering his appearance in her case

in violation of Rule 4-1.16(d). **App. 32 (Tr. 9)**. Ms. Gorajewski had not paid a fee to Respondent, and the client was able to hire another attorney to handle the matter without any consequence to her driver's license. **App. 35-36 (Tr. 22-28)**.

Respondent has practiced law since 2000. **App. 4; App. 25**. All of the conduct at issue in the present disciplinary proceeding occurred in a time period of 2008 to 2012. **App. 55 (Tr. 104)**. Respondent has handled "hundreds of bench trials" and about nine jury trials. **App. 55 (Tr. 104)**.

POINT RELIED ON

I.

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE THE PREPONDERANCE OF EVIDENCE, INCLUDING SEVERAL ADMISSIONS, ESTABLISHES THAT RESPONDENT IS GUILTY OF NUMEROUS INSTANCES OF PROFESSIONAL MISCONDUCT, AS FOLLOWS:

(A) RESPONDENT ENGAGED IN A REPRESENTATION OF DELORES MARRA FROM SEPTEMBER 2008 TO MAY 2009 IN VIOLATION OF RULE 4-1.7(a)(2) BECAUSE THERE WAS A SIGNIFICANT RISK THAT THE REPRESENTATION WOULD BE MATERIALLY LIMITED BY RESPONDENT'S RESPONSIBLITIES TO THIRD PARTIES;

(B) RESPONDENT VIOLATED RULES 4-3.4 AND 4-8.4(c) OR (d) IN THAT HE EITHER UNLAWFULLY OBSTRUCTED MS. MARRA'S ACCESS TO COMPUTER EVIDENCE AND UNLAWFULLY DESTROYED MATERIALS HAVING POTENTIAL EVIDENTIARY VALUE; OR HE

FALSIFIED EVIDENCE; OR HE FAILED TO MAKE REASONABLY DILIGENT EFFORTS TO COMPLY WITH A LEGALLY PROPER DISCOVERY REQUEST MADE ON BEHALF OF MS. MARRA; AND

(C) RESPONDENT VIOLATED RULES 4-1.1 AND 4-1.4 IN HIS REPRESENTATION OF MS. MARRA AND ALSO VIOLATED RULES 4-1.4 AND 4-1.16(d) IN HIS REPRESENTATION OF THERESA GORAJEWSKI.

POINT RELIED ON

II.

IN ORDER TO PROTECT THE PUBLIC AND MAINTAIN THE INTEGRITY OF THE LEGAL PROFESSION, THE COURT SHOULD REMOVE RESPONDENT FROM THE PRACTICE OF LAW BY EITHER SUSPENSION OR DISBARMENT.

ARGUMENT

I.

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE THE PREPONDERANCE OF EVIDENCE, INCLUDING SEVERAL ADMISSIONS, ESTABLISHES THAT RESPONDENT IS GUILTY OF NUMEROUS INSTANCES OF PROFESSIONAL MISCONDUCT, AS FOLLOWS:

(A) RESPONDENT ENGAGED IN A REPRESENTATION OF DELORES MARRA FROM SEPTEMBER 2008 TO MAY 2009 IN VIOLATION OF RULE 4-1.7(a)(2) BECAUSE THERE WAS A SIGNIFICANT RISK THAT THE REPRESENTATION WOULD BE MATERIALLY LIMITED BY RESPONDENT'S RESPONSIBLITIES TO THIRD PARTIES;

(B) RESPONDENT VIOLATED RULES 4-3.4 AND 4-8.4(c) OR (d) IN THAT HE EITHER UNLAWFULLY OBSTRUCTED MS. MARRA'S ACCESS TO COMPUTER EVIDENCE AND UNLAWFULLY DESTROYED MATERIALS HAVING POTENTIAL EVIDENTIARY VALUE; OR HE

FALSIFIED EVIDENCE; OR HE FAILED TO MAKE REASONABLY DILIGENT EFFORTS TO COMPLY WITH A LEGALLY PROPER DISCOVERY REQUEST MADE ON BEHALF OF MS. MARRA; AND

(C) RESPONDENT VIOLATED RULES 4-1.1 AND 4-1.4 IN HIS REPRESENTATION OF MS. MARRA AND ALSO VIOLATED RULES 4-1.4 AND 4-1.16(d) IN HIS REPRESENTATION OF THERESA GORAJEWSKI.

There can be no serious debate in this matter that Respondent has engaged in numerous instances of professional conduct. On the record of the disciplinary hearing, Respondent admitted to violations of Rules 4-1.4 (communication) and 4-1.16(d) (terminating representation) in connection with his representation of Theresa Gorajewski. Ms. Gorajewski had received a pair of traffic citations that required her appearance in a municipal court matter. She contacted Respondent for legal representation. Respondent agreed to represent Ms. Gorajewski. Respondent entered his appearance in the case on her behalf. Ms. Gorajewski never heard from Respondent again. Respondent provided no notice to the client of his termination of the representation.

Respondent also admitted to mishandling the defense of Delores Marra in the underlying associate circuit court collection action. The plaintiff, Hengehold, was a residential contractor who handled repair work resulting from storm-related insurance claims. The plaintiff received referrals from an insurance adjuster. The adjuster arranged

for Hengehold to repair Ms. Marra's home. A dispute over workmanship and final payment had arisen. The insurance adjuster who hired the plaintiff, Hengehold, to work on Ms. Marra's home also hired and paid Respondent to defend the homeowner against Hengehold's claim for additional payment.

Ms. Marra had no direct involvement in retaining Respondent, and she did not approve Respondent to be her counsel. Ms. Marra obviously did not waive any conflict, because she did not even know who Respondent was. There was no fee agreement between Respondent and Ms. Marra. Respondent's loyalties to the insurance adjuster, and potential loyalties to the plaintiff, prevented him from providing zealous, diligent and competent representation to Ms. Marra. Ms. Marra's second attorney, Gina Chiala, correctly identified the potential liability of the adjuster, and she filed suit against the adjuster on behalf of Ms. Marra. Respondent admits that the circumstances under which he was retained to defend Ms. Marra created a conflict of interest, and that he never should have gotten involved in the matter. Respondent admitted to a violation of Rule 4-1.7 (conflicts).

Because Respondent never met Ms. Marra and never even spoke to her (even after a judgment against her was entered), he has also admitted to a violation of Rule 4-1.4. Respondent did not put on much of a defense against the contractor's claim for payment. He did not present evidence at the time of trial. He did not seek to have the adverse judgment against his client modified or appealed. He admits that he did not competently handle the defense of Ms. Marra in the collection action. Accordingly, a preponderance of the evidence establishes a violation of Rule 4-1.1 (competence).

The evidence regarding the computer files and the authenticity of the six letters

purportedly sent by Respondent to Ms. Marra present a closer call. On the one hand, Respondent has accepted responsibility for creating a discovery problem for Ms. Marra's attorney in the malpractice case, addressed by his admission to a violation of Rules 4-3.4(d) and 8-4(d). However, the disciplinary hearing panel found the conduct to be more egregious, raising the question of whether Respondent's admission goes far enough.

On one end of the spectrum are Rules 4-3.4(b) and 4-8.4 (c), which prohibit dishonest and fraudulent falsification of evidence. On the other end of the spectrum are Rule 4-3.4(b) and 4-8.4(d), which merely prohibit discovery tactics that are prejudicial to an opposing party's litigation rights. Somewhere in the middle is Rule 4-3.4(a) which involves unlawful destruction of evidence, which could result from either a dishonest motivation or from poor judgment and negligence. The comments to Rule 4-3.4 expressly provide that 4-3.4(a) applies to computerized information.

The panel found the six letters to have been fraudulently manufactured by Respondent - after the fact - in response to the malpractice action, thus finding violations of Rules 4-3.4(b) and 4-8.4(c). Since the panel's finding is advisory, it is up to this Court to weigh the evidence and make a final determination of the nature of Respondent's misconduct, e.g. not only whether the conduct with regard to the creation of the letters themselves was fraudulent and dishonest, but also whether the conduct in the form of Respondent's deposition testimony and other actions taken by Respondent in the course of discovery were also a result of fraudulent and dishonest conduct.

In *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997), the Court held that "because the origins of the manufactured document remain unclear," there was no violation of Rule

4-3.4(b). In the instant case, the salient points which support the panel's findings as to manufactured documents and its conclusion on this issue are set forth below. First, Respondent admits that he provided inadequate communication to Ms. Marra. He never met her. He never spoke to her. He never went to her house to inspect the workmanship of the contractor. A finding that Respondent never sent letters to Ms. Marra is consistent with his incredibly lackadaisical approach to defending the claim.

Second, the Court is entitled to make an adverse inference against Respondent. The Court can presume that the inspection of the computer by a forensics expert would have revealed that the six letters were created in 2011 in response to the malpractice lawsuit and were not created and sent to Ms. Marra in 2008 – 2009. As Ms. Chiala appropriately raised to the trial court, the destruction of a computer with potentially relevant data in the course of a legal dispute is a matter of spoliation of evidence. A party who intentionally spoliates evidence is subject to an adverse evidentiary inference. *Baldridge v. Director of Revenue*, 82 S.W.3d 212, 222-223 (Mo.App. 2002); *Pisoni v. Steak 'N Shake Operations, Inc.*, 468 S.W.3d 922 (Mo.App. 2015). "The adverse inference holds the spoliator to admit the missing evidence would have been unfavorable to its position." *Pisoni*, 468 S.W.3d at 926.

Obviously, the act of taking a computer to a dump to be destroyed is an intentional act. Respondent does not suggest that the computer was thrown out by mistake. As a litigation attorney with twelve years of experience in the practice of law, Respondent surely recognized a duty to preserve evidence in the legal malpractice action, especially in light of the nature of the alleged malpractice (inadequate communication) and the court-ordered production of documents. In fact, Respondent testified that he actually checked files on

his computer hard drive **before** making the document production in May 2012. By the end of 2012, the computer was gone. Because Respondent says that he did not get a receipt when he paid to drop off items of the dump, there is no way of verifying his testimony that he took the computer to the dump in July 2012. Respondent fails to mention at any point in his deposition that the computer files have supposedly been destroyed. If fact, to the contrary, he even offers to check the computer after the conclusion of the deposition. It is bad enough to have taken the subject computer to the dump **any time** during the pendency of litigation. It is even worse if Respondent took the computer to the dump in November 2012 in specific response to a request to have a computer technician inspect the computer. Respondent's testimony as to the timing of the destruction of the computer stands neither corroborated nor specifically contradicted.

Moreover, in any event, the destruction of evidence occurred less than a year after Respondent was admonished for inadequate record-keeping. Finally, in 2010, Respondent made a written representation to OCDC that he was making a "complete overhaul" of his computer system, to include a new back-up system. Yet by the end of 2012, the computer was gone. Respondent testified that he is not a computer wizard. One need not be a computer wizard to understand that discovery of documents under Mo.R.Civ.P. 58.01 involves production of electronic records as well as paper documents.

In short, Respondent is subject to an adverse inference as a result of the intentional spoliation of evidence. The adverse inference is tantamount to an admission that the computer would have shown that the six letters were created in 2011 in response to the allegations in the malpractice lawsuit and **were not** authored and sent to Ms. Marra in 2008

and 2009 as they purported to be.

An adverse inference has been recently applied by this Court in an attorney discipline matter involving records required to be maintained. *In re Farris*, 472 S.W.3d 549 (Mo. banc 2015). In the *Farris* case, the Court held that a lawyer's failure with record-keeping rules related to trust accounting "must give rise to an inference of knowledge, particularly when the attorney tries to defend a charge of misappropriating trust account funds on grounds that the required documents plainly would support or refute had the attorney kept them." *In re Farris*, 472 S.W.3d at 561. As the *Farris* Court noted, a lawyers' failure to keep required records should not work to his benefit. *In re Farris*, 472 S.W.3d at 561.

Here, Respondent had a general obligation under Rule 4-1.22 to maintain his clients' records for ten years. And, as noted above, he had a specific obligation to avoid spoliation of those records during the lawsuit. Yet, he seeks to rely on purported paper copies of records that no one else can recall, in a case where he otherwise admits that he provided virtually no other communication to his client. As in the *Farris* case, Respondent's credibility cannot be enhanced by his own record-keeping failure (in this case involving intentional document destruction) that is contrary to rules of professional conduct and rules of civil procedure.

The destruction of a computer used for business and professional purposes, especially during the pendency of a legal malpractice lawsuit with a $700,000 counterclaim, is the type of unlawful obstruction of another party's access to evidence and the unlawful destruction of materials having potential evidentiary value contemplated by

Rule 4-3.4(a). The violation has been proven by a preponderance of the evidence.

In considering whether a preponderance of the evidence in this case demonstrates that Respondent fraudulently manufactured evidence of written communications with his former client, the Court might also consider Respondent's overall litigation tactics. "A litigant who is also an attorney is not merely any litigant; that litigant nevertheless remains an attorney, an officer of the courts, and a member of the bar before which he or she has been admitted to practice law, and his or her actions that come within the confines of legal process as either an attorney or as a litigant reflect on the profession of law as a whole. This is especially relevant for an attorney whose role in the filing of a claim or lien as a litigant is directly related to his representation of a former client or clients while he was acting in his capacity as an attorney." *In re Hess*, 406 S.W.3d 37 (Mo. banc 2013). Unfortunately, because Respondent did not have malpractice insurance to defend him in the lawsuit (despite a written promise to OCDC to procure such insurance), Respondent handled the litigation *pro se*. Respondent succumbed to one of the pitfalls faced by many *pro se* litigants. His defense lacked both an objective legal perspective and sound strategy.

Ms. Marra was an elderly widow whose savings account of $5,000 had just been wiped out by a garnishment. It is hard to fathom that counsel with experience in defending professional liability claims would have recommended a $700,000 counterclaim (including $500,000 in punitive damages) for libel and defamation in response to the allegations. Rather, it is hoped that somehow level-headed professionals would have found a way to make Ms. Marra whole for the $8,000 judgment entered against her, instead of engaging in protracted litigation.

The counterclaim was a grossly disproportionate response to the claim against Respondent. Moreover, the counterclaim appears to have been frivolous and abusive[4], given well-settled legal doctrine that allegations in a lawsuit are legally privileged and cannot be actionable as libel or defamation. *See Laun v. Union Electric*, 166 S.W.2d 1065, 1069 (Mo. 1942); *Wunsch v. Sun Life Assurance*, 92 S.W.3d 146, 155-156 (Mo.App. 2003). Further, Respondent's letter to Ms. Marra's attorney that he was going to "go all the way to trial" and proceed "full force" including even more garnishments against Ms. Marra was not only ill-advised, but it suggests a more aggressive, callous and sinister approach. It is easy to see how such a scorched earth, "win at all costs" mindset could have resulted in the

[4]The Information did not charge Respondent with misconduct regarding his decision leverage a dismissal of the malpractice claim with a countersuit against the former client for libel. Similarly, the hearing panel did not comment on the counterclaim. However, the counterclaim by itself arguably violates Rules 4-8.4(d) and Rule 4-3.1. *See In re Hess*, 406 S.W.3d 37 (Mo. banc 2013) ("Because Hess knowingly participated in the filing of frivolous claims, his conduct violated Rule 4–3.1. These frivolous suits were designed to harass, intimidate, and burden the Loyds in order to pressure or influence Kanoski and Blan to settle Hess's claim against them. This conduct is prejudicial to the administration of justice and is, therefore, a violation of Rule 4–8.4(d)"). Inasmuch as the panel found a violation of Rules 4-8.4(d) and 4-3.4(d) based upon other circumstances, the counterclaim can be viewed more as an aggravating circumstance than as a separate instance of misconduct.

intentional falsification of evidence by Respondent.

The Court might also consider, as did the hearing panel, that the content of the letters appear to be more self-serving to Respondent's interests in protecting himself than in presenting a genuine attempt to protect Ms. Marra's litigation rights. **App. 404**. If there had been an earnest attempt to communicate with Ms. Marra, there would have been an affirmative and unequivocal written communication advising Ms. Marra about the actual outcome of the trial, rather than just a series of letters purporting to warn about the future possibility of an adverse judgment.

Finally, the Court might consider the observations of Ms. Chiala, who studied the content of the six letters and compared them to the actual events of the underlying case and the unofficial case.net entries. Ms. Chiala, an experienced attorney in Jackson County, Missouri, testified as a fact witness but was also qualified to provide expert testimony. After noting various tell-tale clues that the letters had been reconstructed well after the fact, Ms. Chiala testified that it was her opinion and belief that the letters had been falsified.

Based upon the above, the weight of the evidence from the disciplinary hearing demonstrates that the six letters were falsified. Ultimately, the legal malpractice case was dismissed as to Respondent, essentially because he was determined to be judgment-proof without professional liability insurance. **App. 122**. Respondent testified that he did not even have the $800 to satisfy the discovery sanction. The six letters were never submitted to a tribunal and were never used at an evidentiary hearing in the matter. Even so, the letters constitute "evidence" as used in Rule 4-3.4(b). A violation of Rule 4-3.4(b) is shown by a preponderance of the evidence.

ARGUMENT

II.

IN ORDER TO PROTECT THE PUBLIC AND MAINTAIN THE INTEGRITY OF THE LEGAL PROFESSION, THE COURT SHOULD REMOVE RESPONDENT FROM THE PRACTICE OF LAW BY EITHER SUSPENSION OR DISBARMENT.

The most significant issue presented in this disciplinary matter involves the imposition of an appropriate disciplinary sanction. The Respondent argued that he should be reprimanded, or alternatively, requested an opportunity to be placed on probation so he could continue to practice law. OCDC and Informant argued that an actual suspension was necessary, but suggested that an indefinite suspension with leave to apply for reinstatement after six months to one year would be sufficient. The disciplinary hearing panel unexpectedly[5] made a recommendation of disbarment. Although not unheard of, it is relatively uncommon for a disciplinary hearing panel to recommend a much more stringent sanction than that put forth by OCDC. Thus, the issue before the Court is somewhat unique. This case illustrates that even where there is little disagreement as to the

[5]At closing argument to the disciplinary hearing panel, OCDC and Informant affirmatively argued that the panel should recommend a sanction less than disbarment. **App. 71-73 (Tr. 168-175)**.

misconduct and the nature of the violations, the sanctions aspect of attorney discipline can sometimes be subjective, unpredictable and in the eye of the beholder.

OCDC and Informant can state with confidence that the circumstances presented here mandate that Respondent be removed from the practice of law without delay. Respondent is a threat to the public. The four previous admonitions considered together with the deficiencies in the representation of Ms. Marra and Mrs. Gorajewski involve a combination of lack of diligence, lack of communication, lack of competence and improper withdrawal. That is enough of a sample size to suggest that there is a palpable problem with the way that Respondent's handles client matters.

The evidence heard below also points out two other troubling shortcomings in Respondent's law practice. First, Respondent does not have a proper regard for recordkeeping. It is expected that lawyers retain documents, files and information for the client's benefit. Lawyers do not have to be computer wizards. However, a lawyer should be able to organize and manage information related to the law practice, including records created and stored electronically. This includes information gathered in the course of litigation as well as financial record-keeping of trust funds.

Second, Respondent's retaliation against former clients should not be tolerated. It is expected that a lawyer maintain a sense of professionalism and fairness even when confronted by a dissatisfied client. Based upon his admissions, Ms. Marra's claim for malpractice appears to have been meritorious. The counterclaim adds insult to injury.

Probation is not appropriate under the circumstances of this case. Respondent was involved in the disciplinary system for most of 2008, all of 2009, and virtually all of 2010.

For many, coming face to face with an order of disbarment as Respondent experienced in July 2008 would be enough to cause an attorney to toe the line, at least for an appreciable period of time. Yet by September 2008, Respondent had undertaken a client representation that he now acknowledges was problematic from the inception.

The diversion opportunity afforded to Respondent in 2009 appears to have been squandered. The ink had barely dried on the diversion agreement when Respondent failed to properly defend Ms. Marra at the trial in April 2009. Significantly, Respondent did not follow through on the agreement to obtain malpractice insurance. It is easy to fathom that if Ms. Marra were made whole by a malpractice carrier in a relatively prompt manner in 2009 following the garnishment, this complaint would never have made it to the hearing stage. There would have been no malpractice suit. Certainly, there would have been no temptation for Respondent to fabricate evidence to support a defense if Respondent had been covered by insurance.

The results of the diversion were disappointing, to say the least. Respondent's ongoing involvement with OCDC for nearly two years (March 2009 to December 2010) was not sufficient to eliminate additional misconduct or even ensure compliance with basic requirements. There is little hope that a stayed suspension with probation would produce a more favorable outcome. Even with dedicated staff at OCDC, the ability to adequately supervise Respondent during a period of probation or stayed suspension is a tall order. Moreover, it is much more difficult to monitor compliance with probationary requirements when the lawyer has demonstrated dishonesty and deceit in the past.

One requirement of probation that is sometimes overlooked is that probation is not

appropriate where its use would cause the courts or profession to fall into disrepute. *See* Rule 5.225. Falsification of evidence can change the outcome of legal proceedings, resulting in distrust and disrespect for our system of justice. Instances of failures in communication, competence or diligence, or even a failure to avoid a conflict of interest, can be more easily forgiven than matters involving intentional manipulation of evidence. *But see In re Krigel*, No. SC95098 (Jan. 16, 2016) (after unanimous finding that lawyer knowingly submitted false evidence to tribunal, four-member majority of Court imposed stayed suspension with probation instead of disbarment). The sanction (stayed suspension with probation) imposed upon Mr. Krigel should be limited to situations where a lawyer has had a spotless disciplinary record over a lengthy career of several decades.

In the present case, however, anything less than an actual suspension will cause our courts and profession to fall into disrepute. With printing, scanning, editing and word-processing software widely available over the last decade or so, most types of evidence can be falsified and manipulated with relative ease. If lawyers who engage in such unethical misdeeds are not given a meaningful sanction, the discovery phase of litigation will be adversely affected. If such litigation tactics are condoned and become commonplace, trial judges will need to intervene on a much more frequent basis. This will burden the judiciary even more with respect to resolution of discovery disputes.

Lawyers should not be allowed to continue to practice law after being found guilty of the intentional destruction of evidence and/or the intentional creation of false evidence. Lawyers in this state must have confidence that their opposing counsel, even in hotly contested litigation, have not knowingly withheld court-ordered evidence and that they

have not produced falsified documentary evidence. *Cf. In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997) (in the absence of candor, the legal system cannot properly function). In this case, probation would cause an erosion in trust between opposing counsel, which brings the profession into disrepute. If left unchecked, it would become routine for opposing counsel to have to hire a computer forensics expert just to verify the authenticity of documents produced in discovery. A lawyer who has been victimized by improperly withheld evidence or manufactured evidence would not be vindicated by anything less than an actual suspension. Of equal importance, anything less than an actual suspension in this case would provide little deterrence to attorneys practicing in this state.

The purpose of imposing discipline is not to punish the attorney but to protect the public and maintain the integrity of the legal profession. *In re Stewart*, 342 S.W.3d 307, 308 (Mo. banc 2011). "Those twin purposes may be achieved both directly, by removing a person from the practice of law, and indirectly, by imposing a sanction which serves to deter other members of the Bar from engaging in similar conduct." *In re Kazanas*, 96 S.W.3d 803, 807-08 (Mo. banc 2003). In the present case, both purposes of attorney discipline will be served if Respondent is removed from the practice of law.

"This Court adheres to a practice of applying progressive discipline when imposing sanctions on attorneys who commit misconduct." *In re Forck*, 418 S.W.3d 437, 444 (Mo. banc 2014). An actual suspension in the present case is also consistent with the adoption of a system of progressive discipline. The six prior admonitions issued to and accepted by Respondent are considered to be prior discipline. *See In re Farris*, 472 S.W.3d 549 (Mo. banc 2015) (majority of Court holding that previous admonitions constitute prior

discipline). Even though the diversion agreement itself is not prior discipline, a comparison of the agreement to the findings of actual misconduct in this case does show a upward trajectory in the seriousness of the misconduct. The diversion was based upon law practice management issues, e.g. better communication with clients and more diligent handling of their legal matters. The current disciplinary proceeding presents far more troubling issues with respect to the falsification of evidence and/or destruction of evidence.

In determining a sanction for attorney misconduct, the Missouri Supreme Court historically relies on three sources. First and foremost, the Court applies its own standards to maintain consistency, fairness, and ultimately, to accomplish the well-established goals of protecting the public and maintaining the integrity of the profession. Those standards are written into law, of course, when the Court issues opinions in attorney discipline cases. *In re Kazanas*, 96 S.W.3d 803, 808 (Mo. banc 2003).

The four most akin cases to the conduct involved in this case are *In re Krigel*, No. SC95098 (January 16, 2016) (submission of false evidence to a tribunal warrants disbarment unless mitigated by spotless disciplinary record over a distinguished thirty-year career); *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997) (disbarment warranted for submission of false evidence); *In re Carey*, 89 S.W.3d 477 (Mo. banc 2002) ("Here, two talented young lawyers, full of promise, lost their way among the economic temptations of modern practice and then again lost their way while struggling to defend themselves. In doing so, they violated two of the most fundamental principles of our profession, loyalty to the client and honesty to the bench. Significant discipline must follow to maintain the public's trust and confidence in our ability to police ourselves. A 'slap on the wrist' will

not suffice. While disbarment would ordinarily be expected in a case such as this, the mitigating factors warrant some degree of leniency and offer hope that respondents can return to the responsible practice of law having learned a very hard lesson. John J. Carey and Joseph P. Danis are indefinitely suspended from the practice of law, with leave to apply for reinstatement not sooner than one year from the date of this opinion."); and *In re Donaho*, 98 S.W.3d 871 (Mo. banc 2003) ("An attorney must be dedicated to the best interests of his clients and must act with unfailing honesty. In this case, Respondent failed in both respects. Therefore, this Court orders Respondent's license to practice law suspended indefinitely with leave to apply for reinstatement no sooner than twelve months from the date of this opinion"). One notable distinction in this case is that the falsified evidence was never submitted to a tribunal nor actually used for any evidentiary purpose. The falsified documents had no impact on the outcome of the legal matter because the lawsuit was dismissed voluntarily based upon the plaintiff's determination that Respondent would be judgment-proof.

For additional guidance, the Court frequently relies on the *ABA Standards for Imposing Lawyer Sanctions*. Those guidelines recommend baseline discipline for specific acts of misconduct, taking into consideration the duty violated, the lawyer's mental state (level of intent), and the extent of injury or potential injury. *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994). Once the baseline guideline is known, the ABA Standards allow consideration of aggravating and mitigating circumstances. *ABA Standards for Imposing Lawyer Sanctions*. The Court also considers the recommendation of the Disciplinary Hearing Panel that heard the case.

The ABA Standards for Imposing Lawyer Sanctions consider the following primary questions:

(1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?);

(2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?);

(3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?); and

(4) Are there any aggravating or mitigating circumstances?

ABA Standards: Theoretical Framework (p. 5).

Application of the ABA Standards requires the user to first analyze the first three questions and then, only after a baseline sanction is apparent, to consider aggravating and mitigating circumstances. ABA Standards, Preface: Methodology (p. 3). The drafters intentionally rejected an approach, however, that focused only on a lawyer's intent. Instead, they recognized that sanctioning courts must consider not only the attorney's intent and damage to his client, but also the damage to the public, the legal system and the profession. ABA Standards Preface: Methodology (p.3). When this Court finds an attorney has committed multiple acts of misconduct, "the ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among the violations." *In re Coleman*, 295 S.W.3d 857, 870 (Mo. banc 2009). In the present case, the most serious instance of misconduct involves the intentional destruction and/or

falsification of evidence, e.g. the violations of Rule 4-3.4.

Lawyers owe ethical duties to the legal system. They are officers of the court, and must abide by the rules of substance and procedure which shape the administration of justice. Lawyers must always operate within the bounds of the law, and cannot create or use false evidence, or engage in any other illegal or improper conduct. ABA Standard 3.0. In the instant case, Respondent's conduct of creating false evidence and concealing electronic evidence is a significant breach of Respondent's duty to the legal system.

The potentially applicable ABA Standards are set forth below:

6.1 False Statements, Fraud, and Misrepresentation

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:

> 6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding;
>
> 6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes

an adverse or potentially adverse effect on the legal proceeding.

6.2 Abuse of the Legal Process

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:

> 6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.
>
> 6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

In closing argument to the disciplinary hearing panel, OCDC and Informant contended that ABA Standard 6.12 was the most applicable baseline standard for a sanction. **App. 71 (Tr. 168)**. The written recommendation of the disciplinary hearing panel does not expressly identify the ABA Standards, nor does it expressly consider aggravating or mitigating circumstances other than the prior discipline consisting of six admonitions. In any event, ultimately it is up to this Court to determine the most appropriate sanction. In so doing, the Court should consider the following aggravating

circumstances.

9.22 Factors which may be considered in aggravation. Aggravating factors include:

(a) prior disciplinary offenses

Respondent has had six prior admonitions. Four were issued in 2009 for conduct occurring in 2006 and 2007. One was issued in 2010 for conduct occurring in 2009 and 2010. The final admonition was issued in 2012 for conduct occurring in 2011. Additionally, while the diversion agreement is not actual discipline, Respondent did stipulate in the agreement to violations of Rule 4-8.4(d) for threatening legal action against a complainant; Rules 4-8.1 and 4-8.4(d) for failing to respond to lawful requests for information from the disciplinary authorities; and Rules 6.05 and Rule 4-5.5(a) for engaging in the unauthorized practice of law during a period of administrative suspension from March 2008 to August 2008.

(b) dishonest or selfish motive

The counterclaim and the destruction and falsification of evidence are clear examples of dishonest and selfish motives, which was to avoid liability to Ms. Marra for acts and omissions alleged to constitute legal malpractice.

(c) a pattern of misconduct

The lack of diligence, communication and competence in handling Ms. Marra's legal matter from September 2008 to May 2009 and the lack of communication and abandonment of the client with respect to Ms. Gorajewski's traffic citation matter is the same type of misconduct involved in the four admonitions issued in February 2009. Further, there is similarity in threatening a former client with legal action for exercising a

legal privilege to complain (as was the case with Ms. Byerly) and actually suing a former client for libel based upon privileged allegations in a malpractice petition (as was the case with Ms. Marra). Finally, there is similarity in being admonished for inadequate record-keeping with respect to trust funds and the ill-advised decision to destroy the most recent six years of electronically stored client records simply because Respondent decided to switch law firms.

(d) multiple offenses

The current disciplinary proceeding involves multiple offenses, grouped into two time periods: lack of diligence, competence and communication and failure to avoid a conflict of interest in September 2008 to May 2009; and fraudulent and/or prejudicial litigation conduct in connection with discovery procedures in 2012.

(h) vulnerability of victim

At least at the time of the initial underlying collection action, Ms. Marra was vulnerable to attorney misconduct due to her age and her reliance upon others outside of her own household for assistance.

(i) substantial experience in the practice of law

Respondent was licensed in 2000. He is an experienced litigator with considerable trial experience. At the time of the misconduct involved in this case, Respondent had practiced for eight to twelve years.

(j) indifference to making restitution

On July 25, 2013, Respondent was ordered by the trial judge to pay $800 to Ms. Marra as a discovery sanction. He has not paid that amount. The failure to obtain

malpractice insurance also demonstrates an indifference to making restitution. It is very likely that the entire situation underlying this complaint could have been rectified in 2009 if Respondent had simply made good on his promise to obtain professional liability insurance.

CONCLUSION

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

(a) to find that Respondent is guilty of professional misconduct with respect to the matters charged in the Information and to find that Respondent has violated Missouri Supreme Court Rules 4-1.4; 4-1.1; 4-1.7(a), 4-1.3; 4-1.16(d); 4-3.4; and 4-8.4(c) and/or (d).

(b) to remove Respondent from the practice of law either by suspension or disbarment; and

(e) to tax all costs in this matter to Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March 2016, a copy of Informant's Brief is being served upon Respondent through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08:

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Lee's Summit, MO 64063
Respondent

Kevin J. Odrowski

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(c);

3. Contains 10,409 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Kevin J. Odrowski