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IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:

RYAN J. MCMILLIN
1470 NW 64th Terrace
Kansas City, MO 64118

Missouri Bar No. 50167

Respondent.

Supreme Court No.: SC96223

RESPONDENT'S BRIEF

KEMPTON AND RUSSELL

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POINT RELIED ON

I.

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

A. RESPONDENT COMMINGLED PERSONAL FUNDS AND CLIENT FUNDS IN HIS TRUST ACCOUNT; MADE CASH WITHDRAWALS FROM HIS TRUST ACCOUNT AND FAILED TO KEEP ACCURATE TRUST ACCOUNT RECORDS IN VIOLATION OF RULE 4-1.15;

B. RESPONDENT VIOLATED RULES 4-8.4(c) AND 4-8.4(d) BY INTENTIONALLY MISAPPROPRIATED ADVANCED FEES WHICH IS DISHONEST AND DAMAGES THE INTEGRITY OF THE PROFESSION;

C. RESPONDENT VIOLATED RULE 4-8.1(c) BY FAILING TO RESPOND TO LAWFUL DEMANDS FOR INFORMATION FROM THE OFFICE OF CHIEF DISCIPLINARY COUNSEL; AND

D. RESPONDENT VIOLATED RULES 4-1.3, 4-1.4 AND 4-1.5 IN HIS REPRESENTATION OF SEVERAL CLIENTS BY FAILING TO DILIGENTLY PURSUE THE CASES, COMMUNICATE AND THEREFORE EARN THE FEES THAT HAD BEEN ADVANCED.

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POINT RELIED ON

II.

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

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ARGUMENT I

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

A. RESPONDENT COMMINGLED PERSONAL FUNDS AND CLIENT FUNDS IN HIS TRUST ACCOUNT; MADE CASH WITHDRAWALS FROM HIS TRUST ACCOUNT AND FAILED TO KEEP ACCURATE TRUST ACCOUNT RECORDS IN VIOLATION OF RULE 4-1.15;

B. RESPONDENT VIOLATED RULES 4-8.4(c) AND 4-8.4(d) BY INTENTIONALLY MISAPPROPRIATED ADVANCED FEES WHICH IS DISHONEST AND DAMAGES THE INTEGRITY OF THE PROFESSION;

C. RESPONDENT VIOLATED RULE 4-8.1(c) BY FAILING TO RESPOND TO LAWFUL DEMANDS FOR INFORMATION FROM THE OFFICE OF CHIEF DISCIPLINARY COUNSEL; AND

D. RESPONDENT VIOLATED RULES 4-1.3, 4-1.4 AND 4-1.5 IN HIS REPRESENTATION OF SEVERAL CLIENTS BY

FAILING TO DILIGENTLY PURSUE THE CASES, COMMUNICATE AND THEREFORE EARN THE FEES THAT HAD BEEN ADVANCED.

Respondent admitted in his answer to the Information, to the Amended Information, in his Stipulation with the OCDC and in his testimony before the Disciplinary Hearing Panel that he had violated the Rules of Professional Conduct in the ways set forth in the Information and that he was and is subject to discipline from the Court for those violations.

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ARGUMENT II

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

Ryan McMillin graduated from William Jewell College in the spring of 1995. He had played baseball at William Jewell and had hoped for a professional baseball career, however, when he graduated it became apparent that was not a viable opportunity. He had considered the law profession for some time as a possible career path if baseball did not pan out. (TR 172, 173)

He enrolled in Oklahoma City University Law School in 1995 and graduated in the spring of 1998. He then returned to Kansas City and went to work for Greg Harrison in Liberty. From there he moved to an office in Jack Norton's offices in Gladstone and practiced there for several years. (TR 136)

By all reports he had a successful practice and provided competent representation primarily in domestic relations and criminal matters. (TR 137) His practice permitted him to play a lot of golf which he did. Unfortunately when he played golf he drank a lot of alcohol and his alcohol consumption became a problem for him in 2007 or 2008. At that point he was drinking daily but he did not go to Court when he was drinking. TR 138

Cocaine came into his life in about 2012. He was playing golf with a buddy and drank too much alcohol in the first seven or eight holes. (TR 139) His drinking affected

his golf and his buddy gave him some cocaine to offset the effects of the alcohol. (TR 139) Respondent found that it did offset the effect of the alcohol and it helped keep him sober. By 2013 the Cocaine had become a problem, (TR 140) although he didn't realize it until he received a call from MOLAP. (TR 141) He was surprised to learn that other attorneys thought he had a drug or alcohol problem. (TR 172)

While he was abusing alcohol and cocaine he had several physical health problems. Both his parents are diabetics (TR 145) and on his father's side there is significant history of alcohol abuse. (TR 63) Respondent's brother also has diabetes and Respondent has diabetes, high blood pressure and high cholesterol. He takes nine medications for those conditions. (TR 146) In early 2016 he was checked at the hospital and his blood sugar was above 450, his cholesterol was over 700. (TR 148)

In July 2015 he had a severe cardiac incident which was life threatening and apparently caused him to have minimal heart functioning which coupled with his high blood pressure, threatened his ability to live. (TR 60, 62)

After his cardiac incident he made a decision to quit drinking and to quit using cocaine. He has been alcohol and drug free since the end of July or the beginning of August 2015. (TR 142) His longtime girlfriend with whom he lives also quit drinking at that time in order to be supportive of him. (TR 145)

In February 2016 Respondent was diagnosed with sleep apnea while in the hospital. The sleep study revealed he was averaging about 95 stops, or apnea moments, per hour. He was told that 50-60 stops is considered high. (TR 149) He was prescribed a

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CPAP machine which has substantially improved his ability to sleep and obtain proper rest. (TR150)

On May 3, 2013, the OCDC received two overdraft notifications on Respondent's trust account. These overdrafts were opened as OCDC File Number 13-718OD. On June 19, 2013, the OCDC received a third overdraft notice on Respondent's trust account. As a result of those trust account overdraft notifications Kelly Dillon reviewed Respondent's trust account records for the period of February 1, 2013 through June 30, 2013. Her review indicated that Respondent's trust account practices violated Missouri Supreme Court Rule 4-1.15 when Respondent deposited earned fees to the trust account, made premature withdrawals from the trust account for fees which had not as yet been earned and by failing to keep proper trust account records including client ledgers, billing statements and receipts.

The OCDC offered Respondent the opportunity to participate in a diversion program on file number 13-718OD. Diversions are governed by Supreme Court Rule 5.105. That Rule provides that a lawyer may participate in a diversion program if 1. The allegations are of a minor nature; 2. There is little likelihood the lawyer will harm the public during the period of diversion; 3. The Chief Disciplinary Counsel can adequately supervise the conditions of the program; and 4. Participation in the program is likely to benefit the lawyer and accomplish the goals of the program.

Further the Rule provides the diversion program is not appropriate, absent special circumstances, in the following situations:

1. The misconduct is likely to result in imposition of discipline by this Court;

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2. The misconduct involves misappropriation of funds or property of a client, or a third-party;
3. The misconduct involves criminal activity as set forth in Rule 5.21;
4. The misconduct resulted in or is likely to result in actual injury, such as loss of money, legal rights or valuable property rights, to a client or other person, unless restitution is made a condition of diversion;
5. The lawyer has previously received discipline;
6. The misconduct involves dishonesty, deceit, fraud or misrepresentation; or
7. The misconduct is part of a pattern of similar misconduct.

Respondent accepted the offer of diversion and on September 4, 2013 signed the diversion agreement. The term of the agreement was for one year from the date it was signed by Respondent, to wit September 4, 2014. Other terms of the agreement required Respondent to attend ethics school, to be evaluated by Dr. Stanley Bier relative to a possible gambling addiction, to file monthly reports and to comply with the Rules of Professional Conduct.

Respondent attended the ethics school, met with Dr. Bier but admits he was not completely candid with him and failed to file monthly reports. (TR 153, TR 157) In addition Respondent received two more client complaints and an additional overdraft. The diversion agreement was terminated August 25, 2014. An Information was filed in which file 13-718OD was the first count. The Information was amended twice. Answers were filed to the original, the amended and the second amended Information and those answers admitted all the alleged violations and raised by answer the mitigating factor that

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Respondent suffered from a mental disorder that should be considered in determining the appropriate discipline to be imposed.

Respondent's Counsel employed Dr. Marilyn Hutchinson, an independent licensed PhD psychologist to determine if Respondent had a mental disorder as defined in Supreme Court Rule 5.285. Dr. Hutchinson conducted an examination, wrote a report (TR 57) and testified before the Disciplinary Hearing Panel that Respondent had five different mental disorders. Those being alcohol use disorder, in remission DSM 5 305.9, stimulant addiction moderate, in remission DSM 5 304.20, major depression recurrent with mixed features DSM 5 296.22, not yet in full remission; generalized anxiety disorder DSM 5 300.02, not in full remission and personal disorder unspecified DSM 5 301.9. (TR 59)

In the comments to Rule 5.285 it states "conditions that impair judgment, cognitive ability, or volitional or emotional functioning in relation to performance of professional duties and commitments are the issue. Conditions that are more likely to produce this type of impairment include, but are not limited to, schizophrenia and other psychotic disorders, bipolar illness types I, II, major depressive disorder, substance dependence or abuse, delirium and dementia." (emphasis added). When asked whether the things she found (major depression and alcohol and substance abuse) fell into the major depressive disorder and substance dependence or abuse listed in the comment, Dr. Hutchinson stated "looks like a perfect fit." (TR 60)

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Dr. Hutchinson also testified that the mental disorder substantially impaired Respondent's judgment, his cognitive ability, or his volitional or emotional functioning in relation to his performance of professional duties and commitments. (TR 61)

At the disciplinary hearing Dr. Hutchinson was asked "and in your opinion, did the mental disorders that you found have a causative or direct and substantial relation to the professional misconduct, not responding to the OCDC, not handling his trust account, not taking care of clients?" Answer "It was completely responsible for it. From what I understand he was—prior to this drug and alcohol abuse that he was using to treat depression, which probably came from the medical conditions, I understand that he was a pretty competent attorney and was successful and that this downward spiral just got bigger and bigger kind of like a staircase that just keeps circling around and at the bottom it's really huge. But for the depression and anxiety and then the subsequent alcohol and drug use, he wouldn't be in this condition." (TR 64)

The 1992 ABA Standards for Imposing Lawyers Sanctions recognize mental disability and chemical dependency as mitigating factors. Standard 9.32(i), In the commentary on page 52 it states "Direct causation between the disability or chemical dependence must be established. If the offense is proven to be attributable solely to a disability or chemical dependency, it should be given the greatest weight." Dr. Hutchinson testified that the offenses are attributable solely to the disorder and the chemical dependency. Her testimony is uncontroverted and should be afforded the greatest weight.

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ABA Standard 9.32 also recognizes physical disability as a mitigating factor. Respondent's diabetes, heart problems, elevated blood sugars, high blood pressure and sleep apnea all are physically debilitating and contribute to Respondent's lethargy and his depression.

Respondent appeared before the Disciplinary Hearing Panel and gave testimony in which he again admitted all of the charges contained in the Second Amended Information. His testimony described candidly and in great detail his transitions from an able, competent attorney, who took care of his clients to the attorney whose judgment and conduct were so impacted that he did not conform to the rules of professional conduct. Respondent did not attempt to mislead the Disciplinary Hearing Panel in any fashion, he did not blame others for his misconduct, he did not offer excuses or denials but took full responsibility for his actions. (TR 127-176)

The members of the very experienced Disciplinary Hearing Panel participated in questioning Respondent and had the opportunity to judge his demeanor, his sincerity, his candor, his character and his abilities. (TR 172-176)

In the Disciplinary Hearing Panel findings at page 13 the Panel stated "…the Panel was impressed by the Respondent's frank testimony describing his fall from grace, his pattern of addiction, and his misconduct, without excuse or equivocation, and that Respondent has, by his own unrebutted testimony, been sober since approximately the end of July or first of August, 2016, more than one year previous to the hearing in this cause." (A 434)

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There are numerous reported cases where attorneys facing discipline for trust account violations have attempted to mislead the Disciplinary Hearing Panel, the Hearing Officer or the Master by producing false or manufactured evidence.

In the case of *In re Forge*, 747 S.W. 2d 141 (Mo. banc 1988) Mr. Forge received $1,500 from his client to cover costs of an appeal. Forge did not have a trust account so he placed the money in a personal checking account at Blue Ridge Bank and Trust Company which was titled in the names of Forge and his wife.

At the hearing before the Master, Forge testified the $1,500 deposit was to be used as a retainer for his attorney fees on the appeal. He also produced a bank statement from the Chrisman Sawyer Bank which he represented to be a bank statement for his trust account. The Chrisman Sawyer account was in the name of Forge and his wife. It was not a trust account. Forge had typed onto the statement next to his name the words "Trust Account."

At a later formal hearing Forge admitted that he had typed the words "Trust Account." Further at the second formal hearing Forge stated he had repaid the $1,500 to his client with interest when in fact he had only returned the money without interest.

Forge, like Respondent, had no prior disciplinary history. Forge lied at the hearings and produced a bank statement he had altered to make it appear he had a trust account. He also lied when he said he had repaid the client with interest.

Forge was found to have undergone some personal emotional trauma which manifested itself in his failing to respond to committee letters, and failing to appear at an investigative hearing. Forge's first wife and his mother died close in time, the former in

1980 the later in 1981. The Master found this resulted in extreme mental strain that affected Forge's law practice. Forge was suspended for six months.

Respondent appeared before the Disciplinary Hearing Panel and unlike Forge was open, candid, remorseful and forthcoming and did not attempt to mislead in any fashion. Respondent produced expert testimony that he suffered from five mental disorders and that his mental disorders were the sole cause of his misconduct. The DHP was impressed by Respondent's frank testimony and found that given Respondent's prior professional standing his problems were indeed the product of addictive, self-destructive, chemical abuse and gambling. (A 434) Unlike Respondent, Forge had no evidence of physical problems such as Respondent's diabetes, cardiac insufficiency, high blood pressure or sleep apnea. Looking at the ABA *Standards for Imposing Lawyer Sanctions*, Standard 6.11 provides "Disbarment is generally appropriate when a lawyer, with the intent to deceive the Court, makes a false statement, submits a false document, or improperly withholds material information and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding." At his hearing Forge was under oath and presented a document which he admittedly altered to make it look like he had a trust account when he did not. His was a disbarrable offense for which he received a six month suspension.

In the case of *In re Donaho*, 98 S.W. 3d 871 (Mo. banc 2003), Donaho was paid $760 by his client for attorney fees and court costs in connection with a Motion to Modify a child custody order. Donaho prepared the Motion which was promptly signed by his client. Inexplicably, Donaho did not file the Motion. Donaho then moved his law

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office from Illinois to St. Louis but did not advise his client of the move. The client made several attempts to contact Donaho but received no response to calls to the office or calls to Donaho at home or any response to his certified letter.

In response to a letter from a friend of the client, Donaho agreed to refund the money to the client if the client would give him a release. Donaho prepared a release which the client signed but Donaho did not refund the money. The client obtained a Judgment against Donaho in small claims Court for $765 and costs.

In the disciplinary hearing Donaho was informed by the committee that timely repayment of the $765 judgment would be regarded as a mitigating factor only if Donaho provided evidence of payment of the judgment. Donaho sent faxed copies of two money orders made payable to the client which Donaho represented had been sent to the client by certified mail. In reliance on Donaho's representation the committee issued an admonition to Donaho.

Instead of sending the money orders to the client, Donaho had instead kept them and cashed them in himself and kept the proceeds.

The Disciplinary Hearing Panel found that although Donaho's conduct was indisputably dishonest behavior, that disbarment was unnecessary. Donaho had no prior disciplinary record and perhaps had a drinking problem and he expressed remorse during the disciplinary proceedings.

This Court found that Donaho's misconduct was intentional and deceptive and that Donaho refused to acknowledge his dishonesty even when asked by the Court. The Court imposed an indefinite suspension with no leave to apply for reinstatement for 12 months.

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Even in cases involving misappropriation of funds the existence of a mental disorder should be considered in determining what discipline to impose providing the primary objective of protection of the public can be achieved. *In re Lang*, 641 S.W. 2d 77, 79 (Mo. banc 1982). Lang, like Respondent, accepted employment, received fees, but failed to do the work and did not return the fees. There were six counts of professional misconduct.

In the case of *In re Houtchens*, 555 S.W. 2d 24 (Mo. banc 1977), Houtchens settled client's claims, failed to remit the funds to the clients, told the clients that payments had not been made, comingled the funds with his own and used them for his own personal use. l.c. 25.

In addition, in another matter, he forged his clients' names to releases and checks, deposited the funds to his personal account, denied that a settlement had been made and did not remit the proceeds to his clients.

The Court found that absent a persuasive and acceptable mitigating factor disbarment would be the appropriate discipline. Evidence was presented that Houtchens suffered from psychotemporal epilepsy, chronic tension and excessive alcohol use. Houtchens presented evidence that he had quit drinking and was doing well.

This Court, in a *per curiam* opinion, suspended Houtchens indefinitely with no leave to apply for reinstatement for three years, upon a showing that he is a person of good moral character and fully qualified to be licensed as a member of the Bar of Missouri. l.c. 27.

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The Informant asks the Court to either disbar the Respondent or to suspend him indefinitely with no right to apply for reinstatement for three years. It has long been the law in Missouri that "Disbarment is an extreme measure and unless it is clear that the attorney should never practice law, some other less extreme means of discipline is preferred." *In re Adelman*, 734 S.W. 2d 509, 511 (Mo. banc 1987); *Matter of Dorsey*, 731 S.W. 2d 252, 253 (Mo. banc 1987); *Matter of Alpers*, 574 S.W. 2d 427, 428 (Mo. banc 1978).

Clearly the Disciplinary Hearing Panel understood the gravity of Respondent's misconduct, recognized 10 years of competent, able and appropriate service prior to his abuse of alcohol and cocaine, and determined he could once again become the able practitioner he once had been. (A 434)

The Disciplinary Hearing Panel also recognized that Respondent suffered from mental disorders that affected his ability to conform his conduct. The Disciplinary Hearing Panel favorably considered the testimony of Dr. Hutchinson that Respondent's misconduct was caused by his mental disorders. (A 434)

Likewise it is clear the Disciplinary Hearing Panel was impressed by Respondent's frank and open testimony of how his life and practice were affected by his substance abuse, his alcohol abuse and his depression. It is also clear that the Disciplinary Hearing Panel was impressed by Respondent's ability to remain drug and alcohol free from August 2015 to the present time. (A 434)

The ABA *Standards for Imposing Lawyer Sanctions* set out mitigating factors in Standard 9.32. Respondent has a number of those mitigating factors. He has an absence

of a prior disciplinary record, he has personal or emotional problem, he has made full and free disclosure to the Disciplinary Hearing Panel and has exhibited a cooperative attitude toward the proceedings by admitting his violations, he has physical disabilities, he has a mental disability or chemical dependency including alcoholism or drug abuse, suffers from depression and anxiety and he has certainly expressed remorse.

Respondent has acknowledged the wrongful nature of his misconduct, and has not submitted any false evidence, false statements or other deceptive practices during the disciplinary process.

The Disciplinary Hearing Panel found that Respondent has been a competent, able, honest attorney prior to his drug and alcohol abuse and found that he can again become a successful, able, competent and appropriate practitioner. Given the fact that he had already ceased his drug and alcohol abuse for more than a year and that Dr. Hutchinson had testified he was in remission for those conditions, the Disciplinary Hearing Panel recommended suspension without leave to apply for reinstatement for one year. (A 434)

Respondent accepted the Disciplinary Hearing Panel findings and recommendation. He has proved in the past the ability properly practice law. He has a sustained period of freedom from drug and alcohol use for what will be two years this August 1.

He has the support of his longtime girlfriend. (TR 65, TR 145) Dr. Hutchinson has given her opinion that his misconduct comes from his mental disorders, that he has been able to stay drug and alcohol free for almost two years and is in remission, that he can

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function properly in a manner that protects the public, and in all respects meets the requirements of Rule 5.285. (TR 67, TR 71)

Disbarment in this case is not necessary. There is no showing that Respondent should never again practice. Respondent agrees with Informant that suspension is appropriate. Given his freedom from drugs and alcohol, the Disciplinary Hearing Panel's recommendation of no right to reapply for one year is appropriate.

Disbarment would have the downside of not providing any financial remuneration to clients. The Application for Reinstatement process provides ample opportunity to determine any problem with Respondent's fitness. If there are concerns about Respondent's handling of his mental disorders, those can be addressed with appropriate requirements at the time of the investigation which will be conducted by the OCDC.

The fact that a lawyer is given the right to apply for reinstatement after a certain time period does not mean the reinstatement is going to occur. If given a suspension Respondent will have to take and pass the MPRE within two years prior to his application, and he will have to obtain the required continuing legal education credits before he can file his application. Supreme Court Rule 5.28.

The application will be forwarded to the OCDC for investigation and recommendation. Respondent will be required to complete a very thorough questionnaire. The time from the filing of the reinstatement application to the conclusion of the OCDC's investigation is often quite lengthy due in large part to the workload of the OCDC. Presently, the OCDC conducts an examination under oath of the applicant which is very thorough and which will explore any conditions which affect the applicant's ability to

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practice law competently, honestly, appropriately and in a way which will protect the public. Such conditions may be mental, physical, financial or involve anything which bears on the applicant's ability to practice without further incidents of misconduct.

While this Court is the ultimate determiner of the facts, the law, and the appropriate discipline, it should not disregard the determinations of the Disciplinary Hearing Panel. The Disciplinary Hearing Panel, like a judge sitting without a jury, has the opportunity to observe the Respondent, the witnesses, to ask questions of the Respondent and the witnesses and to determine the appropriate discipline to be imposed. The members of the Disciplinary Hearing Panel do their jobs with great care and insight, all without pay, and out of a sense of duty to the legal system. Their work should be recognized and their findings and recommendations given significant weight.

CONCLUSION

This Court should follow the findings and decision of the Disciplinary Hearing Panel and suspend Respondent indefinitely from the practice of law with no right to reapply for one year from the date of this Court's Order.

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RESPECTFULLY SUBMITED

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 4th day of April 2017, the above was sent to Informant and Informant's counsel via the Missouri Supreme Court e-filing system pursuant to Rule 103.08:

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_____

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CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(c);

3. Contains 4637 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Robert G. Russell

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