IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:

DUSTIN W. DUNFIELD

1629 Hedges Plaza
P. O. Box 306
Nevada, MO 64772

Missouri Bar No. 63473

Respondent.

Supreme Court No. SC 96255

INFORMANT'S BRIEF

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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.

CASE SUMMARY

This is an honesty case. In 1996, Respondent pled guilty and was found guilty of felony statutory rape. In 2015, Informant charged Respondent with several misconduct violations of the Missouri Rules of Professional Conduct relating to Respondent's failure to disclose his 1996 guilty plea. In Count I, Respondent was charged with violations of Missouri Rule of Professional Conduct 4-8.4(c) and (d) for swearing and affirming on his Candidate Declaration Form for Vernon County Prosecuting Attorney in 2014 that he had "not been convicted of or found guilty of or pled guilty to a felony under the laws of Missouri." In Count II, Respondent was charged with violations of Rule 4-3.4(c) and Rule 4-8.4(d) for refusing to register as a sex offender as ordered by a Judge.

The matter proceeded to a Disciplinary Hearing Panel ("DHP") hearing on December 2, 2016. At the start of the hearing, Informant dismissed the Rule 4-3.4(c) charge in Count II. On December 28, 2016, the Panel entered a decision finding that Respondent violated Rule 4-8.4(c) as alleged in Count I of the Information. The Panel made no finding with respect to the Rule 4-8.4(d) violation alleged in Count I. The Panel further found that Respondent did not violate Rule 4-8.4(d) as alleged in Count II and recommended that Count II be dismissed. The Panel recommended that Respondent be suspended from the practice of law for six months, with said execution stayed and Respondent placed on probation for a period of two years.

On review in this Court, Informant challenges only the DHP's recommended discipline, requesting that Respondent be indefinitely suspended without probation with no leave to apply for reinstatement for at least one year.

STATEMENT OF FACTS

Background

Dustin Dunfield ("Respondent") was licensed to practice in Missouri in April 2011 and holds a Missouri license (bar number) of 63473. **App. 262.** Respondent maintains a solo private practice in Nevada, Vernon County, Missouri. ***Id.*** Respondent has no previous discipline. ***Id.***

Chronological Order of Events

A. Respondent's 1996 Criminal Conviction

In 1996, Respondent was charged with statutory rape in the second degree, a class C felony, in the case styled *State of Missouri v. Dustin Dunfield*, Cedar County Case Nos. CR396-3FX, CR396-0003 or 28RO39600003 (hereinafter "*Dunfield Criminal Case*.") ***Id.***

In December 1996, the matter proceeded to a plea hearing in front of the Honorable Joseph Phillips.[1] **App. 294.** Respondent appeared in person and with counsel, Public Defender Lorna Huber. **App. 295.** Prior to the hearing, Respondent completed and signed a form document entitled "To Defendants who Plan to Enter a Plea of Guilty" (hereinafter "Guilty Plea Form"). **App. 283-88.** Said form contained 50 questions advising Respondent of the consequences of entering a plea of guilty. ***Id.*** During the hearing, Judge Phillips

[1] The transcript of the plea hearing shows the date of the plea as December 13, 1996. **App. 294.** However, the trial court's docket sheet and other evidence show the date of the plea as December 18, 1996. **App. 280; 290; 292.** To avoid confusion, Informant will use simply use "December 1996" as the date of the plea.

further inquired several times with Respondent of the consequences of entering a guilty plea, including, but not limited to the following exchanges:

> THE COURT: Do you understand by pleading guilty you're waiving your right to remain silent and you're incriminating yourself by pleading guilty?
>
> THE DEFENDANT: Yes.
>
> . . .
>
> THE COURT: Do you understand in a plea of guilty there's no further trial?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you understand that you have a plea agreement. Is there any other - - anything else that's causing you to enter your plea of guilty to this charge, other than the plea agreement and the fact that you are guilty?
>
> THE DEFENDANT: No, sir.
>
> **App. 299, Lines ("L.") 3 to 13.**

After being advised of the consequences of entering a plea of guilty, Respondent pled guilty and his plea was accepted by the Court:

> THE COURT: And you're still wishing to enter a plea of guilty; is that correct?
>
> THE DEFENDANT: Yes, Sir.
>
> THE COURT: And you've told me the truth about these - - these proceedings?
>
> THE DEFENDANT: Yes, Sir.
>
> THE COURT: The Court is going to accept your plea of guilty, find it voluntarily and knowingly made, and find there's a factual basis for the plea, and will find you guilty beyond a reasonable doubt.

App. 305, L. 3 to 11.

Respondent received a two year suspended imposition of sentence ("SIS") and was placed on two years unsupervised probation. **App. 290; 305-06.** By all accounts, Respondent completed the terms and conditions of his probation without incident.

B. Respondent's Law School Application

In January 2007, Respondent applied for admission to the University of Arkansas School of Law. **App. 522-30.** On the application, Respondent answered "yes" in response to the question of whether he had been charged with or convicted of any felony. **App. 523.** In an addendum to his application, Respondent explained his felony guilty plea by writing: "I was arrested and later pled guilty on the advice of my public defender to an SIS plea of two years' probation." **App. 530.** Respondent was admitted and graduated from the law school in December 2009. **App. 544.**

C. Respondent's Arkansas Bar Application

Respondent applied for admission to the Arkansas Bar in 2010. In January 2010, Respondent received a letter from Christopher Thomas, Executive Secretary of the Arkansas State Board of Law Examiners, noting Respondent's plea of guilty to statutory rape and requesting proof of completion of probation. **App. 532.** Respondent replied to Mr. Thomas' letter with proof of completion of his probation, but did not challenge his 1996 guilty plea or assert that he was not guilty. **App. 535.** Respondent has never been admitted to the Arkansas Bar.

D. Respondent's Missouri Bar Application

In April 2010, Respondent applied for Admission to the Missouri Bar. **App. 537-64.** Respondent again disclosed his statutory rape SIS on the application. **App. 555.** In 2011, Respondent was admitted to the Missouri Bar. **App. 262.**

E. Respondent's Candidacy for Vernon County Prosecuting Attorney

On or about February 28, 2014, Respondent completed and filed a "Candidate Declaration Form" with the Vernon County Missouri Clerk's Office declaring himself to be a candidate for Vernon County Prosecuting Attorney. **App. 270; 265.** On said "Candidate Declaration Form," Respondent declared that he has "not been convicted of or found guilty of or pled guilty to a felony under the laws of the state of Missouri." **App. 266; 270.** Respondent further swore and/or affirmed that "the information contained in the foregoing declaration of candidacy is, to the best of my knowledge, true." ***Id.***

On August 12, 2014, Lynn Ewing, an opposing candidate for Vernon County Prosecuting Attorney, filed a petition challenging Respondent's candidacy in the Circuit Court of Vernon County Missouri in the case styled *Lynn W. Ewing III v. Dustin W. Dunfield,* Vernon County Case No. 14VE-CV00467 (hereinafter "*Ewing v. Dunfield*"). **App. 266; 503-06.** The case was assigned to Newton County Circuit Judge Timothy Perigo. **App. 500.** On August 18, 2014, Respondent filed an answer to the Petition. **App. 266; 508-09.**

On August 29, 2014, a hearing was held before Judge Perigo in Cedar County, Missouri. ***See, e.g.,* Transcript at App. 324-497.** Prior to testifying, Respondent was advised of his right against self-incrimination. **App. 411, L. 16 to 413, L 21.** During the

course of his testimony, Respondent testified that he had a nearly photographic or eidetic memory stating "I remember almost everything that's ever happened in my life" and "You tell me something once, I remember it forever. I may forget a name, but I remember everything else." **App. 442, L. 20-23; 443, L. 7-9.** With respect to his 1996 guilty plea, Respondent argued that:

> I was never given my fair day in court. I was the only person in the courtroom that day who was not – who did not have a law license. And everyone in the courtroom, the record will reflect, was more confused about what was going on than I was . . . Yet this plea agreement still took place, even though I never admitted guilt. I specifically stated facts to the contrary.
>
> **App. 330, L. 23 to 331, L. 9.**

Respondent further testified that neither Judge Phillips nor his public defender understood the law and that his public defender provided ineffective assistance of counsel. **App. 433, L. 19 to 21; 449, L. 15 to L. 16.** During cross examination in the August 2014 hearing, Respondent testified that:

> Q: Okay. And are you telling the Court you still - - are you still trying to maintain to this Court you didn't understand you were found guilty?
>
> A: I didn't understand that I was found guilty.
>
> . . .
>
> Q: All right. So if I understand correctly, you're saying to this Court you honestly don't believe you've ever pled guilty?
>
> A: I honestly don't believe that I've ever pled guilty.

Q: You don't believe the judge found you guilty?

A: I don't believe that the judge found me guilty.

App. 477, L. 9-13; 480, L. 14 to L. 22.

With respect to statements made on his Candidate Declaration Form, Respondent testified in the August 2014 hearing that:

> I signed an affidavit in regards to those issues, stating that I was qualified to run - - that to my knowledge, I was qualified to run for elective office . . . What I said is that I haven't knowingly been convicted, found guilty, or pled guilty. As far as I knew and as far as I know today, there's no doubt that an SIS probation is not a conviction, but that's been established over time.
>
> **App. 458, L. 4 to L. 24.**

In the middle of making these statements, Judge Perigo again advised Respondent of his right against self-incrimination. **App. 458, L. 25 to 460, L. 18.**

Respondent also testified that he had "contacted the Ethics counsel [Missouri Ethics Commission] in regards to everything that's going on and have been informed that they don't believe I'm in the wrong." **App. 457, L. 11-13.** During cross-examination, Respondent testified that the Ethics Commission did not issue him a written opinion and that the name of the person with whom he spoke was "written down at home, but I do not have it with me right now." ***See*** **App. 482, L. 1 to L. 13.**

On September 3, 2014, Judge Perigo entered a "Judgment on the Pleadings" finding that "contestee Dunfield was found guilty of the [sic] statutory rape in the second degree on December 13, 1996." **App. 266; 511-12.** Judge Perigo declared that since Respondent

had been found guilty of a felony in the State of Missouri, Respondent was an ineligible candidate for Vernon County Prosecuting Attorney. **App. 512.** Judge Perigo further ordered the Vernon County Clerk to remove Respondent's name from the November 4, 2014 ballot. **App. 266-67; 512.** Respondent did not appeal the Judgment on the Pleadings. **App. 267.**

F. Respondent's Actions to Set Aside His 1996 Guilty Plea and Remove His Name from the Sex Offender Registry

On or about July 23, 2014, Respondent filed a Petition in the Circuit Court of Cedar County, Missouri seeking a Court Order to exempt him or remove his name from the state sex offender registry in the case styled *In re Dustin Dunfield*, Case No. 14CD-CV00261. **App. 263.** On or about the same time, Respondent filed a motion to set aside his plea of guilty in the 1996 *Dunfield Criminal Case.* ***Id.*** A first Amended Petition in the *In re Dustin Dunfield* case was filed on August 7, 2014. **App. 263; 314-15.**

Shortly after filing his Petition, Dunfield was contacted by a reporter from the *Nevada Daily Mail*. Dunfield told the reporter that: "I was never convicted, I never pleaded guilty to and was never found guilty of a felony." **App. 570.** Respondent accused Vernon County Prosecutor Lynn Ewing of creating a political scandal stating: "He is under the belief that I have been convicted or pleaded guilty or found guilty of a felony in the state of Missouri. And he's wrong." **App. 571.**

The *In re Dunfield* case and the motion to set aside Respondent's guilty plea were also assigned to Judge Perigo, who heard these matters at the same August 29, 2014 hearing in Cedar County, Missouri. **App. 263.** Following the hearing, Judge Perigo denied

Respondent's Petition to exempt him or remove his name for the sexual offender registry and also denied his motion to set aside his guilty pleas in the *Dunfield Criminal Case.* **App. 264.** Judge Perigo further made an August 29, 2014 docket entry in the *In re Dunfield* case "advising" Respondent to register as a sex offender within three business days in Vernon County. ***See* App. at 264; 310.**

G. Disciplinary Proceedings

On June 25, 2015, Informant, the Office of Chief Disciplinary Counsel ("OCDC") filed a two count Information against Respondent. **App. 3-28.** In Count I, Informant charged Respondent with misconduct violations of Rule 4-8.4(c) and (d) for filing his Candidate Declaration Form and falsely and/or dishonestly declaring, swearing and or affirming that he had "not been convicted of or found guilty of or pled guilty to a felony under the laws of Missouri." **App. 5.** In Count II, Informant charged Respondent with a violation of Rules 4-3.4(c) [2] and misconduct prejudicial to the administration of justice under 4-8.4(d) by failing to register as a sex offender as required by Judge Perigo's August 29, 2014 docket entry. **App. 5-7.**

In the Information, Informant made the following allegations in both Counts:

> 6. In December 1996, in the Circuit Court of Cedar County, Missouri, Respondent pled guilty to the charge of statutory rape in the second degree . . .

[2] Missouri Rule of Professional Conduct 4-3.4(c) provides in relevant part that: "A lawyer shall not: knowingly disobey an obligation under the rules of a tribunal . . . ."

> 20. As discussed above, in December 1996, in the Circuit Court of Cedar County, Missouri, Respondent pled guilty to the charge of statutory rape in the second degree . . .
>
> **App. 4; 6**

In his Answer to the Information, Respondent admitted both of these allegations. **App. 29; 31.** Prior to the DHP hearing, Informant and Respondent prepared a "Joint Stipulation of Facts." ***See, e.g.,*** **App. at 262-68.** Respondent did not stipulate, however, that he pled guilty to statutory rape in 1996. ***See id.***

On December 2, 2016, this matter proceeded to a DHP hearing before the Honorable Donald E. Bonacker, Presiding Officer, and panel members Deana Scott and Lynn Stark.[3] **App. 573.** At the start of the DHP hearing, Informant dismissed the alleged Rule 4-3.4(c) violation in Count II of the Information. **App. 65, L. 24 to 66, L. 6.** Respondent then moved to amend paragraphs 6 and 20 of his Answer to change his admissions to denials. ***See*** **App. 66, L. 25 to 68, L. 13.** Informant objected and the motion to amend was denied. **App. 68, L. 14 to 69, L. 3.**

Prior to his testimony before the DHP, Respondent was again advised of his right against self-incrimination. **App. 69, L 4 to 24.** Respondent was then questioned about his 1996 plea of guilty, leading to the following exchange:

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[3] The large gap in time between the filing of the Information in June 2015 and the DHP hearing in December 2016 occurred because Respondent requested time to collaterally attack his 1996 guilty plea.

Q: All right. Mr. Dunfield, with respect to final adjudication of this criminal charge that occurred in 1996, I'm going to ask you a couple questions, and, if you would, I'd ask for you to answer them with yes-or-no responses, and during your case-in-chief, you'll get an opportunity to explain in narrative format. But for now, "yes" or "no," okay?

A: Okay

Q: All right. In December of 1996, did you plead guilty to the charge of statutory rape in the Circuit Court of Cedar County, Missouri?

A: I didn't believe that I did.

Q: I asked you for a yes-or-no answer.

A: No.

. . .

Q: In December, 1996, were you found guilty of the charge of statutory rape by the Circuit Court of Cedar County, Missouri; yes or no?

A: Yes. And if I could, the question before that I said "no" to, I believe that at this time - - well, I'd like - - I'll get into it later - -

. . .

Q: Well, I'd like a firm either "yes" or "no." Which is it? Because I don't want to hear a "yes" now and then hear a "no" later during your case-in-chief.

So the question again was, in December, 1996, did you plead guilty to the charge of statutory rape in the Circuit Court of Cedar County, Missouri?

A: I think the Court's found that I have, at this point.

Q: No, my question was, did you?

A: I never felt I did, so that was - -

Q: So the answer is "no"?

A: That would be "no."

App. 75, L. 3 to 76, L. 16.

Respondent was then questioned at length about the details of the 1996 plea, including references to the hearing transcript, the docket sheet, the Guilty Plea Form and other documents. Eventually, at the conclusion of this line of questioning, Respondent stated: "Today, after seeing everything, and over the last couple of years, everything that's transpired, I would say that I did plead guilty on that day." **App. 83, L. 21 to 84, L. 6.**

During his case-in-chief, Respondent testified that he previously attested to his innocence during his 1996 plea hearing, including raising questions about improper venue and making statements that showed that he had not committed statutory rape. ***See*** **App. 96, L. 24 to 97, L. 23.** With respect to his affirmations on his Candidate Declaration Form that he had not been convicted of or found guilty of or pled guilty to a felony, Respondent testified that he was under the belief that he could answer that question in the negative because he had "never been convicted, which I believe is accurate with an SIS." **App. 99, L. 17 to L. 20.** Respondent also attempted to offer the statement of an unnamed judge who allegedly told Respondent that because he received a SIS probation, he could answer that question on the Candidate Declaration Form with a "no." **App. 98, L. 23 to 99, L. 10.** Counsel for Informant objected on hearsay grounds to this testimony and after hearing the testimony as an offer of proof, Judge Bonacker rejected it. ***Id.***

During cross-examination, Informant was questioned about why he did not collaterally attack his guilty plea if he knew he was innocent. Respondent testified that in 1997, after entering his guilty plea, he hired a private attorney who does a "great deal" of criminal defense work. Respondent said he told the attorney that he was not guilty, and that the private attorney offered no assistance in setting aside his guilty plea. **App. 113, L. 2 to 114, L. 1.** Respondent also admitted that there was nothing in his application to the University of Arkansas School of Law where he stated he was not guilty, and in fact, that he told the school he pled guilty. **App. 112, L. 9 to 113, L. 1.** Respondent was also shown documents relating to his applications for admission to the Arkansas and Missouri Bars and admitted that he provided nothing in writing to either state showing or arguing that he was not guilty, stating only that he made such statements orally to various representatives of the respective state Board of Law Examiners. ***See*** **App. 117, L. 15 to 123, L. 5.**

With respect to his Candidate Declaration Form, Respondent was asked what legal authorities he relied upon for his belief that he could answer the question of whether he had been convicted of or found guilty of or pled guilty to a felony in the negative. Respondent testified that the closed record provisions of Sections 610.105.1 and 610.110 RSMo., respectively, allowed him to answer the question "no."[4] **App. 124, L. 20 to 126,**

[4] Section 610.105.1 RSMo. provides in relevant part:

> If the person arrested is charged but the case is subsequently nolle prossed, dismissed, or the accused is found not guilty or imposition of sentence is suspended

L. 4. When asked if he researched the statutes to see if they specifically applied to candidate declaration forms, Respondent testified that he just assumed they did. **App. 126, L. 9 to L. 24.** Respondent stated that although he was aware of these two statutes at the time he completed his Candidate Declaration Form, he did not plead or cite these two statutes in his Answer to Lynn Ewing's Petition challenging his candidacy for Vernon County Prosecuting Attorney. **App. 128, L. 7 to 129, L. 13.** Respondent further stated that he did not file an appeal citing these statutes challenging Judge Perigo's Order disqualifying him as a candidate for Vernon County Prosecuting Attorney. **App. 129, L. 14 to 23.** Respondent did testify that he mentioned these statutes at the August 29th, 2014 hearing before Judge Perigo. **App. 129, L. 24 to 130, L. 21.** However, Informant's review of the transcript from the August 2014 hearing shows only that Respondent made reference to a different statute, Section 557.011.3 RSMo., which generally outlines the different sentences a court may impose, including a SIS. **App. 458, L 24.**

> in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records . . . ."

Section 610.110 RSMo. provides that:

> No person as to whom such records have become closed records shall thereafter, under any provision of law, be held to be guilty of perjury or otherwise of giving a false statement by reason of his failure to recite or acknowledge such arrest or trial in response to any inquiry made of him for any purpose . . . ."

Respondent was also asked about his assertion in his Answer to the Information that he spoke with the Missouri Ethics Commission by telephone and "was informed that it was their opinion that he was eligible." **App. 30.** At the hearing, Respondent testified that it was his understanding that the Ethics Commission does not give written opinions following requests through their website or otherwise. **App. 131, L. 4 to L. 24.**

H. DHP Decision

On December 28, 2016, the DHP entered its Decision. **App. 573-76.** With respect to Count I, the DHP unanimously found that "Respondent violated Rule 4-8.4(c) by stating under oath that he had not been found guilty of a felony in his Candidate Declaration Form, which he signed under oath on February 28, 2014 . . . ." **App. 575.** The panel made no findings with respect to the alleged Rule 4-8.4(d) violation in Count I. With respect to Count II, the DHP found that Respondent did not violate Rule 3-8.4 [sic] as alleged in Count II of the Information and recommended that Count II be dismissed.[5] **App. 575-76.** The DHP recommended that Respondent be suspended from the practice of law for six months, with execution of the suspension stayed, and Respondent placed on probation for a period of two (2) years. **App. 576.**

On January 18, 2017, the OCDC filed its notice of rejection of the DHP Decision. **App. 577.** In this review, Informant challenges only the DHP's recommended discipline,

[5] Respectfully, Informant believes that the DHP's reference to Rule 3-8.4 was a scrivener's error and that the correct reference is Rule 4-8.4 which was charged in the Information.

requesting instead that Respondent be suspended from the practice of law indefinitely, with no leave to apply for reinstatement for at least one year.

POINTS RELIED ON

I.

RESPONDENT VIOLATED RULE 4-8.4(c) BY FALSELY DECLARING ON HIS CANDIDATE DECLARATION FORM FOR VERNON COUNTY PROSECUTING ATTORNEY THAT HE HAD NOT BEEN FOUND GUILTY OF OR PLED GUILTY TO A FELONY UNDER THE LAWS OF MISSOURI WHEN, IN FACT, HE PLED GUILTY TO AND WAS FOUND GUILTY OF FELONY STATUTORY RAPE IN THE CIRCUIT COURT OF CEDAR COUNTY MISSOURI IN DECEMBER 1996.

Missouri Supreme Court Rule 4-8.4

Section 115.306 RSMo.

II.

RESPONDENT'S MULTIPLE AND DIFFERING EXPLANATIONS OF WHETHER OR NOT HE PLED GUILTY IN 1996 UP TO AND INCLUDING AT THE TIME OF THE DHP HEARING CONSTITUTE AN ADDITIONAL VIOLATION OF RULE 4-8.4(c), OR IN THE ALTERNATIVE, AGGRAVATE THE UNDERLYING RULE 4-8.4(c) VIOLATION SET FORTH IN POINT I.

Missouri Supreme Court Rule 4-8.4

In re Crews, 159 S.W.3d 355, 360 (Mo. banc 2005).

III.

UPON APPLICATION OF THE ABA SANCTION STANDARDS, INCLUDING AGGRAVATING AND MITIGATING FACTORS, AND PRIOR DECISIONS OF THIS COURT, THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE FOR A PERIOD OF NOT LESS THAN ONE YEAR.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

In re Cary and Danis, 89 S.W.3d 477 (Mo. banc 2002)

In re Eisenstein, 485 S.W.3d 759 (Mo. banc 2016)

Matter of Cupples, 952 S.W.2d 226 (Mo. banc 1997)

ARGUMENT

I.

RESPONDENT VIOLATED RULE 4-8.4(c) BY FALSELY DECLARING ON HIS CANDIDATE DECLARATION FORM FOR VERNON COUNTY PROSECUTING ATTORNEY THAT HE HAD NOT BEEN FOUND GUILTY OF OR PLED GUILTY TO A FELONY UNDER THE LAWS OF MISSOURI WHEN, IN FACT, HE PLED GUILTY TO AND WAS FOUND GUILTY OF FELONY STATUTORY RAPE IN THE CIRCUIT COURT OF CEDAR COUNTY MISSOURI IN DECEMBER 1996.

Misconduct under Rule 4-8.4(c)

Rule 4-8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. In 2014, Section 115.350 RSMo. provided that "No person shall qualify as a candidate for elective public office in the State of Missouri who has been convicted of or found guilty of or pled guilty to a felony under the laws of this state."[6] In this case, the facts establish that Respondent pled guilty

[6] Section 115.350 RSMo. was repealed in 2015 and replaced by Section 115.306 RSMo. which similarly states that "[n]o person shall qualify as a candidate for elective public office in the state of Missouri who has been found guilty of or pled guilty to a felony or misdemeanor under the federal laws of the United States of America or to a felony under the laws of this state . . . ."

to a felony in Cedar County Missouri in 1996. In 2014, he completed a Candidate Declaration Form for Vernon County Prosecuting Attorney wherein he swore and affirmed, under oath, that he had not been convicted of or pled guilty to or found guilty of a felony under the laws of the state of Missouri. **App. 265-66; 270.** As correctly found by the DHP, this was dishonest conduct in violation of Rule 4-8.4(c). **App. 575.**

Respondent's arguments that he did not knowingly make a false statement when he completed his Candidate Declaration Form are bizarre and unpersuasive. His testimony that he spoke to a judge who advised him he could answer the question of whether he had been convicted of or plead guilty to or found guilty on the candidate declaration form was correctly rejected by the DHP as hearsay. **App. 98, L. 23 to 99, L. 10.** His testimony that he spoke with the Missouri Ethics Commission lacks evidentiary support such as an advisory opinion or the name of the person or persons at the Commission with whom he spoke and his belief that he could not request an opinion appears to be incorrect as a matter of law. **App. 131, L.4 to L. 24; 482, L. 1 to L. 13.** *See* Section 105.955.16(1) RSMo. ("Upon written request for an advisory opinion received by the commission, and if the commission determines that the person requesting the opinion would be directly affected by the application of law to the facts presented by the requesting person, the commission shall issue a written opinion . . . .")

His purported reliance on Sections 610.105 and 610.110 RSMo. is also unavailing. He testified that he relied on both statutes at the time he completed his Candidate Declaration Form, but yet failed to cite either statute in his Answer to the Petition challenging his candidacy filed by Lynn Ewing. **App. 128, L. 7 to 129, L. 13.** He again

failed to raise either statute at the August 29, 2014 hearing in front of Judge Perigo and did not appeal Judge Perigo's judgment citing either statute. **App. 129, L. 14 to 130, L. 21; 458, L. 24.** Respondent also testified that he "assumed" both statutes applied to statements made on a Candidate Declaration Form, but provided no case law or statutory authority to that effect. **App. 126, L. 9 to L. 24.**

Accordingly, for all the reasons set forth above, this Court should uphold the DHP's finding that Respondent committed misconduct by engaging in dishonest conduct as prohibited by Rule 4-8.4(c).

II.

RESPONDENT'S MULTIPLE AND DIFFERING EXPLANATIONS OF WHETHER OR NOT HE PLED GUILTY IN 1996 UP TO AND INCLUDING AT THE TIME OF THE DHP HEARING CONSTITUTE AN ADDITIONAL VIOLATION OF RULE 4-8.4(c), OR IN THE ALTERNATIVE, AGGRAVATE THE UNDERLYING RULE 4-8.4(c) VIOLATION SET FORTH IN POINT I.

Although not formally charged in the Information, Informant respectfully submits that Respondent's multiple changing and differing explanations of whether or not he pled guilty in 1996, which continued up to and during the DHP hearing, constitute an additional violation of Rule 4-8.4(c), or in the alternative, aggravate the underlying 4-8.4(c) violation found by the DHP.

This Court has found that an attorney who offers multiple or different explanations for his misconduct also violates Rule 4-8.4(c). *In re Crews*, 159 S.W.3d 355, 360 (Mo. banc 2005). In *Crews*, an attorney failed to respond to or defend a motion for summary judgment that was filed against his clients and offered different and varied explanations for his failures to his clients, the OCDC and at the disciplinary hearing. *Id.* at 358. The attorney offered similar inconsistencies regarding his failure to properly appeal his clients' case. *See id.* at 358. This Court found that the "multiple and differing explanations Respondent provided to the Plaintiffs, the court and the DHP with regard to his failure to defend against the summary judgment motion and prepare an acceptable brief for the court of appeals supports the determination that he violated Rule 4-8.4(c)." *Id* at 360.

At the hearing, counsel for Informant discussed *Crews* as the basis for an enhancement of a Rule 4-8.4(c) violation. **App. 155, L. 22 to 156, L. 13.** Here, as in *Crews*, Respondent's multiple and differing explanations of whether or not he pled guilty in 1996 constitute further dishonest statements or misrepresentations in violation of Rule 4-8.4(c), or at least aggravate the underlying Rule 4-8.4(c) charge of lying on the Candidate Declaration Form. Respondent testified that he has a nearly photographic memory. **App. 442, L. 20-23; 443, L. 7-9.** The evidence from the December 1996 hearing clearly shows that Respondent pled guilty and understood he was pleading guilty at that time. **App. 279-80; 284-307.** In 2007, he disclosed his guilty plea in his application for admission to the University of Arkansas School of Law. **App. 523, 530.** In 2010, he disclosed the guilty plea to both the Arkansas and Missouri Boards of Law Examiners. **App. 532, 555.** However, in July 2014, Respondent told the *Nevada Daily Mail* newspaper that he was never convicted, never pleaded guilty to and was never found guilty of a felony. **App. 571.** He later testified, under oath, in a hearing in front of Judge Perigo on August 29, 2014, that he honestly didn't believe that he had ever pled guilty or been found guilty. **App. 480, L. 14-20.** In his Answer to the Information filed on July 16, 2015, Respondent again admitted that he pled guilty. **App. 29; 31.** However, prior to the DHP hearing in December, the parties prepared a stipulation of facts, but Respondent would not stipulate that he pled guilty in 1996 and attempted to change his admissions to denials at the hearing. **App. 66, L. 25 to 68, L. 13.** Furthermore, when asked to respond with a simple "yes" or "no" answer at the DHP hearing about his plea and finding of guilt, Respondent was equivocal and evasive. **App. 75, L. 3 to 76, L. 16.** Only after being walked through all the information

surrounding his plea, including his testimony, the Guilty Plea Form, the docket sheet and other information did Respondent finally concede that he pled guilty in 1996. **App. 83, L. 21 to 84, L. 6.**

Accordingly, for all these reasons, this Court should find that Respondent's multiple and differing accounts of whether or not he pled guilty in 1996 constitute an additional violation of Rule 4-8.4(c), or in the alternative, that they aggravate or enhance the underlying Rule 4-8.4(c) violation found by the DHP and discussed in Point I, above.

III.

UPON APPLICATION OF THE ABA SANCTION STANDARDS, INCLUDING AGGRAVATING AND MITIGATING FACTORS, AND PRIOR DECISIONS OF THIS COURT, THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE FOR A PERIOD OF NOT LESS THAN ONE YEAR.

Respondent's conduct in making a false statement on his Candidate Declaration Form, under oath, in violation of Rule 4-8.4(c), his multiple and differing explanations of whether or not he pled guilty, also in violation of Rule 4-8.4(c), as well as consideration of aggravating and mitigating factors warrant the imposition of serious discipline in this case. Informant respectfully submits that Respondent should receive an indefinite suspension from the practice of law, with no leave to apply for reinstatement for at least one year.

Standard

Sanction analysis commonly derives from several sources: parties' recommendations or stipulations; hearing panel recommendations; applicable rules, e.g. Rule 5.225 (the probation rule); application of the ABA Standards for Imposing Lawyer Sanctions (1991 ed.); consideration of previous Missouri Supreme Court decisions for consistency; and other jurisdictions' decisions. In deciding what sanctions to recommend, the OCDC routinely consider all of these sources, whether they are reaching a stipulation or whether in more adversarial settings. As importantly, the OCDC attempts to consider the Court's many unreported decisions made in stipulated and contested cases. Using all sources, the analysis is then applied to each new case, and considered along with any

aggravating or mitigating factors. It is the goal of the OCDC to recommend sanctions in accord with those apparent standards and to justify or explain any deviations from the standards.

Analysis

This is an honesty case. This Court has specifically noted that: "Honesty is, perhaps, the most essential quality for a lawyer." *Matter of Cupples*, 952 S.W.2d 226, 238 (Mo. banc 1997) (Covington, J. concurring in part and dissenting in part). ABA Standards 6.1 and 6.12 provide that suspension is appropriate when the case involves conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit or misrepresentation to the court. *In re Eisenstein*, 485 S.W. 3d 759, 763 (Mo. banc 2016) (citing *In re Madison*, 282 S.W.3d 350, 361 (Mo. banc 2009)). *See also Cupples*, 952 S.W.2d at 237 (listing cases) ("[t]his Court disciplines dishonest conduct by disbarment or suspension"). (Covington, J. concurring in part and dissenting in part).

In this case, the DHP recommended that Respondent receive a six month suspension from the practice of law, with said suspension stayed and for Respondent to be placed on probation for two years. **App. 576**. The OCDC respectfully rejects this recommendation and submits that Respondent's conduct justifies not just a six month, but a one year suspension from the practice of law, without probation.

Recently, in *Eisenstein*, a lawyer was suspended for six months for dishonestly obtaining evidence through improper means and failing to disclose it to opposing counsel. *Eisenstein*, 485 S.W.at 763-64. Judge Fischer respectfully dissented, noting that a six

month suspension was the baseline discipline under the ABA Standards, and stating he would have suspended the attorney for a year based on the lack of mitigating factors and presence of several aggravating factors. *Id.* at 764-66 (Fischer, J. dissenting). This court has in the past suspended attorneys for a year based on dishonest conduct. *See, e.g. In re Crews*, 159.SW.3d 355 (Mo. banc 2005) (discussed above in Point II) and *In re Cary and Danis*, 89 S.W.3d 477 (Mo. banc 2002) (withholding evidence and making false statements warranted a one year suspension from the practice of law for two attorneys.)

Here, it is of great concern to the OCDC not only that Respondent made a false statement, but also the context in which it was made. The Missouri General Assembly has decided that as a matter of public policy, those who have been convicted of or found guilty of or pled guilty to a felony are ineligible to run for certain public offices, including the Office of Prosecuting Attorney. *See* former Section 115.350 and Section 115.306 RSMo. In an effort to subvert this public policy, Respondent falsely stated, under oath, that he had not pled guilty to a felony under the laws of Missouri. In so doing, Respondent not only lied, but possibly committed an additional crime, although he has not been charged. *See* Section 115.405.1 RSMo. ("Any person making a sworn statement, affidavit or declaration of candidacy required by this subchapter who swears falsely or signs such document knowing the statements therein are untrue shall be deemed guilty of a class one election offense.")

Consider also that the position for which Respondent was applying—Prosecuting Attorney of Vernon County—is the chief law enforcement officer for a county of roughly

21,000 Missourians.[7] Had he been elected, Respondent would have been charged with prosecuting criminal offenses possibly resulting in significant deprivations of liberty for those convicted or found guilty, including, but not limited to, the death penalty. Those criminal defendants, the victims, as well as county citizens deserve nothing less than total honesty from a prosecuting attorney.

Furthermore, had Respondent's misconduct and guilty plea been discovered after election, the only option would have been to remove him through a writ of *quo warranto* pursuant to Chapter 531 RSMo. *See e.g., State v. Young*, 362 S.W.3d 386 (Mo. banc 2012) (discussing *quo warranto* proceedings to remove elected officials due to prior felony guilty plea). Such action would further burden state agencies, the judicial system, and the citizens of Vernon County. Consider also the burdens likely imposed on these same entities by those convicted by Respondent to collaterally attack their sentences after his removal from office on the basis of prosecutorial misconduct or fraud. As illustrated by the highly publicized disbarment of former Durham County North Carolina Prosecuting Attorney Mike Nifong for dishonest conduct during the Duke Lacrosse rape investigation in 2006, such concerns are not merely theoretical, but real. *See e.g.,* Justin Block, *10 Years Later, The Duke Lacrosse Rape Case Still Stings*, Huffington Post (March 11, 2016), available at http://www.huffingtonpost.com/entry/duke-lacrosse-rape-espn-30-for-

[7] United States Census Bureau – Quick Facts – Vernon County, Missouri, *available at* https://www.census.gov/quickfacts/table/PST045216/29217,00 (last visited April 9, 2017) (estimating Vernon County's population at 20,723 as of July 1, 2016).

30_us_56e07e33e4b065e2e3d486f7 (last visited April 9, 2017) (citing a 2013 study identifying more than two dozen cases where courts set aside convictions due to prosecutorial misconduct).

Finally, as discussed in Point II, above, there is the issue of Respondent's multiple and differing explanations of his guilty plea over the past twenty years.

Aggravating Circumstances

ABA Standard 9.22 sets forth factors which may be considered aggravating circumstances. Respondent's Aggravating factors include:

(a) **Dishonest or Selfish Motive.** Respondent lied on his Candidate Declaration Form in an effort to benefit himself by being elected Prosecuting Attorney of Vernon County.

(b) **Refusal to Acknowledge Wrongful Nature of Conduct.** Respondent has neither conceded that he committed any ethical violations nor taken any responsibility for his behavior. He has at times in the recent past, under oath, blamed the judge and his public defender for not knowing the law and/or providing him with ineffective assistance of counsel resulting in his 1996 guilty plea. **App. 433, L. 19 to 21; 449, L. 15 to L. 16.**

Mitigating Circumstances

ABA Standard 9.32 sets forth factors which may be considered mitigating circumstances. Respondent's Mitigating factors include:

(a) Lack of Prior Discipline.

Respondent has no previous discipline.

Probation Is Not Appropriate In This Case

Missouri Supreme Court Rule 5.225 sets the minimum standards for the use of probation in Missouri discipline cases. A lawyer is eligible for probation if (a) the lawyer is unlikely to harm the public and can be supervised; (b) continued practice by the lawyer would not harm the profession's reputation; and (c) the misconduct does not warrant disbarment. Rule 5.225.

Informant does not believe that probation is appropriate in this case. Respondent made a dishonest statement under oath that harmed both the public and the reputation of the profession as discussed more fully above. Respondent's refusal to accept responsibility and tendency to blame others leads to questions about whether he can be supervised. Further, Respondent has not engaged in the type of conduct conducive to monitoring on probation, such as communication, diligence or trust accounting issues.

If the Court elects to impose stayed suspension with probation, Informant would welcome the opportunity to recommend probation terms and conditions.

CONCLUSION

Informant respectfully recommends that Respondent's license be suspended. Said suspension should be indefinite, with no leave to apply for reinstatement for at least one year.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2017, a true and correct copy of the foregoing was served on Respondent via the electronic filing system pursuant to Rule 103.08:

Dustin Dunfield
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P. O. Box 306
Nevada, MO 64772

Kevin J. Rapp

RULE 84.06(c) CERTIFICATION

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 7059 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

_____

Kevin J. Rapp