

IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:)
)
KARL WILLIAM HINKEBEIN,)
)
Woodrail Centre)
Building 7, Suite 100)
1000 W. Nifong)
Columbia, Missouri 65203,)
)
MoBar No. 41666)
)
Respondent.)

Supreme Court No. SC96089

INFORMANT'S BRIEF

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel
Chief Disciplinary Counsel

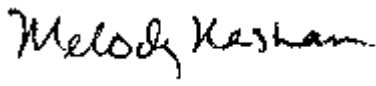
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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Background and Disciplinary History

Respondent, Karl Hinkebein (“Respondent”), was licensed to practice law in Missouri on October 1, 1993. Respondent is a public defender with the Missouri Public Defender System (“MPDS”). **App. A30** (Inf. ¶ 5); **App. A44** (Ans. ¶ 5)¹. The address Respondent designated in his most recent registration with The Missouri Bar is Woodrail Centre, 1000 W. Nifong, Bldg. 7, Ste. 100, Columbia, Missouri 65203. **App. A30** (Inf. ¶ 4); **App. A44** (Ans. ¶ 4).

Respondent’s license is in good standing. **App. A30** (Inf. ¶ 6); **App. A44** (Ans. ¶ 6). Respondent has received three admonitions in the past. **App. A30** (Inf. ¶ 7); **App. A44** (Ans. ¶ 7); **Rec. Vol. 4, p. 783 (Ex. 9)**. By letter dated December 8, 2003, Respondent was admonished for violating Rule 4-1.3 (diligence). **Rec. Vol. 4, pp. 785 - 86 (Ex. 9)**. By letter dated July 16, 2008, Respondent was admonished for violating Rule 4-1.3

¹Citations to the Appendix are denoted by a page reference followed by a description of the cited material, for example, “**App. A_** (Inf. ¶ _). Citations to the Record are denoted by the appropriate Record Volume and page reference followed by a description of the cited material. If the citation is to the testimony before the Disciplinary Hearing Panel, the name of the witness will be included, for example “**Rec. Vol. _, p. _** (Tr. _ (testimony of John Doe))”.

(diligence). **Rec. Vol. 4, pp. 787 – 90 (Ex. 9).** By letter dated February 26, 2010, Respondent was admonished for violating Rules 4-1.3 (diligence) and 4-1.4 (communication). **Rec. Vol. 4, p. 791 - 94 (Ex. 9).**

Procedural History

The Office of Chief Disciplinary Counsel (“OCDC”) received a complaint from Respondent’s client Darin Robinson. Respondent’s client Christopher Hines was identified during the course of the investigation of Mr. Robinson’s complaint, and Respondent identified clients William Williams, Dustin Watson, Allen Giles, and Jeremy Arata. On March 31, 2016, Informant filed an information charging Respondent with violating Rules 4-1.3 and 4-1.4. **App. A30.** Respondent filed an Answer on April 28, 2016. **App. A44.**

On May 2, 2015, the Advisory Committee chair appointed a disciplinary hearing panel to hear the case. **Rec. Vol. 1, p. 37.** A hearing was held on July 26, 2016 in Jefferson City, Missouri before Thomas M. Dunlap, Presiding Officer, Donna M. White, and Dale A. Siebeneck. In addition to Respondent, Steve Harris and Greg Mermelstein testified at the hearing.

The panel issued its decision on October 31, 2016. **App. A2.** The panel concluded Respondent Hinkebein violated Rules 4-1.3 and 4-1.4 and recommended that he “be placed on probation for one (1) year with conditions that he not violate the Rules of Professional Conduct and that he report to the Chief Disciplinary Counsel, or his designee, every ninety (90) days. Informant and Respondent advised the Advisory Committee that they would

accept the hearing paned decision. **Rec. Vol. 4, pp. 944, 945.** This Court ordered the case briefed and argued by its Order dated February 28, 2017.

Facts Underlying Disciplinary Case

Respondent works for the MPDS in Area 67, the Central Appellate PCR division. **Rec. Vol. 1, p. 57** (Tr. 18 – 19 (testimony of Respondent)). His primary work is representing indigent clients who have moved, *pro se*, for post-conviction relief under either Rule 29.15 or Rule 24.035. **Rec. Vol. 1, p. 57** (Tr. 19 (testimony of Respondent)). The movants who are the subject of this disciplinary proceeding sought relief under Rule 29.15. **Rec. Vol. 1, p. 58** (Tr. 21 (testimony of Respondent)).

Appointed counsel, per Rule 29.15, may file an amended motion for post-conviction relief, or a statement in lieu of an amended motion for post-conviction relief. **Rec. Vol. 1, p. 88** (Tr. 143 (testimony of Steve Harris, District Defender Area 67 MPDS)). Determination regarding whether to file an amended motion or a statement in lieu of an amended motion is made after the records have been reviewed, after communication with the client, and after any necessary investigation. **Rec. Vol. 1, p. 88.** (Tr. 144 (testimony of Steve Harris)).

COUNT I – Robinson

Respondent Hinkebein served as counsel for the movant Darin Robinson in *Darin Robinson v. State of Missouri*, Case No. 1031-CV18129, in the Circuit Court of Greene County, Missouri, a post-conviction relief proceeding. **App. A31** (Inf. ¶ 9); **App. A44** (Ans. ¶ 9); **See Rec. Vol. 3, p. 502** (Ex. 5). Respondent entered his appearance as counsel

for Movant Robinson on or about February 14, 2011. **App. A31** (Inf. ¶ 10); **App. A44** (Ans. ¶ 10); **Rec. Vol. 3, p. 522** (Ex. 5). Respondent filed a motion for extension of time in which to file an amended Rule 29.15 motion on behalf of Movant Robinson. **App. A31** (Inf. ¶ 11); **App. A44** (Ans. ¶ 11); **Rec. Vol. 3, p. 523 - 24** (Ex. 5). The Court granted the motion for extension of time to March 13, 2011. **App. A31** (Inf. ¶ 12); **App. A44** (Ans. ¶ 12); **Rec. Vol. 3, p. 525** (Ex. 5).

Respondent wrote the prison to arrange telephone calls with Movant Robinson on March 10, March 11, and March 14, 2011. **App. A31** (Inf. ¶ 13); **App. A44** (Ans. ¶ 13). Respondent failed to communicate with Mr. Robinson after March 2011. **App. A32** (Inf. ¶ 17); **App. A44** (Ans. ¶ 17).

Respondent sent letters to potential witnesses for Mr. Robinson on March 9 and 10, 2011. **App. A31** (Inf. ¶ 14); **App. A44** (Ans. ¶ 14). The letters to potential witnesses for Mr. Robinson were sent too late for any information forwarded by those potential witnesses to be included in a timely filed amended motion. **Rec. Vol. 1, p. 60** (Tr. 32 (testimony of Respondent)).

At the time the amended motion was due, Respondent had not yet decided whether to file an amended motion or a statement in lieu of an amended motion on behalf of Movant Robinson. **Rec. Vol. 1, p. 61** (Tr. 33 - 34 (testimony of Respondent)). In a statement in lieu of an amended motion, counsel must include, *inter alia*, a statement that the pro se motion contains all claims known to the movant after counsel has examined the file. **Rec. Vol. 1, pp. 58 – 59, 61** (Tr. 24-25, 33 (testimony of Respondent)); **Rec. Vol. 1, p. 88** (Tr.

143 – 144 (testimony of Steve Harris)). After the statement in lieu is filed, the movant has 10 days to respond as to whether they disagree with the filing of the statement in lieu. **Rec. Vol. 1, pp. 59, 61** (Tr. 25, 33 (testimony of Respondent)).

Respondent did not prepare a Statement in Lieu of an Amended Motion regarding Mr. Robinson’s post-conviction relief motion. **App. A32** (Inf. ¶ 15); **App. A44** (Ans. ¶ 15). Respondent did not file an amended Rule 29.15 motion, or a Statement in Lieu of an Amended Motion, on behalf of Mr. Robinson on or before March 13, 2011. **App. A32** (Inf. ¶ 16); **App. A44** (Ans. ¶ 16); **See Rec. Vol. 3, p. 502** (Ex. 5).

Respondent intended to file a Statement in Lieu of an Amended Motion on behalf of Movant Robinson. **Rec. Vol. 1, p. 61** (Tr. 34 (testimony of Respondent)); **Rec. Vol. 4, pp. 872 - 28** (Ex. 18). Respondent did not send Mr. Robinson a Statement in Lieu of an Amended Motion for his review. **App. A32** (Inf. ¶ 18); **App. A44** (Ans. ¶ 18).

Respondent Hinkebein never filed an amended Rule 29.15 motion or a Statement in Lieu of an Amended Motion on behalf of Movant Robinson. **App. A32** (Inf. ¶ 19); **App. A44** (Ans. ¶ 19). Respondent remained Movant Robinson’s attorney until he withdrew as counsel of record for Movant Robinson on September 5, 2014. **App. A32** (Inf. ¶ 20); **App. A44** (Ans. ¶ 20); **Rec. Vol. 3, pp. 527 - 28** (Ex. 5); **Rec. Vol. 1, p. 61** (Tr. 34 (testimony of Respondent)). His motion was granted September 12, 2014. **Rec. Vol. 3, p. 530** (Ex. 5). Respondent withdrew as Movant Robinson’s counsel because Movant Robinson’s case was reassigned to another public defender. **Rec. Vol. 3, p. 61.** (Tr. 35 (testimony of Respondent)).

Movant Robinson's new counsel filed a Motion for Finding of Abandonment and for Leave to File an Amended Motion. **App. A32** (Inf. ¶ 21); **App. A44** (Ans. ¶ 21); **Rec. Vol. 3, pp. 533 - 36** (Ex. 5). The trial court entered an Order finding that Respondent had abandoned Movant Robinson on his post-conviction relief action. **App. A32** (Inf. ¶ 22); **App. A44** (Ans. ¶ 22); **Rec. Vol. 3, p. 538** (Ex. 5.)

COUNT II – Hines

Respondent Hinkebein served as counsel for the Movant Christopher Hines in *Christopher J. Hines v. State of Missouri*, Case No. 1231-CV16886, in the Circuit Court of Greene County, Missouri, a post-conviction relief proceeding. **App. A33** (Inf. ¶ 25); **App. A45** (Ans. ¶ 25); **See Rec. Vol. 2, p. 389** (Ex. 4). Respondent entered his appearance as counsel for Movant Hines on or about December 21, 2012. **App. A33** (Inf. ¶ 26); **App. A45** (Ans. ¶ 26); **Rec. Vol. 2, p. 427** (Ex. 4). Respondent filed a motion for extension of time in which to file an amended Rule 29.15 motion on behalf of Movant Hines. **App. A33** (Inf. ¶ 27); **App. A45** (Ans. ¶ 27); **Rec. Vol. 2, p. 425 - 26** (Ex. 4). The Court granted the motion for extension of time to March 5, 2013. **App. A33** (Inf. ¶ 28); **App. A45** (Ans. ¶ 28); **Rec. Vol. 2, p. 428** (Ex. 4).

Respondent received Movant Hines' trial file on or about December 26, 2012. **App. A33** (Inf. ¶ 29); **App. A45** (Ans. ¶ 29); **Rec. Vol. 1, p. 62** (Tr. 37 (testimony of Respondent)). Respondent received Movant Hines' direct appeal file on or about December 11, 2012. **App. A33** (Inf. ¶ 30); **App. A45** (Ans. ¶ 30); **Rec. Vol. 1, p. 62** (Tr. 37 (testimony of Respondent)).

Respondent wrote the prison to arrange telephone calls with Movant Hines on March 4, 2013, March 5, 2013, March 6, 2013, and August 15, 2014. **App. A33** (Inf. ¶ 31); **App. A45** (Ans. ¶ 31). March 4, 2013 was the first time Respondent had attempted to speak to Mr. Hines regarding the facts of his case. **Rec. Vol. 1, p. 62** (Tr. 38 – 39 (testimony of Respondent).) Before March 4, 2013, the only communication Respondent had with Mr. Hines since he was appointed was the introductory packet of information generated by his secretary that is sent to movants and which includes a form questionnaire. **Rec. Vol. 1, p. 62** (Tr. 38 – 39, 46 (testimony of Respondent)).

Respondent did not file an amended Rule 29.15 motion, or a Statement in Lieu of an Amended Motion, on or before March 5, 2013 on behalf of Movant Hines. **App. A33** (Inf. ¶ 32); **App. A45** (Ans. ¶ 32); See **Rec. Vol. 2, p. 389** (Ex. 4.) Respondent intended to file an amended motion on behalf of Movant Hines. **Rec. Vol. 1, p. 62** (Tr. 39 (testimony of Respondent)); **Rec. Vol. 4, p. 829** (Ex. 20).

Respondent did not communicate with Mr. Hines from March 2013 until August 15, 2014. **App. A34** (Inf. ¶ 33); **App. A45** (Ans. ¶ 33). Respondent communicated with Mr. Hines on or about August 15, 2014 after Mr. Hines complained to Respondent's supervisor that Mr. Hines hadn't heard from Respondent. **Rec. Vol. 1, p. 62** (Tr. 39 – 40 (testimony of Respondent)).

Respondent Hinkebein never filed an amended Rule 29.15 motion, or a Statement in Lieu of an Amended Motion, on behalf of Movant Hines. **App. A34** (Inf. ¶ 34); **App. A45** (Ans. ¶ 34); See **Rec. Vol. 2, p. 389** (Ex. 4); **Rec. Vol. 1, p. 62** (Tr. 39 (testimony of

Respondent)). Respondent withdrew as counsel of record for Movant Hines on September 5, 2014 and the case was reassigned to another public defender. **App. A34** (Inf. ¶ 35); **App. A45** (Ans. ¶ 35); **Rec. Vol. 2, pp. 432 - 33** (Ex. 4); **Rec. Vol. 1, p. 62** (Tr. 40 (testimony of Respondent)).

Movant Hines' new counsel filed a Motion for Finding of Abandonment and for Leave to File an Amended Motion. **App. A34** (Inf. ¶ 36); **App. A45** (Ans. ¶ 36); **Rec. Vol. 2, pp. 438 - 41** (Ex. 4); **Rec. Vol. 1, pp. 62 - 63** (Tr. 40 - 41 (testimony of Respondent)). The trial court entered an Order sustaining Movant Hines' motion and finding that Movant had been abandoned by Respondent on his post-conviction relief action. **App. A34** (Inf. ¶ 37); **App. A45** (Ans. ¶ 37); **Rec. Vol. 2, p. 444** (Ex. 4).

COUNT III – Williams

Respondent Hinkebein served as counsel for the Movant William Williams in *William J. Williams v. State of Missouri*, Case No. 13PO-CC00056, in the Circuit Court of Polk County, Missouri, a post-conviction relief proceeding. **App. A34** (Inf. ¶ 40); **App. A45** (Ans. ¶ 40); **See Rec. Vol. 3, p. 672** (Ex. 7). Respondent entered his appearance as counsel for Movant Williams on or about September 9, 2013. **App. A35** (Inf. ¶ 41); **App. A45** (Ans. ¶ 41); **Rec. Vol. 3, p. 693** (Ex. 7); **Rec. Vol. 1, p. 63** (Tr. 42 (testimony of Respondent)). Respondent filed a motion for extension of time in which to file an amended Rule 29.15 motion on behalf of Movant Williams. **App. A35** (Inf. ¶ 42); **App. A45** (Ans. ¶ 42); **Rec. Vol. 3, p. 694 - 95** (Ex. 7); **Rec. Vol. 1, p. 63** (Tr. 42 (testimony of Respondent)). The Court granted the motion for extension of time to November 10, 2013.

App. A35 (Inf. ¶ 43); **App. A45** (Ans. ¶ 43); **Rec. Vol. 3, p. 691** (Ex. 7); **Rec. Vol. 1, p. 63** (Tr. 42 (testimony of Respondent)).

Respondent received Movant Williams' direct appeal file on or about August 30, 2013. **App. A35** (Inf. ¶ 44); **App. A45** (Ans. ¶ 44.) Respondent received Movant Williams' trial file on or about September 13, 2013. **App. A35** (Inf. ¶ 45); **App. A45** (Ans. ¶ 45). The earliest entry on Respondent's caseload timeline regarding Respondent's work on Mr. Williams's case is November 19, 2013. **Rec. Vol. 1, p. 64** (Tr. 45 – 46 (testimony of Respondent)); **Rec. Vol. 4, p. 800** (Ex. 13).

Respondent spoke with Movant Williams by telephone on November 21, 2013. **App. A35** (Inf. ¶ 46); **App. A45** (Ans. ¶ 46); **Rec. Vol. 1, p. 63** (Tr. 43 (testimony of Respondent)). Respondent first spoke to Mr. Williams after the deadline to file an amended motion for post-conviction relief had passed. **Rec. Vol. 1, p. 63** (Tr. 43 (testimony of Respondent)). During the November 21, 2013 telephone call, Respondent told Movant Williams that Respondent intended to file an amended Rule 29.15 motion on his behalf. **App. A35** (Inf. ¶ 47); **App. A45** (Ans. ¶ 47); **Rec. Vol. 1, p. 63** (Tr. 43 (testimony of Respondent)).

Respondent did not communicate with Mr. Williams after November 21, 2013. **App. A35** (Inf. ¶ 49); **App. A45** (Ans. ¶ 49). Respondent spoke with Movant Williams' mother, a witness identified by Movant Williams. **App. A35** (Inf. ¶ 50); **App. A45** (Ans. ¶ 50). Respondent did not speak with the other five witnesses identified by Movant

Williams’ during the November 21, 2013 telephone call between Respondent and Movant Williams. **App. A36** (Inf. ¶ 51); **App. A45** (Ans. ¶ 51).

Respondent did not file an amended Rule 29.15 motion, or a Statement in Lieu of an Amended Motion, on or before November 10, 2013, or ever, on behalf of Movant Williams. **App. A35, A36** (Inf. ¶¶ 48, 52); **App. A45** (Ans. ¶¶ 48); **See Rec. Vol. 3, p. 672** (Ex. 7). Respondent intended to file an amended motion on behalf of Mr. Williams. **Rec. Vol. 1, p. 63** (Tr. 41 – 42, 43 (testimony of Respondent)); **Rec. Vol. 4, p. 829** (Ex. 20).

Mr. Williams case was reassigned to another public defender and Respondent withdrew as counsel of record for Movant Williams on September 8, 2014. **App. A36** (Inf. ¶ 53); **App. A45** (Ans. ¶ 53); **Rec. Vol. 3, pp. 688 – 89** (Ex. 7); **Rec. Vol. 1, p. 63** (Tr. 43 - 44 (testimony of Respondent)). Movant Williams’ new counsel filed a Motion for Finding of Abandonment and for Leave to File an Amended Motion. **App. A36** (Inf. ¶ 54); **App. A45** (Ans. ¶ 54); **Rec. Vol. 3, pp. 682 - 85** (Ex. 7); **Rec. Vol. 1, p. 63** (Tr. 44 (testimony of Respondent)). The trial court entered an Order finding that Respondent had abandoned Movant Williams on his post-conviction relief action. **App. A36** (Inf. ¶ 55); **App. A45** (Ans. ¶ 55); **Rec. Vol. 3, p. 678** (Ex. 7); **Rec. Vol. 1, p. 63** (Tr. 44 (testimony of Respondent)).

COUNT IV – Watson

Respondent Hinkebein served as counsel for the Movant Dustin Watson in *Dustin S. Watson v. State of Missouri*, Case No. 1231-CV00474, in the Circuit Court of Greene County, Missouri, a post-conviction relief proceeding. **App. A36** (Inf. ¶ 58); **App. A46**

(Ans. ¶ 58); **See Rec. Vol. 3, p. 593** (Ex. 6). Respondent entered his appearance as counsel for Movant Watson on or about February 9, 2012. **App. A37** (Inf. ¶ 59); **App. A46** (Ans. ¶ 59); **Rec. Vol. 3 p. 611** (Ex. 6); **Rec. Vol. 1, p. 64** (Tr. 47 (testimony of Respondent)). Respondent filed a motion for extension of time in which to file an amended Rule 29.15 motion on behalf of Movant Watson. **App. A37** (Inf. ¶ 60); **App. A46** (Ans. ¶ 60); **Rec. Vol. 3, p. 608 - 09** (Ex. 6); **Rec. Vol. 1, p. 64** (Tr. 48 (testimony of Respondent)). The Court granted the motion for extension of time to April 16, 2012. **App. A37** (Inf. ¶ 61); **App. A46** (Ans. ¶ 61); **Rec. Vol. 3, p. 612** (Ex. 6).

Respondent received Movant Watson's trial file on or about February 8, 2012. **Rec. Vol. 1, p. 82** (Tr. 120 (testimony of Respondent)); **Rec. Vol. 4, p. 840** (Ex. 45). Respondent sent a letter requesting Movant Watson's appellate file on or about May 16, 2012. **Rec. Vol. 1, pp. 82 - 83** (Tr. 120 - 121 (testimony of Respondent)); **Rec. Vol. 4, p. 842** (Ex. 45). Respondent didn't request Movant Watson's appellate file until after the April 16, 2012 due date for the amended motion. **Rec. Vol. 1, p. 82 - 83** (Tr. 120 - 121 (testimony of Respondent)); **Rec. Vol. 4, p. 842** (Ex. 45). Respondent received Movant Watson's appellate file on or about June 20, 2012. **Rec. Vol. 1, pp. 79, 82** (Tr. 106, 120 (testimony of Respondent)); **Rec. Vol. 4, p. 841** (Ex. 45).

Respondent wrote the prison to arrange telephone calls with Movant Watson on July 19, 2012, July 25, 2012, July 26, 2012, and July 31, 2012. **App. A37** (Inf. ¶ 62); **App. A46** (Ans. ¶ 62). Respondent didn't speak to Mr. Watson until three months after the amended motion was due. **Rec. Vol. 1, p. 64** (Tr. 48 (testimony of Respondent)).

Respondent did not file an amended Rule 29.15 motion, or a Statement in Lieu of an Amended Motion, on or before April 16, 2012 on behalf of Movant Watson. **App. A37** (Inf. ¶ 63); **App. A46** (Ans. ¶ 63); **See Rec. Vol. 3, p. 593** (Ex. 6); **Rec. Vol. 1, p. 64** (Tr. 48 (testimony of Respondent)). Respondent did not communicate with Mr. Watson after July 2012. **App. A37** (Inf. ¶ 64); **App. A46** (Ans. ¶ 64); **Rec. Vol. 1, p. 64** (Tr. 48 (testimony of Respondent)). Respondent intended to file an amended motion on behalf of Mr. Watson. **Rec. Vol. 1, pp. 63, 64** (Tr. 41 – 42, 48 (testimony of Respondent)); **Rec. Vol. 4, p. 829** (Ex. 20). Respondent Hinkebein never filed an amended Rule 29.15 motion, or a Statement in Lieu of an Amended Motion, on behalf of Movant Watson. **App. A37** (Inf. ¶ 65); **App. A46** (Ans. ¶ 65); **See Rec. Vol. 3, p. 593** (Ex. 6.)

Mr. Watson's case was reassigned to another public defender and Respondent withdrew as counsel of record for Movant Watson on September 5, 2014. **App. A37** (Inf. ¶ 66); **App. A46** (Ans. ¶ 66); **Rec. Vol. 3, pp. 613 - 14** (Ex. 6); **Rec. Vol. 1, p. 64** (Tr. 48 (testimony of Respondent)). Movant Watson's new counsel filed a Motion for Finding of Abandonment and for Leave to File an Amended Motion. **App. A37** (Inf. ¶ 67); **App. A46** (Ans. ¶ 67); **Rec. Vol. 3, pp. 619 - 21** (Ex. 6); **Rec. Vol. 1, pp. 64 - 65** (Tr. 48 – 49 (testimony of Respondent)). The trial court entered an Order finding that Respondent had abandoned Movant Watson on his post-conviction relief action. **App. A37** (Inf. ¶ 68); **App. A46** (Ans. ¶ 68); **Rec. Vol. 3, pp. 624 - 35** (Ex. 6); **Rec. Vol. 1, p. 65** (Tr. 49 (testimony of Respondent)).

COUNT VI – Giles

Respondent Hinkebein served as counsel for the Movant Allen Giles in *Allen D. Giles v. State of Missouri*, Case No. 1231-CV17820, in the Circuit Court of Greene County, Missouri, a post-conviction relief proceeding. **App. A39** (Inf. ¶ 85); **App. A47** (Ans. ¶ 85); **See Rec. Vol. 2, p. 269** (Ex. 3). Respondent entered his appearance as counsel for Movant Giles on or about January 24, 2013. **App. A39** (Inf. ¶ 86); **App. A47** (Ans. ¶ 86); **Rec. Vol. 2, p. 283** (Ex. 3); **Rec. Vol. 1, p. 65** (Tr. 51 (testimony of Respondent)). Respondent filed a motion for extension of time in which to file an amended Rule 29.15 motion on behalf of Movant Giles. **App. A39** (Inf. ¶ 87); **App. A47** (Ans. ¶ 87); **Rec. Vol. 2, p. 284 - 85** (Ex. 3); **Rec. Vol. 1, p. 65** (Tr. 51 (testimony of Respondent)). The Court granted the motion for extension of time to April 15, 2013. **App. A39** (Inf. ¶ 88); **App. A47** (Ans. ¶ 88); **Rec. Vol. 2, p. 287** (Ex. 3); **Rec. Vol. 1, p. 65** (Tr. 51 (testimony of Respondent)).

Respondent spoke by telephone with Movant Giles on April 25, 2013 and March 24, 2014. **App. A40** (Inf. ¶ 89); **App. A47** (Ans. ¶ 89); **Rec. Vol. 1, p. 65** (Tr. 51 (testimony of Respondent)). Respondent first spoke to Mr. Giles after any amended motion was due. **Rec. Vol. 65, p. 65** (Tr. 51 – 52 (testimony of Respondent)). Respondent did not begin reviewing Mr. Giles case until April 1, 2013. **App. A40** (Inf. ¶ 90); **App. A47** (Ans. ¶ 90). Respondent last reviewed Mr. Giles transcript on March 24, 2014. **App. A40** (Inf. ¶ 91); **App. A47** (Ans. ¶ 91).

Respondent intended to file a Statement in Lieu of an Amended Motion in Mr. Giles' case. **Rec. Vol. 1, p. 65** (Tr. 52 (testimony of Respondent)). Respondent told Mr. Giles that he intended to file a Statement in Lieu on April 25, 2013. **Rec. Vol. 1, p. 65** (Tr. 52 (testimony of Respondent)). Respondent spoke to Mr. Giles eleven (11) months later on March 24, 2014, and again told him he intended to file a Statement in Lieu. **Rec. Vol. 1, p. 66** (Tr. 53 (testimony of Respondent)).

Respondent did not prepare a Statement in Lieu of an Amended Motion regarding Mr. Giles' post-conviction relief motion. **App. A40** (Inf. ¶ 92); **App. A47** (Ans. ¶ 92). Respondent did not file an amended Rule 29.15 motion, or a Statement in Lieu of an Amended Motion, on or before April 15, 2013 on behalf of Movant Giles. **App. A40** (Inf. ¶ 93); **App. A47** (Ans. ¶ 93); **See Rec. Vol. 2, p. 269** (Ex. 3); **Rec. Vol. 1, p. 65** (Tr. 52 (testimony of Respondent)).

Respondent failed to communicate with Mr. Giles after March 24, 2014. **App. A40** (Inf. ¶ 94); **App. A47** (Ans. ¶ 94); **Rec. Vol. 1, p. 66** (Tr. 53 (testimony of Respondent)). Respondent did not send Mr. Giles a Statement in Lieu of an Amended Motion for his review. **App. A40** (Inf. ¶ 95); **App. A47** (Ans. ¶ 95). Respondent Hinkebein never filed an amended Rule 29.15 motion, or a Statement in Lieu of an Amended Motion, on behalf of Movant Giles. **App. A40** (Inf. ¶ 96); **App. A47** (Ans. ¶ 96); **See Rec. Vol. 2, p. 269** (Ex. 3).

Mr. Giles's case was reassigned to another public defender in August 2014 and Respondent withdrew as counsel of record for Movant Giles on September 5, 2014. **App.**

A40 (Inf. ¶ 97; **App. A47** (Ans. ¶ 97); **Rec. Vol. 2, p. 288 - 89** (Ex. 3); **Rec. Vol. 1, p. –** (Tr. 53 - 54 (testimony of Respondent))). Movant Giles’ new counsel filed a Motion for Finding of Abandonment and for Leave to File an Amended Motion. **App. A40** (Inf. ¶ 98); **App. A47** (Ans. ¶ 98); **Rec. Vol. 2, p. 294 - 97** (Ex. 3); **Rec. Vol. 1, p. 66** (Tr. 54 (testimony of Respondent))). The trial court entered its Order finding that Respondent had abandoned Movant Giles on his post-conviction relief action. **App. A40** (Inf. ¶ 99); **App. A47** (Ans. ¶ 99); **Rec. Vol. 2, p. 299** (Ex. 3); **Rec. Vol. 1, p. 66** (Tr. 54 (testimony of Respondent))).

COUNT VII – Arata

Respondent Hinkebein served as counsel for the Movant Jeremy Arata in *Jeremy W. Arata v. State of Missouri*, Case No. 1331-CC00971, in the Circuit Court of Greene County, Missouri, a post-conviction relief proceeding. **App. A41** (Inf. ¶ 102); **App. A47** (Ans. ¶ 102); **See Rec. Vol. 1, p. 152** (Ex. 1.) Respondent entered his appearance as counsel for Movant Arata on or about August 6, 2013. **App. A41** (Inf. ¶ 103); **App. A47** (Ans. ¶ 103); **Rec. Vol. 1, p. 163** (Ex. 1); **Rec. Vol. 1, p. 66** (Tr. 54 (testimony of Respondent))). Respondent filed a motion for extension of time in which to file an amended Rule 29.15 motion on behalf of Movant Arata. **App. A41** (Inf. ¶ 104); **App. A47** (Ans. ¶ 104); **Rec. Vol. 1, p. 164 - 65** (Ex. 1); **Rec. Vol. 1, p. 66** (Tr. 54 - 55 (testimony of Respondent))). The Court granted the motion for extension of time to October 22, 2013. **App. A41** (Inf. ¶ 105); **App. A47** (Ans. ¶ 105); **Rec. Vol. 1, p. 66** (Tr. 55 (testimony of Respondent))).

Respondent wrote the prison to arrange a telephone call with Movant Arata on January 6, 2014. **App. A41** (Inf. ¶ 106); **App. A47** (Ans. ¶ 106); **Rec. Vol. 1, p. 66** (Tr. 55 (testimony of Respondent)). Respondent did not speak to Mr. Arata until over two (2) months after any amended motion was due. **Rec. Vol. 1, p. 66** (Tr. 55 (testimony of Respondent).)

Respondent intended to file a Statement in Lieu in Mr. Arata's case. **Rec. Vol. 1, p. 66** (Tr. 55 (testimony of Respondent)). On January 6, 2014, Respondent told Mr. Arata that he intended to file a Statement in Lieu. **Rec. Vol. 1, p. 66 - 67** (Tr. 55, 56 - 57 (testimony of Respondent)); **Rec. Vol. 4, p. 839** (Ex. 29). Respondent did not prepare a Statement in Lieu of an Amended Motion regarding Mr. Arata's post-conviction relief motion. **App. A41** (Inf. ¶ 107); **App. A47** (Ans. ¶ 107). Respondent did not send Mr. Arata a Statement in Lieu of an Amended Motion for his review. **App. A41** (Inf. ¶ 108); **A47** (Ans. ¶ 108).

Respondent did not file an amended Rule 29.15 motion, or a Statement in Lieu of an Amended Motion, on or before October 22, 2013 on behalf of Mr. Arata. **App. A41** (Inf. ¶ 109); **App. A47** (Ans. ¶ 109); **See Rec. Vol. 1, p. 152** (Ex. 1). Respondent failed to communicate with Mr. Arata after January 2014. **App. A41** (Inf. ¶ 110); **App. A47** (Ans. ¶ 110). Respondent Hinkebein never filed an amended Rule 29.15 motion, or a Statement in Lieu of an Amended Motion, on behalf of Movant Arata. **App. A42** (Inf. ¶ 111); **App. A47** (Ans. ¶ 111); **See Rec. Vol. 1, p. 152** (Ex. 1).

Mr. Arata's case was reassigned to another public defender in August 2014. **Rec. Vol. 1, p. 67** (Tr. 59 (testimony of Respondent).) Respondent withdrew as counsel of record for Movant Arata on September 5, 2014. **App. A42** (Inf. ¶ 112); **App. A47** (Ans. ¶ 112); **Rec. Vol. 1, p. 167 - 68** (Ex. 1); **Rec. Vol. 1, p. 67** (Tr. 59 (testimony of Respondent)). Movant Arata's new counsel filed a Motion for Finding of Abandonment and for Leave to File an Amended Motion. **App. A42** (Inf. ¶ 113); **App. A47** (Ans. ¶ 113); **Rec. Vol. 1, p. 173 - 76** (Ex. 1); **Rec. Vol. 1, p. 67** (Tr. 59 (testimony of Respondent)). The trial court entered its Order finding that Respondent had abandoned Movant Arata on his post-conviction relief action. **App. A42** (Inf. ¶ 114); **App. A47** (Ans. ¶ 114); **Rec. Vol. 1, p. 178** (Ex. 1).

Potential Injury

If any of these movants, Robinson, Hines, Williams, Watson, Austin, Giles, and/or Arata, had gained actual relief from their Rule 29.15 motion for post-conviction relief, the delay in processing those motions could have resulted in them being incarcerated for a longer period of time. **Rec. Vol. 1, p. 67** (Tr. 60 (testimony of Respondent)).

Respondent did not intentionally delay any of the cases that are the subject of this case in hopes that the passage of time would result in the prosecutor agreeing to a better outcome for the movant. **Rec. Vol. 1, p. 84** (Tr. 125 (testimony of Respondent)).

Respondent did not ask any of the movants who are the subjects of this case to agree to a delay in hopes that the passage of time would result in the prosecutor agreeing to a better outcome for the movant. **Rec. Vol. 1, p. 84** (Tr. 125 (testimony of Respondent)).

Respondent's Employee Improvement Plan

Missouri Public Defender System Attorney Greg Mermelstein, who reviews complaints from the client base for the MPDS, received a letter from Movant Hines, Respondent's client, asking about the progress of his case. (Tr. 215 (testimony of Greg Mermelstein, Deputy Director of Specialty Practice and Resources for the MPDS ("Mermelstein")); **Rec. Vol. 1, p. 59** (Tr. 26 (testimony of Respondent)); **Rec. Vol. 4, p. 831** (Ex. 21). Mr. Mermelstein asked Mr. Harris, Respondent's immediate supervisor, the District Defender, to look into Mr. Hines' complaint, and Mr. Harris looked through Respondent's cases and found a number of cases where amended motions had not been timely filed. **Rec. Vol. 1, p. 106** (Tr. 215 - 216 (testimony of Mermelstein)); **Rec. Vol. 1, p. 59** (Tr. 26 (testimony of Respondent)); **Rec. Vol. 4, p. 837** (Ex. 28).

Mr. Mermelstein determined that the cases where an amended motion had not been timely filed should be reassigned to another MPDS office. **Rec. Vol. 1, p. 106 - 07** (Tr. 216 – 217 (testimony of Mermelstein).) Mr. Harris and Mr. Mermelstein determined that it would be best for the cases to be transferred out of their Area so that they could be examined anew and so there would be no appearance of any conflict. **Rec. Vol. 1, p. 91** (Tr. 155 – 156 (testimony of Steve Harris, District Defender Area 67 of the MPDS ("Harris")); **Rec. Vol. 1, p. 106 – 07** (Tr. 216 – 218 (testimony of Mermelstein)).

Respondent gathered up the files to be reassigned and gave them to Mr. Harris. **Rec. Vol. 1, p. 7** (Tr. 29 (testimony of Respondent)); **Rec. Vol. 4, p. 837** (Ex. 28). The cases reassigned were the subject of the Information: Movants Arata, Austin, Giles, Hines,

Robinson, Watson, and Williams. **Rec. Vol. 1, p. 59 - 60** (Tr. 28 – 29, 30 (testimony of Respondent).) Those cases were reassigned to other public defenders in August 2014. **Rec. Vol. 1, p. 50** (Tr. 28 (testimony of Respondent)). Respondent withdrew from the reassigned cases in September 2014. **Rec. Vol. 1, p. 60** (Tr. 29 (testimony of Respondent).)

On September 4, 2014, Respondent was issued an Employee Improvement Plan by Steven J. Harris, District Defender Area 67. **Rec. Vol. 1, p. 67 - 68** (Tr. 60 - 61 (testimony of Respondent)); **Rec. Vol. 1, p. 4** (Ex. 10). Respondent met with Mr. Harris and Greg Mermelstein, Divison Director, about the Employee Improvement Plan. **Rec. Vol. 1, p. 68** (Tr. 61 - 62 (testimony of Respondent)). The Employee Improvement Plan recites that Respondent had “failed to file timely amended motions or statements in lieu of amended motions in the following cases: Dustin Watson, Christopher Hines, Allen Giles, William Austin, Jeremy Arata, William Williams, Darin Robinson....” **Rec. Vol. 4, p. 795** (Ex. 10). The Employee Improvement Plan recites that Respondent’s failures “jeopardizes the clients’ rights to pursue state post-conviction relief.” **Rec. Vol. 4, p. 795** (Ex. 10).

Mr. Harris, via the Employee Improvement Plan, gave Respondent directives to improve his performance. **Rec. Vol. 1, p. 68** (Tr. 62 (testimony of Respondent)); **Rec. Vol. 4, p. 795 - 97** (Ex. 10). Respondent signed the Employee Improvement Plan September 4, 2014. **Rec. Vol. 4, p. 797** (Ex. 10). The Employee Improvement Plan issued to Respondent provides: “You cannot miss filing deadlines for amended motions, statements in lieu of amended motions, or notices of appeal.” **Rec. Vol. 4, p. 795** (Ex. 10).

Mr. Harris directed Respondent to notify him if there was a time when he would not be able to file a timely amended motion, statement in lieu of an amended motion, or voluntary dismissal before the due dates. **Rec. Vol. 1, p. 68** (Tr. 64 (testimony of Respondent)); **Rec. Vol. 4, p. 796 - 96** (Ex. 10). Mr. Harris directed Respondent to implement a calendaring system that could be monitored by Respondent's secretary and by Mr. Harris. **Rec. Vol. 1, p. 69** (Tr. 65 (testimony of Respondent)); **Rec. Vol. 4, p. 796** (Ex. 10). Respondent's secretary now generates a report for Respondent showing all due dates in the upcoming month. **Rec. Vol. 1, p. 69** (Tr. 65 - 66 (testimony of Respondent)); **Rec. Vol. 1, p. 94** (Tr. 166 - 167 (testimony of Steve Harris)). Respondent now generates a report for Mr. Harris that includes his deadlines for the month past and the upcoming month. **Rec. Vol. 1, p. 69** (Tr. 66 (testimony of Respondent)); **Rec. Vol. 1, p. 94** (Tr. 166 - 167 (testimony of Steve Harris)).

Mr. Harris also provided in the Employee Improvement Plan that he would meet with Respondent periodically to review and discuss Respondent's performance. **Rec. Vol. 4, p. 797** (Ex. 10). The calendaring and system established in September 2014 has been mostly successful. Respondent has had issues with electronic filing where the filing was not completed before midnight. He also missed a deadline in another case where he thought he had filed the amended motion, but somehow had not. **Rec. Vol. 1, pp. 69, 70, 80** (Tr. 65, 69 - 70, 110 - 111 (testimony of Respondent)); **Rec. Vol. 1, p. 94** (Tr. 167 - 168 (testimony of Steve Harris)). Mr. Harris believes Respondent has had a marked improvement in his performance. **Rec. Vol. 1, p. 95** (Tr. 171 (testimony of Steve Harris)).

Respondent's Health

Respondent suffers from chronic, severe health problems. **Sealed Rec. Vol. 5, p. - 947 - 48** (Tr. 76 – 80 (testimony of Respondent).) Respondent believes his health issues affected his performance between 2010 and 2014. **Rec. Vol. 1, pp. 74, 78, 81** (Tr. 85, 102, 114 (testimony of Respondent)). Respondent believes his health condition was a physical disability between 2010 and 2014. **Rec. Vol. 1, p. 81** (Tr. 114 - 115 (testimony of Respondent)). Respondent's health has been fairly stable since he last was hospitalized in 2013. **Rec. Vol. 1, p. 82** (Tr. 118 – 119 (testimony of Respondent)). Respondent believes he is functioning better now than he was in 2011 through 2013. **Rec. Vol. 1, p. 85** (Tr. 130 (testimony of Respondent)).

Respondent's Workload

Respondent believes his workload includes an unreasonable number of cases. **Rec. Vol. 1, p. 80** (Tr. 111 (testimony of Respondent)). Respondent has approximately 110 cases. **Rec. Vol. 1, pp. 83, 84** (Tr. 122, 126 (testimony of Respondent)). Respondent testified that if he declined new cases, he believes he “would probably get fired.” **Rec. Vol. 1, p. 75** (Tr. 92 (testimony of Respondent)).

Steve Harris believes he was assigning too much work to Respondent before the issues in this case were revealed. **Rec. Vol. 1, pp. 95 - 96** (Tr. 172 – 174 (testimony of Steve Harris)). Historically, Respondent filed more amended motions and had more court hearings than anyone else in his office. **Rec. Vol. 1, p. 100** (Tr. 189 – 190 (testimony of

Steve Harris); **Rec. Vol. 1, pp. 105, 106** (Tr. 212 – 213 (testimony of Greg Mermelstein, Deputy Director of Specialty Practice and Resources for the MPDS (“Mermelstein”)); **Rec. Vol. 4, p. 845** (Ex. D).

Steve Harris believes Respondent’s dedication to his clients is beyond reproach. **Rec. Vol. 1, pp. 100 - 01** (Tr. 191 – 192 (testimony of Steve Harris)). Steve Harris testified that Respondent has a strong work ethic and even when he was very ill, he did not ask for help. **Rec. Vol. 1, p. 98** (Tr. 181 (testimony of Steve Harris)). Steve Harris believes Respondent is an absolute asset to the office. **Rec. Vol. 1, p. 101** (Tr. 193 (testimony of Steve Harris)). Greg Mermelstein believes Respondent’s work product is of very high quality, he is hard-working, and he is very good at untangling complex legal issues such a jail time credit issues. **Rec. Vol. 1, pp. 105 - 06** (Tr. 212 – 214 (testimony of Mermelstein)).

Since August 2014, when the cases which are the subject of this hearing were reassigned, Respondent’s supervisor has assigned him more Rule 24.035 motions than he used to, resulting in a slightly lighter workload because Rule 24.035 motions generally have much shorter records and aren’t as time-consuming. **Rec. Vol. 1, pp. 83** (Tr. 123 – 124 (testimony of Respondent)); **Rec. Vol. 1, p. 95** (Tr. 172 (testimony of Steve Harris)). Since August 2014, Mr. Harris has reduced Respondent’s case number assignments as well as the seriousness of the cases he is assigned. **Rec. Vol. 1, p. 95** (Tr. 172 (testimony of Steve Harris)).

Steve Harris testified that he has no flexibility with regard to the attorneys' heavy workload in Area 67. **Rec. Vol. 1, p. 101** (Tr. 195 – 196 (testimony of Steve Harris)). Public defenders cannot decline cases based on case load. **Rec. Vol. 1, p. 104** (Tr. 207 – 208 (testimony of Mermelstein)). According to senior staff with the MPDS, a Missouri Bar task force, a Missouri Senate Interim Committee, and the American Bar Association have studied the MPDS and found that the System has more cases than it can ethically, reasonably, or effectively handle. **Rec. Vol. 1, p. 104** (Tr. 205 (testimony of Mermelstein)). The Public Defender Commission Caseload Crisis Protocol suggests that the MPDS needs 269 additional attorneys. The System currently has approximately 370 attorneys statewide. **Rec. Vol. 1, p. 103** (Tr. 204 (testimony of Mermelstein)). MPDS Area 67 actually has lost an attorney position since 2007. **Rec. Vol. 1, pp. 101** (Tr. 195 – 196 (testimony of Steve Harris)).

POINTS RELIED ON

I.

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S
LICENSE BECAUSE HE VIOLATED RULE 4-1.3 IN THAT
RESPONDENT FAILED TO DILIGENTLY REPRESENT HIS
CLIENTS.**

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

II.

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S
LICENSE BECAUSE HE VIOLATED RULE 4-1.4(a) IN THAT
RESPONDENT FAILED TO KEEP HIS CLIENTS REASONABLY
INFORMED ABOUT THE STATUS OF THEIR CASES.**

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

III.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE LAW WITH NO LEAVE TO REAPPLY FOR ONE YEAR BECAUSE RESPONDENT KNOWINGLY VIOLATED TWO RULES OF PROFESSIONAL CONDUCT MULTIPLE TIMES, BOTH OF WHICH WERE OBLIGATIONS HE OWED HIS CLIENTS, AND CAUSED AN INJURY OR POTENTIAL INJURY.

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

In re Frank, 885 S.W.2d 328 (Mo. banc 1994)

In re Genuik, SC95726, (Mo. S. Ct., June 28, 2016)

ABA Standards for Imposing Lawyer Sanctions (1986 Ed., as amended 1992)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE HE VIOLATED RULE 4-1.3 IN THAT RESPONDENT FAILED TO DILIGENTLY REPRESENT HIS CLIENTS.

“The findings of fact, conclusions of law, and the recommendations from the DHP are advisory. This Court reviews the evidence *de novo*, independently determining all issues pertaining to the credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed.” *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005), citing *In re Snyder*, 35 S.W.3d 380, 382 (Mo. banc 2000).

Missouri Rule of Professional Conduct 4-1.3 provides that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” In *In re Crews*, 159 S.W.3d 355, 359 (Mo. banc 2005), Crews was found to have violated Rule 4-1.3 by failing to adequately investigate the plaintiffs’ claim, failing to diligently pursue the plaintiffs’ claim, failing to respond to a summary judgment motion, and failing to prepare an acceptable appellate brief.

Respondent violated Rule 4-1.3 by not attempting to speak to his client Robinson until two (2) days before the deadline to file an amended motion, by not contacting potential witnesses for Mr. Robinson until he sent them letters three (3) days before the deadline to

file an amended motion, by not filing any motion, whether an amended motion or a statement in lieu, by the March 13, 2011 due date for an amended motion or by the time Mr. Robinson's case was reassigned in August 2014. Mr. Hinkebein entered his appearance on behalf of Mr. Robinson on February 14, 2011, but filed no pleadings on his behalf between then and his withdrawal from Mr. Robinson's representation on September 5, 2014, approximately three (3) years and six (6) months later.

Respondent violated Rule 4-1.3 by not attempting to speak to his client Hines until one (1) day before the deadline to file an amended motion, by not timely filing the amended motion by the March 5, 2013 due date, and by not acting to cause an amended motion to be filed by the time Mr. Hines' case was reassigned in August 2014.

Respondent violated Rule 4-1.3 by not attempting to speak to his client Williams until eleven (11) days after the November 10, 2013 due date to file an amended motion, by not communicating with all of the witnesses identified by Mr. Williams, by not timely filing the amended motion by November 10, 2013, and by not acting to cause an amended motion to be filed by the time Mr. Williams' case was reassigned in August 2014.

Respondent violated Rule 4-1.3 by not attempting to speak to his client Watson until three (3) months after the April 16, 2012 due date to file an amended motion, by not requesting Mr. Watson's appellate file until after the due date to file an amended motion, by not timely filing the amended motion by the April 16, 2012 due date, and by not acting to cause an amended motion to be filed by the time Mr. Watson's case was reassigned in August 2014.

Respondent violated Rule 4-1.3 by not attempting to speak to his client Giles until ten (10) days after the April 15, 2013 due date to file an amended motion, by not filing the statement in lieu after telling Mr. Giles he intended to on April 25, 2013 and on March 24, 2014, by not beginning to review Mr. Giles case until April 1, 2013, by not filing any motion, whether an amended motion or a statement in lieu, by the April 15, 2013 due date for an amended motion or by the time Mr. Giles' case was reassigned in August 2014.

Respondent violated Rule 4-1.3 by not attempting to speak to his client Arata until eleven (11) weeks after the October 22, 2013 due date to file an amended motion, by not filing any motion, whether an amended motion or a statement in lieu, by the October 22, 2013 due date for an amended motion or by the time Mr. Giles' case was reassigned in August 2014.

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE HE VIOLATED RULE 4-1.4(a) IN THAT RESPONDENT FAILED TO KEEP HIS CLIENTS REASONABLY INFORMED ABOUT THE STATUS OF THEIR CASES.

Missouri Rule of Professional Conduct 4-1.4(a) requires a lawyer to (1) “keep the client reasonably informed about the status of the matter;” and (2) “promptly comply with reasonable requests for information.” In *In re Ehler*, 319 S.W.3d 442, 449 (Mo. banc 2010), this Court found Ehler violated Rule 4-1.4 by repeatedly failing to respond to her clients’ requests for information.

Respondent violated Rule 4-1.4(a) by failing to keep Mr. Robinson adequately informed in that he did not speak to Mr. Robinson until two (2) days before any amended motion was due, and he did not communicate at all with Mr. Robinson between March 2011 and when Mr. Robinson’s case was reassigned in August 2014.

Respondent violated Rule 4-1.4(a) by failing to keep Mr. Hines adequately informed in that he did not speak to Mr. Hines until one (1) day before any amended motion was due, and he did not communicate at all with Mr. Hines between March 2013 and August 15, 2014 when he wrote to Mr. Hines after Mr. Hines complained to Respondent’s supervisor.

Respondent violated Rule 4-1.4(a) by failing to keep Mr. Williams adequately informed in that he did not speak to Mr. Hines until eleven (11) days after his amended

motion was due, and he did not communicate at all with Mr. Williams between November 21, 2013 and August 2014 when Mr. Williams' case was reassigned.

Respondent violated Rule 4-4.1(a) by failing to keep Mr. Watson adequately informed in that he did not speak to Mr. Watson until three (3) months after his amended motion was due, and he did not communicate at all with Mr. Watson between July 2013 and August 2014 when Mr. Watson's case was reassigned.

Respondent violated Rule 4-1.4(a) by failing to keep Mr. Giles adequately informed in that he did not speak to Mr. Giles until ten (10) days after any amended motion was due, and he did not communicate at all with Mr. Giles between April 25, 2013 and March 24, 2014, or between March 24, 2014 and when Mr. Giles' case was reassigned in August 2014.

Respondent violated Rule 4-1.4(a) by failing to keep Mr. Arata adequately informed in that he only spoke to Mr. Arata one time and that was not until eleven (11) weeks after any amended motion was due, and he did not communicate at all with Mr. Arata between January 2014 and when Mr. Arata's case was reassigned in August 2014.

III.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE LAW WITH NO LEAVE TO REAPPLY FOR ONE YEAR BECAUSE RESPONDENT KNOWINGLY VIOLATED TWO RULES OF PROFESSIONAL CONDUCT MULTIPLE TIMES, BOTH OF WHICH WERE OBLIGATIONS HE OWED HIS CLIENTS, AND CAUSED AN INJURY OR POTENTIAL INJURY.

Pursuant to Missouri case law and the ABA Standards, a suspension of Respondent's license is warranted. In determining the appropriate sanction for attorney misconduct, this Court historically has relied on several sources. First and foremost, the Court applies its own standards to maintain consistency and fairness and, ultimately, to accomplish the overriding goal of protecting the public and maintaining the integrity of the legal profession. *In re Kazanas*, 96 S.W.3d 803, 807 (Mo. banc 2003).

The Court also looks to the ABA Standards for Imposing Lawyer Sanctions (1986 Ed., as amended 1992) (hereinafter "ABA Standards") for guidance when imposing discipline, but considers the Standards advisory. *See In re Ehler*, 319 S.W.3d 442, 451 (Mo. banc 2010). The Court also considers as advisory the Disciplinary Hearing Panel's findings of fact, conclusions of law, and recommendation of sanction. *Ehler*, 319 S.W.3d 448. In this instance, the Panel recommended that Respondent be placed on probation for one year. **App. A27 - 29.**

Respondent failed to communicate with his clients (Robinson, Hines, Williams, Watson, Giles, Arata), and he failed to diligently represent his clients (Robinson, Hines, Williams, Watson, Giles, Arata). ABA Sanctions Standard 3.0 provides:

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

- (a) the duty violated;
- (b) the lawyer's mental state; and
- (c) the actual or potential injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating or mitigating factors.

The ABA Standards provide a standard for the violation of a particular rule. Section II of the ABA Standards states in part:

The Standards do not account for multiple charges of misconduct. The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it may well be and generally should be greater than the sanction for the most serious violation.

In this case, the evidence shows that the Respondent has violated two (2) Rules six (6) times each.

The duties violated. Under Section II, The Theoretical Framework, the ABA Standards provide that the most important ethical duties are those obligations that an attorney owes the client. Respondent's violations were of obligations he owed his clients.

ABA Standard 4.43 regarding "Lack of Diligence" provides: "Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client." ABA Standard 4.42 regarding "Lack of Diligence" provides: "Suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client." The Commentary to ABA Standard 4.42 provides:

Suspension should be imposed when a lawyer knows that he is not performing the services requested by the client, but does nothing to remedy the situation, or when a lawyer engages in a pattern of neglect with the result that the lawyer causes injury or potential injury to a client. Most cases involve lawyers who do not communicate with their clients.

Respondent's mental state. The ABA Standards define the mental states used in the Standards as follows:

The most culpable mental state is of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her

conduct but without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

ABA Standards, Sec. II. Respondent repeatedly failed to communicate and to diligently represent his clients. Respondent's misconduct was knowing and/or Respondent engaged in a pattern of neglect.

Injury or potential injury caused by Respondent's misconduct. All of Respondent's clients who are the subject of this case were allowed to file amended motions for post-conviction relief. As of the day of the disciplinary hearing, no movant had been granted relief based on those amended motions. Respondent's clients were, however, at risk of injury from his violations. If Respondent's clients' post-conviction motions had been meritorious, their relief was, at the most, in jeopardy, and, at the least, delayed.

Applicable aggravating and mitigating factors. Certain aggravating and mitigating factor are applicable in this case. "Aggravation or aggravating circumstances are any considerations, or factors that may justify an increase in the degree of discipline to be imposed." ABA Sanction Standard 9.21. In the case at bar, aggravating factors are: Respondent's prior disciplinary offenses (ABA Sanction Standard 9.22(a)); a pattern of misconduct (ABA Sanction Standard 9.22(c)); multiple offenses (ABA Sanction Standard 9.22(d)); and the vulnerability of the victims (ABA Sanction Standard 9.22(h)).

Respondent has prior disciplinary offenses. He has been admonished three times for failing to diligently represent clients, the most recent of which was in 2010, and one of which was for failure to timely file an amended Rule 29.15 motion. **Rec. Vol. 4, pp. 783-94.** Respondent failed to diligently represent the six movants who are the subject of this case, evidencing a pattern of misconduct and multiple offenses. Further, the six movants were incarcerated and in need of appointed counsel, rendering them vulnerable to Respondent's failure to diligently represent their interests and to adequately communicate with them.

Further, "[t]his 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). Respondent's misconduct in this case is the same or similar to the misconduct he was admonished for in the past. ABA Standard 8.3 provides: "Reprimand is generally appropriate when a lawyer ... (b) has received an admonition for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

"Mitigation or mitigating circumstances are any consideration or factors that may justify a reduction in the degree of discipline to be imposed." ABA Sanction Standard 9.31. Mitigating factors include Respondent's full and free disclosure to disciplinary counsel and cooperative attitude toward these proceedings (ABA Sanction Standard 9.32(e)), physical disability (ABA Sanction Standard 9.32(h)), and expressed remorse (ABA Sanction Standard 9.32(l)). Respondent has cooperated with disciplinary counsel

throughout the investigation and proceeding, and he has expressed remorse for his failures. Respondent also has produced medical records and has testified regarding his serious health conditions.

Respondent has argued that his caseload was excessive and that such caseload was out of his control. This Court has not addressed whether an “excessive caseload” is a mitigating factor in a disciplinary case. While discussing the professional risks borne by public defenders who carry large caseloads, however, this Court noted:

Beyond the constitutional problems this may be creating for indigent defendants in Missouri, the public defenders themselves are risking their own professional lives. The American Bar Association has stated that there is “*no exception* [to the Model Rules of Professional Responsibility] for lawyers who represent indigent persons charged with crimes.” Nor has this Court created an exception in the Code of Professional Responsibility, Rule 4, which governs all Missouri lawyers.

State ex rel. Missouri Public Defender Commission v. Pratte, 298 S.W.3d 870, 880 (Mo. banc 2009), quoting ABA Formal Op. 06-441, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation*, May 13, 2006, at 3 (emphasis added by *Pratte* Court). Respondent testified that he thought he would be fired if he refused additional cases. Following August 2014 discovery of the cases wherein he had missed deadlines, however, his supervisor, Steve Harris, placed him on an Employee Improvement Plan and

has assigned him more Rule 24.035 motions than he used to, resulting in a slightly lighter workload because Rule 24.035 motions generally have much shorter records and aren't as time-consuming. Since August 2014, Mr. Harris also has reduced Respondent's case number assignments as well as the seriousness of the cases he is assigned.

The prior opinions of this Court in attorney discipline cases support suspension in this case. In *In re Crews*, 159 S.W.3d 355, 359 (Mo. banc 2005), the Respondent was found to have violated his duties of competence, diligence, and communication. Crews also failed to memorialize a contingency fee agreement in writing and he engaged in dishonest, fraudulent or deceitful conduct. *Id.* at 359-60. "Respondent's actions demonstrate a pattern of neglect with prosecuting Plaintiffs' cases that resulted in a potential injury to his clients and the legal profession." *Id.* at 361. This Court suspended Crews' license to practice law indefinitely with leave to apply for reinstatement in one (1) year. *Id.*

In *In re Frank*, 885 S.W.2d 328, 333 - 34 (Mo. banc 1994), the court found that the respondent had committed multiple violations of his diligence and communication obligations, and that he had failed to cooperate with bar counsel.

Reprimand is not the proper sanction for respondent. As noted above, two previous written admonitions from the bar committee have done nothing to curb respondent's misconduct. Respondent's thirty-nine ethical violations in the representation of eleven clients demonstrate a disturbing, continuing

disregard for the rights and interests of his clients. A sanction stronger than a reprimand is clearly necessary to protect the public and the legal profession.

Id. at 334. The Court suspended respondent Frank’s license with leave to apply for reinstatement in two (2) years, noting his failure to respond to disciplinary authorities and the “pattern of neglect, [and] the volume and repeated nature of respondent’s ethical violations.” *Id.*

In an order entered last June 2016, in *In re Genuik*, SC95726, (Mo. S. Ct., June 28, 2016), June this Court found that Respondent Genuik had violated Rules 4-1.3 and 4-1.4(a). The case involved four (4) complaints (a probate case, two traffic cases, and a child support case). Respondent Genuik had three (3) previous admonitions, two (2) of which were for communication violations, but this Court suspended Genuik indefinitely with no leave to apply for reinstatement for one (1) year.

Informant asked the Disciplinary Hearing Panel to recommend an indefinite suspension of Respondent’s license with no leave to apply for reinstatement for one (1) year. Informant then accepted the Disciplinary Hearing Panel’s recommendation of one (1) year of probation. Informant believed the Disciplinary Hearing Panel’s recommendation was within an acceptable range and that the recommended sanction would have furthered the cause of public protection.

The sanction originally requested by Informant was more severe than the Panel’s recommended sanction. Per this Court’s decisions and the ABA Standards, probation, a stayed suspension with probation, or an actual suspension would fit within an acceptable

sanction range for Respondent's misconduct – all would seek to protect the public and tend to maintain the integrity of the legal profession.

Probation is an available sanction under Rule 5.225 if an attorney: (A) “is unlikely to harm the public . . . and can be adequately supervised”; (B) “is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute.”; and (C) “has not committed acts warranting disbarment.” Informant believes Respondent can be adequately supervised in such a way that he is unlikely to harm the public. Informant has not sought disbarment as the evidence does not suggest that Respondent intentionally set out to harm his clients. The question remaining as to probation is whether Respondent's misconduct is such that a sanction less than an actual suspension would in any way harm the integrity of the legal profession.

Informant asks this Court to impose an actual suspension sanction because of the extended periods of inaction and lack of communication in this case, coupled with his prior disciplinary history reflecting a course of conduct. Mr. Robinson, for example, did not hear from Respondent after March 2011; neither did Respondent file an amended motion or a statement in lieu on Mr. Robinson's behalf before his case was re-assigned away from Respondent in August 2014. Further, Respondent did not speak with his clients Williams, Watson, Giles, or Arata until after an amended Rule 29.15 motion was due. Informant believes that given the nature and extent of Respondent's misconduct, and the aggravating and mitigating factors, Respondent's license should be indefinitely suspended and that no application for reinstatement be entertained for a period of one (1) year.

CONCLUSION

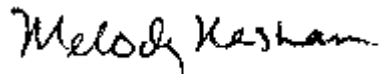
WHEREFORE, the Chief Disciplinary Counsel proposes that a decision be issued finding that Respondent has committed professional misconduct as alleged in the Information and that the Panel issue a decision recommending that Respondent be indefinitely suspended with leave to apply for reinstatement after one (1) year.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2017, a true and correct copy of the Informant's foregoing Brief was served on Sara Rittman, Counsel for Respondent, via the Missouri Supreme Court electronic filing system pursuant to Rule 103.08:

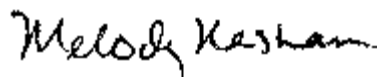


Melody Nashan, Staff Counsel

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 10,510 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Melody Nashan, Staff Counsel