IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
THEODORE ROY HOEFLE	)	**Supreme Court #SC96110**
	)	
Respondent.	)	

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.

STATEMENT OF FACTS

Respondent, Theodore R. Hoefle, started his legal practice with the Crouch, Spangler and Douglas law firm in Harrisonville upon his admission to the bar in 2004. By 2013, he was a partner in the firm. He routinely practiced in the firm's Belton office two days each week while maintaining an office in the firm's primary office in Harrisonville. He spent most Mondays in Belton and more time there than any other firm lawyer. **App. 120 (Tr. 29); 159-160 (Tr. 68-69).**

In September 2013, Respondent expressed his displeasure when another partner, junior to Respondent, was named co-managing partner. **App. 99-100 (Tr. 8-9); 127 (Tr. 36).** Respondent showed "hard feelings" toward the firm. **App. 110 (Tr. 19); 127 (Tr. 36).**

A few weeks after his displeasure surfaced, Respondent reported to the firm and the Belton police that he found that the Belton office had been burglarized. That occurred on October 28, 2013, a Monday morning. **App. 102 (Tr. 11); 117 (Tr. 26).** He reported that a computer, two computer monitors, a scanner, a briefcase, and an iPad had been stolen. **App. 104 (Tr. 13); 227.**

The police investigated and found marks on the rear door to the office; the marks indicated a break-in. The police found no helpful fingerprints. **App. 197 (Tr. 106).** Respondent never asked whether the police found the burglar. **App. 197 (Tr. 106).**

One of the items reported as stolen was an Apple iPad purchased by Respondent earlier in 2013. **App. 227; 102 (Tr. 11).** The firm had reimbursed Respondent for the

iPad; he understood that it became firm property. **App. 188 (Tr. 97).** Respondent testified that more than a week before the October 28 break-in, he had realized that the iPad was missing. In fact, on October 21, 2013, one week before the break-in, Respondent had set the iPad to "Lost Mode." Respondent explained Apple's "Lost Mode" this way:

> "…I put it into "Lost Mode," which, as I understand it, is supposed to make it show up on the map whenever it comes into contact with a wireless network. It's supposed to make it easier to find."

App. 117 (Tr. 26); 159-160 (Tr. 68-69); App. 160 (Tr. 69). He said that he reported it as stolen with the other items because he believed - after the break-in - that he had left it on top of a filing cabinet at the Belton office. **App. 165 (Tr. 74).** He also said that he had probably been to the Belton office at least once or twice during the week between setting the iPad in "Lost Mode" (October 21) and the break-in (October 28). **App. 194-196 (Tr. 103-105).**

Respondent never told his firm the iPad had already been missing at the time of the break-in. **App. 181 (Tr. 90).**

When asked by his partners, on November 8, 2013, whether he had tried to use the "Find my iPhone" feature to locate the iPad, Respondent told them he had done so. He said he found nothing. **App. 105-106 (Tr. 14-15); 136-138 (Tr. 45-47).** Respondent

told the Disciplinary Hearing Panel that he tried that feature at least four times after the break-in, all without success. **App. 164 (Tr. 73).**

Three days after the break-in, (October 31) Respondent took the iPad out of "Lost Mode." **App. (Exhibit A) 222-225; (Exhibit E) 228; 182-186 (Tr. 91-95).** He told the Disciplinary Hearing Panel that he did that because an online article about lost Apple devices suggested that the device location might be revealed when a new user attempted to start it. **App. 164 (Tr. 73).** Five days later, on November 5, 2013, Respondent took another step with Apple by disabling the "Find My iPhone" feature. **App. 166 (Tr. 75); 181-186 (Tr. 90-95).** Apple notified Respondent that by disabling "Find My iPhone", "the device can no longer be activated, placed in "Lost Mode," or remotely erased using iCloud.com/find on the find my iPhone iOS app." **(Exhibit E) App. 228.** Respondent explained that he tried to deactivate the iPad to prevent others from accessing information on the device and on the firm's computers. But, the message from Apple not only explained that the device could no longer be remotely erased, it also informed him that his "Apple ID and password will no longer be required for someone to erase, reactivate, and use your iPad." **(Exhibit E) App. 228.** Respondent read that message. **App. 184-185 (Tr. 93-94)**

Respondent bought two more iPads three weeks later, on November 17, 2013. The firm reimbursed him for one of the new iPads and he kept the other for personal use. **App. 106 (Tr. 15); 167-168 (Tr. 76-77); App. (Exhibit F) 229.**

Charles Weedman, one of the two co-managing partners of the firm, coordinated with the police and the firm's insurer (Auto Owners) to submit claims for the stolen property. **App. 102-104 (Tr. 11-13).** Based on Respondent's report, the original missing iPad was included on the list of stolen property. Charles Weedman made a formal claim for the iPad and other equipment to Auto Owners in April 2014. **App. 107-108 (Tr. 16-17); 130 (Tr. 39).**

Later that summer, in July and August 2014, the firm noticed recurrent computer problems. **App. 108-110 (Tr. 17-19).** The co-managing partner responsible for technology, Andrew Goffinet, analyzed the issue and saw that many of Respondent's files were being deleted. Charles Weedman and Andrew Goffinet testified that when Respondent was confronted about the computer issues, he offered explanations that they did not find credible. **App. 108-111 (Tr. 17-20); 140-144 (Tr. 49-53).** The firm terminated Respondent on August 31, 2014. **App. 108 (Tr. 17).** They asked him to return firm property.

A few weeks later, in October, Respondent delivered the original (reportedly stolen) iPad to the firm. **App. 111 (Tr. 20); 199 (Tr. 108).** Respondent initially told the Hearing Panel that he wasn't sure which iPad he had returned, but eventually testified that he knew he was returning the original iPad. **App. 198-199 (Tr. 107-108).**

Relying on his statement that the original iPad was stolen in the break-in, Respondent's partners assumed Respondent had returned the replacement iPad. **App. 112-113 (Tr. 21-22).** When they contacted Apple for assistance in reactivating it, they

learned that Respondent had returned the original (reportedly stolen) iPad. **App. 111-114 (Tr. 20-23); 149 (Tr. 58).** They did not confront Respondent; instead, they submitted a report to the Office of Chief Disciplinary Counsel. **App. 115 (Tr. 24); Exhibit H 230-231.**

The Office of Chief Disciplinary Counsel and Region IV Disciplinary Committee investigated the firm's complaint. To explain why he still had the original iPad (reported as stolen in October 2013) in October 2014, Respondent told the OCDC he had found it in his car in December 2013. **App. 115 (Tr. 24).** He later said that he found it in his car when he was getting ready for a family trip over Thanksgiving in 2013. **App. 169 (Tr. 78).** He said he wondered what to do, but did nothing. **App. 169 (Tr. 78).** Respondent did not tell his firm (he was still a partner at that time), or the police, that he had found the original (reportedly stolen) iPad. When asked why, he said: "Primarily probably mostly because I was essentially embarrassed that the darn thing had been in my car and I didn't really have an explanation for why it was in my car and I didn't know it was in my car – I unfortunately made the decision not to say anything." **App. 169 (Tr. 78).** He admitted "In hindsight, 100 percent, I should have." **App. 169 (Tr. 78).** (See also Exhibit I Respondent's initial response to the OCDC). **App. 232-233.**

Five months later, in April 2014, Respondent was a partner at the firm. At that time, Mr. Weedman submitted the insurance claim for items stolen from the firm's Belton office. Respondent still did not report that he had found the original iPad. **App. 115 (Tr. 24); 169-170 (Tr. 78-79); 187-188 (Tr. 96-97).**

In October 2014, when the firm terminated Respondent and asked him to return firm property, he delivered only the original iPad. **App. 169-171 (Tr. 79-81).** He did not return the replacement iPad, (bought in November 2013), although he acknowledged both iPads were firm property. **App. 187-188 (Tr. 96-98).** The firm had reimbursed him for both iPads. **App. 170-171 (Tr. 79-80).**

When asked why he did not then return the replacement iPad, Respondent testified:

> "I don't know, other than the fact that it obviously would have raised questions to turn in two at that point in time, and given everything, in my opinion, ridiculous accusations that had been leveled against me, I was not, at that point, comfortable with having to explain anything to them. The wound was still raw at that point in time from leaving."

App. 172 (Tr. 81); 193 (Tr. 102). He did not explain that he found the reportedly stolen iPad until confronted by the Office of Chief Disciplinary Counsel. **App. 122 (Tr. 31); 189-199 (Tr. 98-109).** Respondent also told the hearing panel that he should have told the firm and the police when he found the iPad but was too embarrassed. **App. 175 (Tr. 84).**

The Region IV Disciplinary Committee held an investigatory hearing in 2015. Respondent said that one of the committee members suggested that he still owed the firm (or the insurance company) for one of the iPads because the firm had reimbursed him for

two iPads. He still possessed one of those iPads and the insurance company had paid a claim (after a deductible) on the reportedly stolen iPad. **App. 199 (Tr. 108).** He reimbursed the insurance company for the cost of an iPad in 2015.

Disciplinary Hearing Panel Decision

The hearing panel concluded that:

1. Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 4.8-4(c) by failing to reveal that the original iPad was not stolen, when he found it in his vehicle and failed to advise either the law firm or Auto Owners Insurance of that fact, knowing a claim that the iPad was stolen would be submitted. **App. 248-259 (DHP Decision).**

2. Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 4-8.4(c) by failing to return both iPads to the law firm upon his termination, knowing that both were firm property and not his personal property. **App. 248-259 (DHP Decision).**

In analyzing a sanction, the Panel found that Respondent's dishonesty, fraud, deceit, or misrepresentation was done "knowingly." **App. 257.** But, in considering an ABA Sanction Standard apparently intended to address deception in judicial proceedings, the Panel also found that Respondent engaged in "negligence in determining whether his statements were false or in taking remedial action when material information is withheld." **App. 258.**

The Panel relied on ABA Sanction Standards and on a 1997 decision by this court (split 4-3 over sanction) in recommending a reprimand. *In re Cupples*, 952 S.W.2d 226 (Mo. banc 1997). **App. 253-258.**

Respondent accepted the Panel's decision. **App. 261-262.** Informant, the Chief Disciplinary Counsel, rejected the Disciplinary Hearing Panel's recommendation for a reprimand. **App. 260.**

POINT RELIED ON

I.

RESPONDENT SHOULD BE DISCIPLINED BECAUSE HE VIOLATED 4-8.4(c) BY:

A. DISHONESTLY FAILING TO DISCLOSE TO HIS PARTNERS, THE POLICE, OR HIS FIRM'S INSURANCE COMPANY THAT HE POSSESSED FIRM PROPERTY AFTER REPORTING THE PROPERTY STOLEN;

B. DISHONESTLY ALLOWING HIS LAW PARTNERS TO UNWITTINGLY SUBMIT A FALSE INSURANCE CLAIM FOR REPORTEDLY STOLEN FIRM PROPERTY IN THAT RESPONDENT POSSESSED THE PROPERTY AND KNEW THAT IT WAS NOT STOLEN; AND

C. DISHONESTLY FAILING TO RETURN FIRM PROPERTY WHEN HE WAS DISCHARGED.

In re Cupples (Cupples I), 952 S.W.2d 226 (Mo. banc 1997)

In re Cupples (Cupples II), 979 S.W.2d 932 (Mo. banc 1998)

In re Kazanas, 96 S.W.3d 803 (Mo. banc 2003)

Supreme Court Rule 4-8.4

POINT RELIED ON

II.

THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE BECAUSE REPRIMAND IS NOT AN ADEQUATE SANCTION FOR AN ATTORNEY WHO REPEATEDLY AND SELFISHLY DECEIVED HIS PARTNERS, THE POLICE, AND HIS PARTNERSHIP'S INSURANCE COMPANY.

SUSPENSION IS APPROPRIATE UNDER:

A. PREVIOUS MISSOURI DISCIPLINE FOR DISHONEST ATTORNEY CONDUCT INVOLVING LAW PARTNERS; AND

B. APPLICATION OF ABA SANCTION GUIDELINES INVOLVING SELFISHNESS AND DISHONESTY.

In re Cupples (Cupples I), 952 S.W.2d 226 (Mo. banc 1997)

In re Cupples (Cupples II), 979 S.W.2d 932 (Mo. banc 1998)

In re Krigel, 480 S.W.3d 294 (Mo. banc 2016)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

Supreme Court Rule 4-8.4

Supreme Court Rule 5.225

ARGUMENT

I.

RESPONDENT SHOULD BE DISCIPLINED BECAUSE HE VIOLATED 4-8.4(c) BY:

A. DISHONESTLY FAILING TO DISCLOSE TO HIS PARTNERS, THE POLICE, OR HIS FIRM'S INSURANCE COMPANY THAT HE POSSESSED FIRM PROPERTY AFTER REPORTING THE PROPERTY STOLEN;

B. DISHONESTLY ALLOWING HIS LAW PARTNERS TO UNWITTINGLY SUBMIT A FALSE INSURANCE CLAIM FOR REPORTEDLY STOLEN FIRM PROPERTY IN THAT RESPONDENT POSSESSED THE PROPERTY AND KNEW THAT IT WAS NOT STOLEN; AND

C. DISHONESTLY FAILING TO RETURN FIRM PROPERTY WHEN HE WAS DISCHARGED.

Violations

Respondent is charged in two counts with violating Rule 4-8.4(c) by dishonesty, fraud, deceit, or misrepresentation. Count I involves Respondent's admitted failure to report (to his firm and their insurance company) that he had the original iPad in his

possession after he purportedly found it in his car. **App. 48-53 (Paragraph 13-18, 24-26); App. 169-170 (Tr. 78-79).**

Respondent admits, in his Amended Answer, that he engaged in professional misconduct by failing to disclose his possession of the iPad when he learned that it wasn't stolen. **App. 52 (Paragraph 27-28).** He doesn't specify what Rule of Professional Conduct he violated, and denies that his conduct involved dishonesty, fraud, deceit, or misrepresentation. **App. 52.** He denies violating Rule 4-8.4(c).

In Count II, Respondent is charged with violating Rule 4-8.4(c) by reporting to his firm that the "Find My iPhone" feature did not locate the reportedly stolen iPad despite knowing that he had previously disabled that feature. In his Amended Answer, Respondent denies violating Rule 4-8.4(c) and denies dishonesty or any misconduct; he argues that his decision to place the iPad in "Lost Mode" enhanced his ability to locate the iPad. **App. 54-55 (Paragraph 34-37).**

The Panel's decision does not seem to directly address Count II. As to Count I, the Panel concluded that Respondent violated Rule 4-8.4(c) in two respects. First, the Panel concluded that Respondent engaged in dishonesty, misrepresentation, deceit, or fraud and thereby violated Rule 4-8.4(c) by failing to tell his firm or the firm's insurer that the original iPad was not stolen, upon discovering it in his car. **App. 252: Conclusions of Law.** The Panel also concluded that Respondent violated Rule 4-8.4(c) by engaging in dishonesty, misrepresentation, fraud, or deceit in that he failed to return

both iPads to the firm upon his termination, knowing that both were firm property. **App. 252: Conclusions of Law.**

We should first consider whether Respondent's explanation that he found the iPad in his car is likely true. To believe Respondent's story, we have to ignore that Respondent refrained from telling the police or his firm that the iPad had been missing for over a week at the time of the break-in. We also have to ignore an apparent motive: Respondent's admitted frustration with the firm for failing to name him co-managing partner. And, we have to ignore Respondent's steps, not disclosed to the firm, to set the iPad in "Lost Mode" a week before the break-in, and then to disable the "Find My iPhone" feature after the break-in. Finally, we have to ignore Respondent's own testimony that he probably had visited the Belton office at least twice after he placed the device in "Lost Mode" but that he nevertheless decided, after the break-in, that it had been on top of a filing cabinet until it was stolen. In other words, despite believing it was stolen from the top of a filing cabinet, he didn't look there on those occasions he was in that office. His actions were inconsistent with barely plausible stories and raise too many doubts about his explanation that he found the iPad in his car.

For the sake of this argument, assume that Respondent found the reportedly stolen iPad in his car when he was getting ready for Thanksgiving 2013 trip. (Even that story is inconsistent with his report to the Office of Chief Disciplinary Counsel that he found the device in his car in December 2013). Under his explanation, he admits he should have immediately reported his discovery to the firm and the police. He said he wondered what

to do, but did nothing. His equivocal language when specifically asked why he didn't report his discovery does nothing to enhance his credibility. He said:

> "Primarily probably mostly because I was essentially embarrassed that the darn thing had been in my car and didn't really have an explanation for why it was in my car and I didn't know it was in my car and I just – I unfortunately made the decision not to say anything to anybody." **App. 169.**

For many months, Respondent stuck with his initial decision not to report despite his acknowledgement that he should have "In hindsight, 100%, - absolutely," and despite several opportunities to set things straight. **App. 169.** In April 2014, when the firm was finalizing its formal insurance claim for items lost in the break-in, Respondent again decided to keep both iPads. He allowed his partners to submit a false claim to the insurance carrier. By that decision and action, Respondent used his firm as an unknowing accomplice to commit a fraud on the insurance company

Four months later, when the firm removed him from the partnership, Respondent was given another opportunity (and obligation) to disclose that he had both iPads. He was told to return all firm property but again chose not to.

Once the firm learned from Apple that Respondent had held onto the original (reportedly stolen iPad), they reported that fact to the Office of Chief Disciplinary Counsel. The Office of Chief Disciplinary Counsel confronted Respondent with that information. At that point, having been found out, Respondent's hindsight apparently

improved. But, he did not return the replacement iPad or pay the insurance company until advised to by the Region IV Disciplinary Committee.

Respondent intentionally deceived his firm, the police, and the insurance company on each occasion he had an obvious reminder, opportunity, and duty to report his claimed mistake. In other words, this discipline case is not about an isolated and momentary embarrassing choice. Even accepting Respondent's unlikely explanation that he found the iPad while packing for a trip in November 2013, he then made repeated calculated decisions, over many months, to allow the firm to submit a false insurance claim and to keep the replacement iPad. Both devices were firm property. He asks this Court to believe that he repeatedly made those choices just so that he could avoid the embarrassment of his partners knowing he lost an iPad for a month. With all due respect, Respondent was a lawyer practicing for ten years, and was a partner in a long established law firm.

Lawyers who violate duties to their firms and who engage in dishonest behavior thereby violate Rule 4-8.4(c). In 1997, this Court determined that the attorney discipline process was fitting when an attorney hid files from his partners and began competing for clients while still a partner in the firm. That lawyer's conduct also resulted in the clients' cases being processed without the safeguards the firm had established to protect client interests. In other words, that attorney's behavior violated duties to both his partners and his clients. *In the Matter of Cupples*, 952 S.W.2d 228 (Mo. banc 1997).

In the instant case, Respondent not only stole firm property, he intentionally and selfishly allowed the firm to unwittingly submit a false claim to the firm's insurance company. The firm paid a deductible and the insurance company paid the false claim.

A 1998 decision, involving the same attorney disciplined in the 1997 *Cupples I* case, also supports a conclusion that Respondent's misconduct violates Rule 4-8.4(c). (*In re Cupples*, 979 S.W.2d 932 (Mo. banc 1998)). In *Cupples II* (the 1998 case), the attorney was 'of counsel' with a different firm than in the 1997 case. While at the new firm, Mr. Cupples maintained a secret practice separate from the firm. He collected fees for his secret practice and misrepresented his billable hours to the firm. That conduct, the Court held, violated Rule 4-8.4(c) because it was dishonest and deceitful in his dealings with the firm. *Cupples II*, 979 S.W.2d at 935-936. Like Respondent in the instant case, Mr. Cupples violated Rule 4-8.4(c) "by failing to disclose matters to the firm that should have been disclosed." *Cupples II*, 979 S.W.2d at 936. Intra-firm disagreements appropriately result in discipline when an attorney's conduct involves dishonesty, fraud, deceit and misrepresentation or if he "used firm resources for his own personal gain", *Cupples II*, 979 S.W.2d at 236, (reiterated in 2003, with a reference to *Cupples II*, *In re Kazanas*, 96 S.W.3d 803, 808 (Mo. banc 2003)).

Respondent's repeated calculated and selfish decisions constitute violations of Rule 4-8.4(c). His violations warrant more than a reprimand.

ARGUMENT

II.

THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE BECAUSE REPRIMAND IS NOT AN ADEQUATE SANCTION FOR AN ATTORNEY WHO REPEATEDLY AND SELFISHLY DECEIVED HIS PARTNERS, THE POLICE, AND HIS PARTNERSHIP'S INSURANCE COMPANY.

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B. APPLICATION OF ABA SANCTION GUIDELINES INVOLVING SELFISHNESS AND DISHONESTY.

Sanction: Missouri Cases

Determining a sanction in this case presents some challenges. First, the black letter ABA Standards for Imposing Lawyer Sanctions allow room for interpretation in dealing with lawyers' dishonesty. Second, the most obviously applicable Missouri decision (*Cupples I*) includes a unanimous analysis that the attorney violated Rule 4-8.4(c) by secreting both files and prospective income from his partners. But, in

Informant's view, the Court's 4-3 split decision to reprimand rather than suspend Mr. Cupples offers limited precedential authority in determining a sanction. Dissenting Judges Covington, Limbaugh and Holstein pointed to a previous opinion by this court in explaining "where an attorney lied to his partners and deceived his clients, reprimand is unwarranted." *In re Cupples II*, 952 S.W.2d at 238. The earlier cited decision put it this way: "Reprimand . . . is appropriate only where the attorney's breach of discipline does not involve dishonest, fraudulent, or deceitful conduct on the part of the attorney," citing *In re Littleton*, 719 S.W.2d 772, 777 (Mo. banc 1986).

Informant acknowledges that Judge Price's majority opinion in the *Cupples I* case was a landmark decision that continues to provide essential guidance for lawyers facing firm breakups. The opinion is widely cited and taught. But, Informant argues here that the dissenting judges applied a better sanction analysis. Since *Cupples I*, the Court seems to have followed the dissent's approach as often as that of the majority in sanctioning dishonest lawyers. First, of course, a unanimous court suspended the same Mr. Cupples in 1998. In *Cupples II*, the court ruled that suspension was mandated, "if not disbarment," despite a lack of client harm. *In re Cupples*, 979 S.W.2d at 937.

Last year, the Court imposed a stayed suspension (with probation) in a lawyer discipline case involving deception of a court and a third party. The principal opinion distinguished two disbarment cases where the lawyers affirmatively misrepresented facts in multiple litigation matters. *In re Krigel*, 480 S.W.3d 294, 301-302 (Mo. banc 2016), citing *In re Caranchini*, 956 S.W.2d 910, 919 (Mo. banc 1997) and *In re Oberhellmann*,

873 S.W.2d 851 (Mo. banc 1994). Referring specifically to *Caranchini*, the principal opinion noted: "A lesser sanction of suspension may be appropriate when" the attorney merely knows of the misrepresentation. *In re Krigel*, 480 S.W.3d at 302. The *Krigel* principal decision to impose suspension also relied on ABA Sanction Standard 6.12. As noted, the instant case involves deception of the Respondent's law firm, an official police investigation and an insurance company handling a formal claim; it did not involve deception of a court.

The dissenting opinion in *Krigel*, not dissimilar to Judge Covington's dissent in *Cupples I*, reiterated previous holdings that dishonest conduct should not result in reprimand. *In re Krigel*, 480 S.W.3d 294 (Mo. banc 2016). In that recent dissent, Judge Fisher, joined by Judge Wilson and Judge Teitelman, referenced a 1994 case involving a St. Louis lawyer. That lawyer (in the 1994 case) falsely reported a client's address in court pleadings in one case and forged a former associate's signature in another. He was disbarred, *In re Oberhellmann*, 873 S.W.2d 851 (Mo. banc 1994). In imposing the disbarment, the *Oberhellmann* court held: "In cases of false statements, fraud or misrepresentation, this court issues reprimands only if the lawyer was merely negligent in determining whether statements or documents are false." *In re Oberhellmann*, 873 S.W.2d at 856.

The recent *Krigel* decision, (including the principal and dissenting opinions), supports the concept that a lawyer's knowing failure to correct misapprehensions is no less dishonest than affirmative misstatements. *In re Krigel*, 480 S.W.3d at 299-300. In

the instant case, Respondent failed to correct false information (first reported by him) to his partners, the police and his partnership's insurance company – all to the detriment of his partnership and its insurer.

Probation

Rule 5.225 permits a stayed suspension and probation if the lawyer:

A) is unlikely to harm the public and can be adequately supervised;

B) is able to practice without causing the profession to fall into disrepute; and

C) has not committed acts warranting disbarment.

Informant opposes probation here under Sections A and B of Rule 5.225.

First, although direct harm to the public doesn't seem likely, given Respondent's lack of disciplinary history, adequate supervision for dishonest behavior seems tenuous. No obvious probation conditions address lawyer dishonesty. Second, as to Section B, the profession could fall into disrepute if a lawyer is merely reprimanded following his repeated conscious decisions to withhold information and property that he was required by law and duty to disclose.

ABA Sanction Guidelines

As mentioned, application of the Black Letter ABA Sanction Standards to this respondent's misconduct is difficult, because inconsistent points could be reasonably argued. The hearing panel, for example, considered Standards 4.62 and 4.63 to the case;

those provisions most clearly address the sufficiency of lawyers' communication with their clients. As such, Standards 4.62 and 4.63 do not apply here because client communication is not an issue.

The Panel also applied ABA Standards 6.12 and 6.13. Those particular provisions relate to lawyers' actions in encouraging or allowing false statements in judicial proceedings. Respondent's failure to disclose his possession of the reportedly stolen iPad was not within a pending court matter, but he did allow official police investigators to believe the iPad was stolen when he knew that was not true. And, he allowed his firm to unwittingly file a false insurance claim. In light of the fact that Respondent's misrepresentations were used in an official police investigation and insurance claims, we need to look at both Standard 6.12 and 6.13 to determine which is most applicable under the facts.

In this case, even if we accept Respondent's explanation that he found the missing iPad a month after he reported it stolen, he acknowledges making several conscious decisions over eleven months to refrain from disclosing the truth to his partners, the police, and the firm's insurance company. Respondent seems to argue that his lapse was both momentary and in some way negligent. But, he admits he carefully considered his options more than once and decided against telling the truth each time. Application of Standards 6.12 and 6.13 should lead to a suspension because his conduct was, at least, knowing.

Finally, the Hearing Panel also considered Standards 5.12 and 5.13; those standards address personal integrity. The key context of Standard 5.12 is Standard 5.11, in that Standard 5.12 is a of catch-all for criminal conduct not addressed in Standard 5.11. Standard (5.11) calls for disbarment for "serious criminal conduct" that includes, *inter alia*, misrepresentation or fraud. Before rejecting Standard 5.11's possible applicability in the case, a decider should at least consider whether Respondent's dishonest, purposeful, and continued possession of an iPad, or his decision to allow his firm to unwittingly submit a false and fraudulent insurance claim, might be "serious criminal conduct" that includes misrepresentation or fraud. If that standard isn't applicable, for whatever reason, only then do we look to Standard 5.12 and 5.13. Standard 5.12 suggests suspensions for criminal conduct (even if not "serious criminal conduct") if the conduct seriously adversely reflects on the lawyer's fitness to practice. In the instant case, Standard 5.12 would call for a suspension if the Court decides that Respondent's repeated decisions to mislead his partners, the police and an insurance company paying a false claim were criminal and "seriously adversely reflect on his fitness to practice."

If the Court decides otherwise, Standard 5.13 would call for Reprimand, in that Respondent's conduct "knowingly engaged in . . . dishonesty, fraud, deceit, or misrepresentation that adversely reflects on his fitness to practice law." ABA Standards for Imposing Lawyer Sanction 5.13.

The analysis of dishonest conduct under the ABA Sanctions can get more confusing. In 1998, this Court applied Standard 7.2 to a lawyer's dishonest and selfish

behavior, as it pertained to his law firm. *In re Cupples II*, 979 S.W.2d at 936-937. The Court concluded that Mr. Cupples, by maintaining a practice separate from his firm, not only violated Rule 4-8.4(c), but also violated his duties to his profession as contemplated by ABA Standard 7.2. Relying on that standard, the Court suspended Cupples, noting that his knowing conduct "caused injury or potential injury to a client, the public, or the legal system." *In re Cupples*, 979 S.W.2d at 936, (citing ABA Standard 7.2).

Finally, application of ABA Standards does not end with finding one or more appropriate baseline standards. We still have to consider aggravating and mitigating factors. In mitigation, Respondent has no prior discipline, he has responded promptly to the discipline investigation, and he has admitted most facts. On the other hand, key aggravators should include Respondent's experience, his repeated dishonest misconduct, and, in Informant's view, continued dishonesty in asking the disciplinary authorities to accept his unlikely explanation that he didn't know he had the reportedly stolen iPad all along. Because that story is not credible, he should not receive credit for cooperating with disciplinary authorities. And, he should not receive credit for accepting responsibility when his defense is based on tall tales.

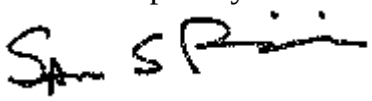
CONCLUSION

Respondent knew that he improperly held firm property but failed to disclose it on at least three occasions where disclosure was mandated by his duty to be honest. First, accepting his story that the iPad had been stolen, Respondent failed in his duty to disclose that he found it (and return it) as soon as he found it. Second, Respondent allowed his partners to unwittingly file a false insurance claim for firm property that he knew was not stolen because he still possessed it; and third, Respondent dishonestly withheld firm property after his firm discharged him and rightfully demanded that he return firm property.

Informant asks the Court to suspend Respondent's license indefinitely. Probation is not appropriate because there are no terms of probation that suitably addresses dishonesty. He should not be allowed to apply for reinstatement for at least six months.

ALAN D. PRATZEL #29141

Chief Disciplinary Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2017, the Informant's Brief was sent to Respondent and Respondent's counsel via the Missouri Supreme Court e-filing system to:

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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(b);
3. Contains 5,649 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Sam S. Phillips