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IN THE SUPREME COURT OF THE STATE OF MISSOURI

IN RE:

THEODORE R. HOEFLE

Respondent.

Supreme Court No.: SC96110

RESPONDENT'S BRIEF

KEMPTON AND RUSSELL

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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 STOLDEN FIRM PROPERTY IN THAT RESPONDENT POSSESSED 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 Donaho,*98 S.W. 3d 871, 873 (Mo. banc 2003)

In re Sizer, 134 S.W. 2d 1085 (MoApp 1939)

In re Adoption of W.B.L., 681 S.W. 2d 452,455 (Mo. banc 1984)

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ARGUMENT I

Counsel for Informant now takes the position that Respondent's explanation of having found the iPad in his vehicle is untrue. The Disciplinary Hearing Panel did not find that Respondent's explanation of finding the iPad was untrue. The Disciplinary Hearing Panel had the opportunity to see and hear the Respondent testify and in addition to that each Disciplinary Hearing member asked the Respondent searching, appropriate and well thought out questions relative to the issues raised by Counsel for Informant. Appendix A 193 through A 200. After hearing and seeing Respondent's testimony and after questioning of Respondent the Disciplinary Hearing Panel made its findings and recommendations and contrary to Counsel for Informant's portrayal of Respondent's explanation as lies the Disciplinary Hearing Panel did not so find.

A Disciplinary Hearing Panel is in the same position to judge the credibility of witness as the trial court sitting without a jury. In a court tried case the judge is in a better position to not only judge the credibility of witnesses directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record. In Re: Adoption of W.B.L., 681 S.W. 2d 452, 455 (Mo. banc 1984). Here the Disciplinary Hearing Panel had the opportunity to judge Respondent's credibility, sincerity and character not only through cross examination by the special representative but also through the D.H.P.'s own interrogation.

Further in disciplinary matters the findings and recommendations of the Disciplinary Hearing Panel are entitled to considerable weight. Donaho 98 S.W. 3d 871,

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873 (Mo. banc 2003). The Court reviews the record de novo and is free to determine the facts even though they have been determined by the Disciplinary Hearing Panel.

The Panel was an experienced panel and they wrote a well thought out decision which found that the facts in this case were much less egregious than the facts in In Re Cupples 952 S.W. 2d 226 (Mo. banc 1997) and that reprimand was the appropriate discipline.

Respondent admitted his misconduct in failing to disclose to his firm that he found the iPad. Pursuant to *In re Cupples*, S*upra* Respondent had a duty to treat his partners fairly. He admits his failure to advise the firm that he had found the original iPad, was not fair treatment to his partners. However, his motive for not advising the firm was not dishonesty, but his embarrassment for looking stupid because he had reported it stolen when it was actually in the back of his vehicle.

Respondent received no benefit from continuing to possess the original iPad. He made no use of it, and ultimately returned it to the firm when he was terminated for matters not connected to the iPad issue.

Likewise Respondent should have advised the Belton Police Department that he had found the iPad which had been reported stolen in the burglary. Again fairness to his partners required that he advise the Police Department as well as his partners. His failure to do so was not motivated by dishonesty.

Counsel for Informant alleges Respondent had an apparent motive for all of his conduct because he was not named co-managing partner of the firm. While Respondent was frustrated that he was not made managing partner, the jump from that to an allegation

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that his conduct was motivated by that frustration is simply not true and is unsupported factually.

Respondent had no plan to leave the firm. He intended to stay as shown by the fact that he was still at the firm on September 2, 2014, eleven months after the burglary. On October 28, 2013, prior to the burglary, Respondent had lost his iPad. In order to attempt to find it he used his computer to put the iPad into lost mode which was part of the Find My iPhone app. The lost mode feature did not result in the iPad showing up on that feature. Apple verifies that the lost mode feature was activated. If the feature had received an indication the phone was found that information would have been known to Apple. Apple made no indication that Respondent's testimony was wrong when he said he received no indication of the iPad's location in lost mode.

Ten days after placing the iPad in lost mode, Respondent took the iPad out of the lost mode because he understood that if the burglar determined the iPad was in lost mode, the likelihood was that the iPad would be discarded and never found. Apple verifies the iPad was taken out of lost mode and there is no evidence from Apple or any source which would contradict Respondent's belief that taking the iPad out of lost mode would help locate the iPad. Apple verified that the iPad was taken out of lost mode on October 31, 2013.

On November 5, 2013, after Respondent understood the stolen iPad was going to be replaced, he disabled the Find my iPhone feature to be sure the stolen iPad could not be used to access the firm's computer system. Apple verified the date and did not indicate that Respondent was in error by disabling the Find my iPhone feature.

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The lost mode feature should have indicated the whereabouts of the iPad when Respondent was at either the Harrisonville or Belton offices. The parking areas are right next to the office buildings but the lost mode feature did not ever show the location of the original iPad. One possibility described by Respondent had to do with whether the iPad had enough charge to send a signal. No evidence was offered by Informant as to why the iPad did not show up on lost mode. Experience tells us that the best computer systems don't always work as planned or expected and Respondent's explanation that the iPad did not have sufficient power to send a signal is certainly a reasonable explanation.

Respondent's actions in placing the iPad in lost mode than removing it from lost mode after the burglary and disabling the Find my iPhone when the decision to replace it was made were all reasonable actions to take and were taken prior to Respondent's discovery of the iPad right before Thanksgiving.

Respondent's failure to advise the firm or the Belton Police Department was not reasonable. His explanation that he did not want to look stupid and be embarrassed did not overcome his duty to be fair and candid, but certainly was not a part of some plan or scheme to harm his firm. Experience tells us that people don't like to look stupid or to be embarrassed, and while that is a valid explanation of Respondent's motive, it is not a sufficient reason to overcome Respondent's failure to advise the firm that he found the iPad in his vehicle.

Respondent agrees that he should be disciplined for not advising the firm or the Belton Police Department of his finding the iPad. Respondent believes the case of *In Re*

Cupples, Supra makes reprimand the proper discipline rather than suspension as requested by Counsel for Informant.

Informant now wants to claim that Respondent's conduct was criminal. There is no allegation in the Information that Respondent committed any criminal act and the Informant's Brief makes no allegation of what criminal statutes are alleged to have been violated. If an Information does not charge the conduct a Respondent is alleged to have committed, then Respondent is not properly notified of the charge or charges and has no opportunity or obligation to address allegations of uncharged conduct. In Re Sizer 134 S.W. 2d 1085 (MoApp 1939). The allegation in Informant's Brief that Respondent committed some criminal act is not supported by charge in the Information and should not be considered by the Court.

Counsel for Informant is correct when he states Respondent did not timely return the iPads and did not timely repay the insurance company. The fact is, however, that he did ultimately return the iPads and did reimburse the insurance company. Those facts are neither aggravating or mitigating but do show neither the firm nor the insurance company sustained any substantial damage as a result of Respondent's conduct. The firm recovered the original iPad, received the replacement iPad back after the hearing before the D.H.P. and was reimbursed for the value of an iPad by the insurance company. A single deductible was paid for the burglary which would have been the same whether or not the original iPad was stolen. At the end of the day the firm had paid for two iPads and had recovered two iPads and had been paid for a third.

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The insurance company sustained no damage because it was reimbursed for the amount it paid to the firm by Respondent.

Further, none of Respondent's conduct involved any duty to a client or any client harm. Consistency would suggest reprimand to be the proper discipline in this case.

In the Information in Count I, Paragraph 13, the Informant charged that "subsequent to the filing of the police report, Respondent found the original iPad in his vehicle." Respondent admitted that allegation. Informant now argues that Respondent did not find the original iPad in his vehicle. Respondent either found it or he didn't. Informant charged that Respondent found it. Now in an effort to discredit Respondent the Informant alleges that Respondent did not find the iPad. Respondent should not have to address an assertion by Informant that is contrary to what was charged in the Information and admitted by Respondent. The Information and the Answer define the issues in the case. There was no issue as to whether Respondent did or did not find the iPad. He did find it. Respondent should not have to address an assertion by Informant that is contrary to what was charged in the Information and admitted by Respondent.

Informant's labored arguments that Respondent lied and did not find the iPad in his vehicle, raise the question of whether Informant is personalizing this matter and trying to punish Respondent instead of seeking discipline to protect the public and preserve the integrity of the profession.

Respondent had a duty to advise the firm and the Belton Police Department that he had found the iPad in his vehicle. He did not do that. This is a single isolated event. Certainly Respondent could have advised the firm and the police department that any

time after he found the iPad, however, he didn't do that. That does not mean that he violated his duty numerous times.

This Court should discipline Respondent for not advising his firm and the Belton Police Department when he discovered the iPad and for not timely returning the iPads.

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POINT RELIED ON

II.

THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE BECAUSE REPRIMAND IS NOT AN ADEQUATE SANCTION AND 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 DISHONEST.

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

In re Belz, 258 S.W. 3d 38, 41(Mo. banc 2008)

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

ABA Standard 5.13

ABA Standard 6.13

ABA Standard 9.32

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ARGUMENT II

Counsel for Informant states to the Court that suspension is appropriate under previous dishonest attorney conduct cases involving law partners. Respondent then cites Cupples I as the most obvious applicable decision. Respondent agrees that Cupples I is the most applicable decision as did the Disciplinary Hearing Panel. This Court reviews decisions of Disciplinary Hearing Panels on a de novo review independently determining all issues pertaining to credibility of witnesses and the weight of the evidence and draws its own conclusions of law. In Re Belz 258 S.W. 3d 38,41 (Mo. banc 2008). Belz also cites to earlier cases which have held that the Court considers the ABA Standards when determining what level of discipline to impose. In the Preface to ABA Standards page 1, it states "inconsistent sanctions either within in a jurisdiction, or among jurisdictions cast doubt on the efficiency and the basic fairness of all disciplinary systems." On page 2 of the Preface the sanctions committee stated "finally, the standards should help achieve the degree of consistency in the imposition of lawyer discipline necessary for fairness to the public and the Bar."

On page 9 in paragraph 1.3 the purposes of the standards for imposing lawyer disciplines are set out. It states "they are designed to promote: (1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions." On page 5 of the standards it is stated "in determining the nature of the ethical duty violated, the standard assume that the

most important ethical duties are those obligations which a lawyer owes to clients." Cupples I involves the duty Cupples owed to State Farm, the client of the Deacy firm, as well as harm to the client because a default judgment was entered against one of State Farm's insureds as a result of the conduct of Cupples. Not only was Cupples' conduct directed at a client it was also a result of a well-planned, nefarious scheme to aid Cupples' plan to leave the Deacy firm and try to take State Farm business with him.

In Cupples I the Deacy firm learned that Cupples had leased office space to open his own law practice. Partners called the directory assistance and got a number for Gary Cupples Attorney at Law. The partners called the number and a voice answered the phone "Gary Cupples Law Office." Thereafter the two managing partners of the firm, Spencer Brown and Tom Deacy, met with Mr. Cupples. Cupples said that he leased the space for his wife's catering business and denied using the office to practice law. Both of those statements were obviously untrue. Cupples then agreed to withdraw from the firm.

Once Cupples decided that he was going to leave the firm he failed to register the State Farm cases in the system at the firm which had been approved by State Farm. He lied to the firm about what he was doing. When he left he took 12-15 cases with him. The firm only learned of the scheme of Cupples when a default judgment was entered against a State Farm client and the firm received a message from opposing counsel in the case that he would not agree to set aside a default judgment.

Cupples met again with Deacy partner Spencer Brown. Cupples told Brown there were two or three cases he had worked on that were not on the firm books. He denied there were other cases. That was untrue. Cupples then called Brown back and admitted to

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having 12 or 13 files. He indicated he planned to keep the files and split the fee with the Deacy firm. A few days later he called and agreed to return the 12 files. Brown asked Cupples if he had any other State Farm files. Cupples evaded answering. A week later the firm received six more files from State Farm which had been returned to State Farm by Cupples when State Farm told Cupples that Deacy would continue to represent State Farm.

Cupples never told State Farm he was hiding cases from the firm or that he was not using the firm's system for handling State Farm cases. The Supreme Court found that Cupples was planning to withdraw from the firm and he was secreting files to take with him to his new practice. l.c. 230. Cupples was charged with removing files without the consent or knowledge of the firm with the purpose to deceive and defraud his partners and with an intent to appropriate the files for his own use. The Master found that Cupples did so.

Cupples raised five points all of which the Supreme Court found to be frivolous. Cupples contested the jurisdiction of the Court, claimed a denial of due process and claimed there was insufficient evidence. The evidence was clear that Cupples had planned to leave the firm and planned to take files with him. He didn't enter the files into the firm's system so the firm would not know he had the files. He didn't tell State Farm that he hadn't entered the files. He didn't tell State Farm he was taking the files with him. The Court found that Cupples had appropriated the cases and in fact did not bill cases while he was at Deacy and was going to bill the cases after he moved and left Deacy thus taking monies that should have gone to the Deacy firm. His conduct was planned conduct

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and he put together a dishonest scheme to prevent both State Farm and the Deacy firm from knowing that he was taking the files or that he had failed to enter them in the system.

The Disciplinary Hearing Panel found that the conduct of Cupples was much more egregious than the conduct of Respondent in this case. First off there was no client duty in Respondent's case and there was no client harm. The ABA Standards point out that the most important ethical duties are those obligation which a lawyer owes to a client. That is not present in this case.

Cupples was planning to leave the Deacy firm and was planning to take the files that he had not entered into the firm's system. He was planning to keep the money that should have been billed on those files while he was at Deacy firm. In contrast Respondent was not planning to leave the firm. He was fired for reasons other than failing to tell the firm that he had found the iPad at Thanksgiving or that he failed to return the two iPads after he was fired.

Unlike Cupples, Respondent was not planning to leave firm, he had no plan to take equipment with him, he had no plan to appropriate equipment, he had no plan to have a burglary, and he reasonably thought the iPad was at the Belton office. Because Respondent was planning to stay it makes no sense that he would steal an iPad that he already could use. That would jeopardize his partnership. After the burglary a complete inventory of all the equipment at the Belton office was made. The office was searched and the original iPad was gone along with a number of other pieces of equipment. Respondent mistakenly believed that the iPad was there at the time of the burglary. It did

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not show up anywhere when the iPad was put into lost mode. Respondent normally kept the iPad either at home, at the Belton office or at the Harrisonville office. Most of the time it was at the Belton office. When Respondent told the Belton Police Department that he believed the iPad was stolen he believed it. It was not a lie.

In Informant's Brief he suggests that Cupples I is the applicable case and tacitly indicates that reprimand would be the appropriate discipline if the majority opinion in Cupples were to be followed. Informant now asks this Court not to follow the majority rule but to adopt the minority opinion written by Judge Covington. In that dissent Judge Covington stated l.c. 238 "in the present case, Respondent lied to his partners and deceived his clients. Reprimand is unwarranted." In Respondent's case he failed to advise his partners he had found the original iPad. He did not lie to his partners. His was an act of omission rather than commission. Unlike Cupples, Respondent did not deceive any clients or violate any duty to clients. Cupples violated the most important ethical duty that he had which was to his client, State Farm.

Informant cites the case of In Re Krigel 480 S.W. 3d 294 (Missouri 2016). In that case Krigel signed and then submitted a Petition which stated that the birth mother did not know of any "other person not a party to these proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child." That was not a true statement because Krigel knew the name, address and attorney for the birth father and knew that the birth father had a claim of child custody or visitation.

The Court also found that Krigel's most egregious act of misconduct was a lack of candor towards the tribunal. The Court stated that when an attorney with intent to deceive

the Court, submits a false document and makes a false statement or withholds material information, disbarment is the appropriate sanction. l.c. 301 The Court suspended Krigel but suspended the suspension and placed him on probation for a period of two years. Thus looking at the case law it would seem that Cupples would require that Respondent be reprimanded if there is to be consistency between the Cupples' case and Respondent's case. Respondent did not deceive any Court.

Further, it would seem that Standard 5.13 makes reprimand the appropriate discipline under the ABA Standards. Standard 5 deals with the failure to maintain personal integrity. Standard 5.1 deals with the commission of a criminal act. Standard 5.13 sets out that in cases not involving commission of a criminal act but which involved dishonesty, fraud, deceit or misrepresentation then reprimand is the appropriate discipline.

The Disciplinary Hearing Panel also found that Standard 6.13 was appropriate because Respondent was negligent in taking remedial action once he learned that the iPad was in his vehicle. The Commission essentially found that once Respondent found the original iPad in the back of his vehicle that he had a duty to advise the firm and the Belton Police Department that he had found the iPad in his vehicle. The Panel found that his breach of duty was negligent rather than intentional. "Negligence" is defined in the Standards as "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation."

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Looking at aggravating and mitigating factors the mitigating factors include an absence of a prior disciplinary record, absence of a dishonest or selfish motive as it relates to his failure to advise that he had found the iPad, full and free disclosure to the Disciplinary Board and a cooperative attitude towards the proceedings. There is also evidence of Respondent's good character or reputation and there is remorse. Standard 9.32

In regard to the absence of a dishonest or selfish motive, Respondent's return of the two iPads and his payment to the insurance company are neither aggravating nor mitigating factors. The reason for this is because they amount to forced or compelled restitution. Respondent's return of the equipment and his payment to the insurance company were suggested by the Disciplinary Hearing Panel and by the Committee conducting the probable cause hearing. Because those acts of restitution were not made until after a disciplinary proceeding had been instituted they should not be considered as either aggravating or mitigating. ABA Standard 9.4 (a)

Both Cupples I and the ABA Standards 5.13 and 6.13 indicate that reprimand is the appropriate discipline in this case.

The Disciplinary Hearing Panel found that Standard 5.13 was applicable and that reprimand was the appropriate discipline pursuant to that Standard and found that Standard 6.13 was appropriate because Respondent was negligent in taking remedial action once he learned that the iPad was in his vehicle. The Commission essentially found that once Respondent found the original iPad in the back of his vehicle then he had a duty to advise the firm and the Belton Police Department that he had found the iPad in

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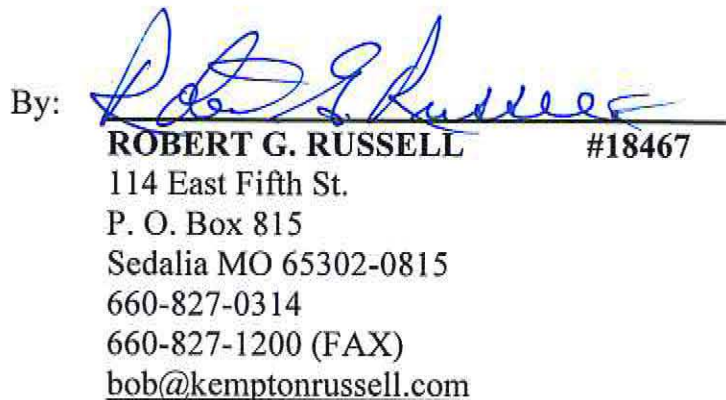
his vehicle which was material information that should have been divulged. The Panel found that his breach of duty was negligent rather than intentional.

CONCLUSION

The Cupples' case and Standards 5.13 and 6.13 together with the mitigating factors of an absence of a prior disciplinary record, free disclosure to the Disciplinary Hearing Panel and the Office of the OCDC, the character and reputation of Respondent, the lack of any client duty and his remorse all make reprimand the appropriate discipline. Any discipline in excess of reprimand would be inconsistent with the Cupples I case where in addition to the other factors there was client harm and deceit directed towards the client.

RESPECTFULLY SUBMITED



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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 3d day of February, 2017 the above was sent to Informant and Informant'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 4,516 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Robert G. Russell

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