IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
JONATHAN D. McDOWELL	)	**Supreme Court #SC96699**
	)	
Respondent.	)	

INFORMANT'S BRIEF

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL

Nancy L. Ripperger

NANCY L. RIPPERGER #40627
STAFF COUNSEL
3327 AMERICAN AVENUE
JEFFERSON CITY, MO 65109
(573) 635-7400
(573) 635-2240 (FAX)
Nancy.Ripperger@courts.mo.gov

ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

TREATISES

STATEMENT OF JURISDICTION

This action is one in which Informant, the Chief Disciplinary Counsel, is seeking to discipline an attorney licensed in the State of Missouri for violations of the Missouri Rules of Professional Conduct. 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 2016.

STATEMENT OF FACTS

I. DISCIPLINARY HEARING

On November 14, 2016, Informant, the Chief Disciplinary Counsel, filed an Information against Respondent, Jonathan D. McDowell. **R. Vol. 1 pp. 1-9**. The Information alleged that Respondent violated various Rules of Professional Conduct. On January 6, 2017, Respondent filed his Answer to the Information. **R. Vol. 1 pp. 24-35**. On January 12, 2017, the Chair of the Advisory Committee appointed a Disciplinary Hearing Panel to conduct a hearing on the matter. **R. Vol. 1, pp. 36-40**. On April 17, 2017, Respondent sought leave to file an Amended Answer. On April 18, 2017, the Panel granted Respondent leave to file his Amended Answer. **R. Vol. 1, p. 85**.

On April 18, 2017, the Panel held a hearing on the matter. **App. 214-240**. Informant was represented by Nancy Ripperger. Respondent appeared pro se. At the hearing, Informant offered 19 Exhibits into evidence and the Panel admitted all exhibits offered. Informant put on testimony from three live witnesses. Respondent offered five exhibits, all of which were admitted into evidence, and testified on his own behalf.

During the hearing, the following evidence was presented:

A. Background Information

Licensure and Disciplinary History

Respondent was licensed as an attorney in Missouri on September 15, 2010. His bar number is 63074. **R. Vol. 1 p. 236**. The address Respondent designated with the

Missouri Bar at the time of the hearing was: 2413 Calder Court, Columbia, Missouri. **R. Vol. 1 pp. 227-246**.[1] Respondent's license is in good standing. **R. Vol. 1 p. 227; 236**.

Respondent has a prior disciplinary history. On October 7, 2015, Informant issued an admonition to Respondent for violation of Rules 4-1.15 (trust accounting) and 4-1.4 (communication). The admonition provided that on two different occasions Respondent deposited client funds into his business account and Respondent failed to adequately communicate with his client about his decision to forgo an examination of a judgment debtor. **R. Vol. 1 pp. 249-250**.

Respondent's Law Practice and Personal Life

Respondent and his wife are both attorneys. **App. 64 (Tr. 248)**. After Respondent and his wife graduated from law school, they were unable to find employment, so they opened their own law practice in Kansas City, Missouri in late 2010. **App. 64 (Tr. 248)**. Respondent surrounded himself "with mentors that could guide [him] in the practice of law." **App. 64 (Tr. 248)**. Respondent discussed his cases with his mentors. **App. 64 (Tr. 247)**.

While practicing with his wife, Respondent handled several employment law cases. **App. 65 (Tr. 252)**. Most of Respondent's employment law cases were in the United States District Court, District of Kansas and settled via mediation. **App. 65 (Tr. 252)**.

[1] On October 3, 2017, Respondent changed the address he had registered with the Missouri Bar to 110 Fulkerson, Jefferson City, MO 65109.

In May 2013, Respondent's wife gave birth to twins. **App. 76 (Tr. 296)**.

In August 2013, Respondent and his wife moved their practice to Springfield, Missouri. **R. Vol. 1 p. 236**.

In August 2014, Respondent's wife gave birth to their second set of twins. **App. 76 (Tr. 296)**.

Between 2010 and 2014, Respondent presented several continuing education programs for the Missouri Bar and authored a book called, *From Law School to Lawyer*, which addresses issues new attorneys face when starting their own practices. He has also served on several Missouri Bar Association and American Bar Association Committees. **App. 70; R. Vol. 1 pp. 236-246**.

B. Respondent's Representation Of Alaa Almoghrabi

Underlying Facts Concerning Respondent's Representationof Alaa Almoghrabi

In 2012, Alaa Almoghrabi hired Respondent to represent him in an employment discrimination lawsuit against his former employer, GoJet Airlines, LLC ("GoJet"), and his union, the International Brotherhood of Teamsters Local 618 ("the Union"). **App. 49 (Tr. 185-86); R. Vol. 5 pp. 979-980**.

Mr. Almoghrabi is a Muslim-American of Jordanian descent. **App. 28 (Tr. 103)**. Mr. Almoghrabi is an airline pilot and he was employed by GoJet from 2007 until GoJet terminated his employment in 2012. **App. 97**. GoJet fired Mr. Almoghrabi after a minor altercation between Mr. Almoghrabi and his copilot while on a layover in Jacksonville, Florida. **App. 28 (Tr. 102)**. After landing in Jacksonville, the flight team checked into a hotel and went out for drinks and a meal. **App. 28 (Tr. 102)**. The altercation occurred

after the flight team had finished their meal and the team was waiting for a cab to take them to their hotel. **App. 28 (Tr. 102)**. While standing outside the restaurant, Mr. Almoghrabi's copilot began mocking Mr. Almoghrabi's speech and his clothing. **App. 28 (Tr. 102)**. Mr. Almoghrabi asked the copilot to stop and when the copilot continued to taunt Mr. Almoghrabi, Mr. Almoghrabi shoved the copilot and the copilot fell to the ground. **App. 98**. The copilot reported the incident to GoJet and GoJet fired Mr. Almoghrabi for violation of its "no fighting" policy. **App. 28 (Tr. 102)**.

Respondent represented Mr. Almoghrabi from 2012 until mid-May 2015. **App. 49 (Tr. 185-86); 83 (Tr. 322)**. While Respondent was representing Mr. Almoghrabi, Mr. Almoghrabi was either unemployed or working at a job that payed much less than he had earned as a pilot for GoJet. **App. 36-37 (Tr. 136-37); 49 (Tr. 186-87)**. Mr. Almoghrabi filed for bankruptcy in 2014. **App. 53 (Tr. 203)**.

Testimony by Chris Vaporean Regarding the

Standard of Practice in Employment Discrimination Cases

Chris Vaporean testified at the hearing on behalf of Informant as to the standard of practice in employment discrimination cases. **App. 18 (Tr. 63)**. Ms. Vaporean is the Co-Chair of the Employment Law Group of Brown & James, PC ("the Firm"). **App. 19 (Tr. 65)**. She is a shareholder with the Firm and has practiced employment law since 2007. **App. 18 (Tr. 64)**. She has successfully handled several hundred employment law cases. **App. 19 (Tr. 66)**. She has written and spoken on the topic numerous times. **App. 19 (Tr. 65)**.

Ms. Vaporean provided the following opinions:

1. Race, religion and natural origin employment discrimination claims can be brought either under the Missouri Human Rights Act ("MHRA") or Title VII of the Civil Rights Act of 1964 ("Title VII"). **App. 21 (Tr. 73-76)**.
2. Employment discrimination claims must be presented first to either the Equal Employment Opportunity Commission ("EEOC"), a federal agency, or the Missouri Human Rights Commission ("MHRC"), a state agency, before a lawsuit can be filed. If the matter is not resolved at the agency level, the employee can request a "Right to Sue Letter" from either or both agencies. **App. 22 (Tr. 77-78)**.
3. The MHRA requires a plaintiff to file suit within 90 days of the issuance of the MHRC's "Right to Sue Letter". This is an absolute deadline. **App. 22 (Tr. 78)**. Title VII requires a plaintiff to file suit within 90 days of receipt of the EEOC's "Right to Sue Letter". **App. 22 (Tr. 78-79)**.
4. A plaintiff can file suit in either State or Federal Court. However, most employment discrimination claims originating in Missouri are brought only under the MHRA and filed in State Court, rather than Federal Court.[2] This is because of this Court's holding in *Daugherty v. City of Maryland*, 231 S.W.3d 814 (Mo. banc 2007). In *Daugherty*, this Court applied the "contributing

[2] The MHRA was amended by the legislature in 2017 to bring it back in line with federal employment discrimination law. The amendments became effective August 28, 2017. Ms. Vaporean's opinions are based upon MHRA law prior to August 28, 2017.

factor" causation standard. Under this causation standard, any amount of discrimination, no matter how slight, is a violation of the MHRA. **App. 21 (Tr. 74)**. The "contributing factor" causation standard is much easier to meet than the "motivating factor" required under Title VII. In addition, in *Daugherty*, this Court held that summary judgment should seldom be used in MHRA actions. Federal Courts routinely grant summary judgments in Title VII actions. **App. 21 (Tr. 73-76); R. Vol. 3 pp. 655-667**.

5. Besides the advantages provided by this Court's *Daugherty* decision, there are other advantages to filing under the MHRA in State Court. In State Court, a verdict only requires nine of the twelve jury members to agree as opposed to the unanimous verdict required in Federal Court. Finally, there are no caps on compensatory and punitive damages under the MHRA as opposed to Title VII actions. **App. 21 (Tr. 73-76); R. Vol. 3 pp. 655-667**.
6. Employment law attorneys do not file employment discrimination claims under both the MHRA and Title VII very often. If a case is filed in State Court, it is subject to removal to Federal Court due to the Title VII claim creating federal question jurisdiction. **App. 21 (Tr. 76)**. If a MHRA claim is brought in Federal Court, federal judges interpret the "contributing factor" standard to require more evidence than is required in State Court. **App. 36 (Tr. 133)**.

Issuance Of Right To Sue Letters By The MHRC And The EEOC

On December 8, 2013, the MHRC issued its "Right to Sue Letter" against GoJet and on January 6, 2014, the MHRC issued its "Right to Sue Letter" against the Union. **App. 87-90; R. Vol. 5 p. 903**. The MHRA required Mr. Almoghrabi to file his MHRA causes of actions within 90 days of the date of the issuance of the "Right to Sue Letters" and no later than two years after the alleged causes of action. **App. 87-90; R. Vol. 5 p. 903**.

The EEOC issued its "Right to Sue Letter" against GoJet on December 17, 2013. **App. 151**. Title VII required Mr. Almoghrabi to file his Title VII cause of action within 90 days of receipt of the notice.

Respondent's Filing Of Mr. Almoghrabi's Lawsuit

Respondent decided that he would file Mr. Almoghrabi's lawsuit in Federal Court. Respondent did not explain to Mr. Almoghrabi the advantages of only filing a claim under the MHRA and bringing the cause of action in State Court because Respondent did not understand the advantages himself. **App. 65-66 (Tr. 252-54)**. Respondent incorrectly advised Mr. Almoghrabi that proceeding forward with both the MHRA and Title VII claims in Federal Court would be a better option even though it significantly reduced Mr. Almoghrabi's chance of recovery. Respondent based his opinion upon the fact that cases usually move forward faster in Federal Court. **App. 65-66 (Tr. 249-54)**. Although Mr. Almoghrabi generally desired a quick outcome to his case, he did not want the case filed in Federal Court if it lessened his chance of recovery. **App. 62 (Tr. 238)**.

Respondent prepared Mr. Almoghrabi's Complaint but had Mr. Almoghrabi sign the Complaint as a pro se party because Respondent had not obtained admission to the United

States District Court, Eastern District of Missouri ("Eastern District"). **App. 50 (Tr. 190); 59 (Tr. 225)**. Mr. Almoghrabi did not understand what the term "pro se" meant. **App. 60 (Tr. 230)**.

On March 10, 2014, Respondent advised Mr. Almoghrabi, via email, that he had filed Mr. Almoghrabi's lawsuit. **App. 51 (Tr. 193-94); R. Vol. 5 p. 1101**. This was not true. **App. 95-108**.

On March 18, 2014, Respondent sent several emails to other employment law attorneys trying to give Mr. Almoghrabi's case away. **R. Vol. 5 pp. 1123-1127**. Respondent did not advise Mr. Almoghrabi of his actions. **App. 50 (Tr. 192)**. Respondent was unsuccessful in finding another attorney to take over the case.

On March 19, 2014, Respondent filed the Complaint in the Eastern District on behalf of Mr. Almoghrabi against GoJet and the Union. **App. 95-107**. In the Complaint, Respondent alleged that GoJet and the Union violated both the MHRA, Sections 213.010, et seq, RSMo and Title VII. **App. 95-107**.

Respondent missed the statute of limitation for Mr. Almoghrabi's MHRA claim against GoJet. **App. 22 (Tr. 79); 155**. The March 19, 2014, filing date was 101 days after the MHRC issued its "Right to Sue Letter" regarding GoJet. **App. 87-90; 126**. Respondent knew that he had not filed the GoJet MHRA claim within 90 days of the issuance of the "Right to Sue Letter", but he believed that the MHRA claim would be considered timely because it would "come in" with his timely filed Title VII claim. **App. 66 (Tr. 253-55)**.

When filing the Complaint, Respondent signed the Civil Cover Sheet and the Original Filing Form. **App. 79-80 (Tr. 306-11)**. Respondent testified that he signed his

own name to both forms. **App. 79 (Tr. 306)**. The signature on both forms was scribbled but appeared to begin with a capital "A.". **App. 108-109**. The Cover Sheet required the "filing party" to list the basis of jurisdiction, the citizenship of the parties, and the nature of the lawsuit. It also required the "filing party" to affirm that the information provided on the Cover Sheet was true and accurate. **App. 108**. The Original Filing Form required the "attorney of record" to check a box regarding whether the same case, or a related case, had been filed previously in the Court and for the "attorney of record" to affirm that the provided information was true and correct. **App. 109**.

At the hearing, the Panel questioned Respondent extensively about whether Respondent's initial testimony was correct or whether Respondent, in fact, had signed Mr. Almoghrabi's name to the forms. The Panel pointed out to Respondent that if he had signed Mr. Almoghrabi's name to the forms, Respondent's actions could have been misleading to the Court. **App. 80 (Tr. 312)**. Respondent continued to insist that he signed his own name to the forms. Respondent cited Exhibits 21 and Exhibits 22 as documents containing his authentic signatures for comparison with the signatures on the Cover Sheet and Filing Form. The Panel concluded that the signatures on Exhibits 21 and 22 were dissimilar to the signatures on the Cover Sheet and the Original Filing Form and Respondent had signed Mr. Almoghrabi's name to the forms even though Respondent testified to the contrary. **App. 214-240**.

Respondent's Representation of Mr. Almoghrabi

After Filing the Lawsuit But Prior to Joining the Law Firm

Respondent did not take any action to obtain service on GoJet for five months. In Federal Court, cases are subject to dismissal by the Court if the parties are not served within a timely manner. **App. 23; 194-95**.

On May 15, 2014, the Union filed a Motion to Dismiss alleging that Mr. Almoghrabi had failed to meet the applicable statute of limitation on his statutory duty of fair representation claim. **App. 111-114; R. Vol. 4 pp. 698-702**. In Federal Court, responses to motions are due within seven days. **App. 23 (Tr. 83)**. Respondent could not respond to the Motion within the required time frame because he had not yet sought, or obtained, admission to the Eastern District. **R. Vol. 4 pp. 675-872 - Vol. 5 pp. 873-928**.

Respondent did not apply for admission to the Eastern District until May 29, 2014, because it was difficult for him to pay the application fee. **App. 84 (Tr. 326)**. On June 23, 2014, Respondent advised Mr. Almoghrabi that he was not admitted in the Eastern District and that when he filed Mr. Almoghrabi's case he had represented to the Court that Mr. Almoghrabi had no counsel. **App. 60 (Tr. 232); R. Vol. 5 p. 1105**.

On August 13, 2014, the Court ordered Mr. Almoghrabi to show cause by August 26, 2014, why Mr. Almoghrabi's case should not be dismissed for lack of service on GoJet. **R. Vol. 4 pp. 703-704**. The Court also ordered Mr. Almoghrabi to file a response to the Union's Motion to Dismiss by August 26, 2014. **R. Vol. 4 pp. 703-704**.

Respondent was admitted to the Eastern District on August 20, 2014. He entered his formal appearance in the case on August 22, 2014. **App. 115**. On August 22, 2014,

Respondent filed a Motion to Enlarge the Time whereby he requested additional time to serve GoJet and to respond to the Union's Motion to Dismiss. In his Motion, Respondent represented to the Court that he needed the additional time because he needed to complete a due diligence review of the pleadings. **App. 116**. The Court granted Respondent until September 22, 2014, to obtain service on GoJet and to respond to the Union's Motion to Dismiss. **App. 195**.

Respondent did not obtain service on GoJet until September 24, 2014. **App. 195**. Respondent filed his Response to the Union's Motion to Dismiss on September 26, 2014, after obtaining two extensions of time to do so. **App. 116-122**.

Respondent's Handling of the Lawsuit After Joining the Firm

On November 5, 2014, GoJet filed a Partial Motion to Dismiss in which it asserted that Mr. Almoghrabi's MHRA claim against GoJet was time-barred because it was not filed within the 90 days of the issuance of the "Right to Sue Letter". **App. 123-138**.

In December 2014, Respondent joined the Springfield, Missouri office of the Firm as an associate. Respondent represented to the Firm that he had four years' experience in handling plaintiffs' employment discrimination lawsuits. **App. 9 (Tr. 26); 16 (Tr. 55)**.

On December 9, 2014, Respondent requested permission from the Firm to continue representing Mr. Almoghrabi in his employment discrimination case. Respondent prepared a memorandum to the Firm's Executive Committee which discussed the factual background for the lawsuit, the parties involved, the fee agreement, and Respondent's assessment of the case. In the memorandum, Respondent stated that he believed the case was winnable and stated he would not require assistance from any other attorney in the Firm except to possibly

"bounce litigation strategy and theory off of." Respondent, however, indicated that he would welcome the Firm assigning a supervising principal to the case. Respondent did not disclose in his memorandum that he had filed Mr. Almoghrabi's MHRA claim out of time or that GoJet had filed a Partial Motion to Dismiss Mr. Almoghrabi's MHRA claim. **App. 91-93**.

The Firm allowed Respondent to continue representing Mr. Almoghrabi based upon the representations Respondent made in his memorandum. No other attorney with the Firm entered an appearance on the case or performed any substantive work on the case until Respondent resigned from the Firm on May 14, 2015. **App. 10 (Tr. 30); 194-204; 206**.

Respondent had difficulty working with the managing principal of the Springfield office of the Firm. **App. 9 (Tr. 25)**. During some of the relevant time periods, Respondent felt ill due to the stress he was under while working for the Firm. **App. 75-76 (Tr. 290-94)**.

On January 5, 2015, Respondent filed his Response to GoJet's Partial Motion Dismiss. **App. 144-151**. In his Response, Respondent admitted that Mr. Almoghrabi's MHRA claim against GoJet was filed nine days[3] after the 90-day deadline. He, however, asserted that equitable tolling should be applied for excusable neglect because Mr. Almoghrabi, as a pro se party, could have been confused about the 90-day timeline. **App. 144-46**.

Respondent's statement was not true. **App. 49 (Tr. 185-86)**. Respondent had prepared the Complaint and Respondent decided when to file the Complaint. **App. 50 (Tr.**

[3] Actually, the claim was filed eleven days after the 90-day deadline. **App. 154**.

189-90); 52 (Tr. 199). Almoghrabi did not instruct Respondent regarding the timing of the filing or delay the filing in any way. **App. 52 (Tr. 199)**. During the hearing, Respondent tried to deflect blame away from himself regarding the untruthful statement, by asserting that Mr. Almoghrabi had reviewed and approved Respondent's Response to the Motion to Dismiss before he filed it with the Court. **App. 72 (Tr. 277)**.

On March 11, 2015, the Court granted GoJet's Partial Motion to Dismiss and dismissed Mr. Almoghrabi's MHRA claim against GoJet. **App. 152-163**. The Court specifically found, "Plaintiff concedes his MHRA claims were not filed within the ninety-day period . . ., but he argues that equitable tolling should apply because of his confusion arising from the different deadline set by the EEOC notice. The Court rejects the argument. Both the MHRA and the MHRC's right-to-sue notice clearly set forth the ninety-day deadline, and Plaintiff's pro se status did not excuse him from complying with this statutory requirement." **App. 158**.

GoJet was the primary defendant in the case as the claim against the Union was very weak. **App. 22 (Tr. 79-80)**. The Court's dismissal of the GoJet MHRA claim materially prejudiced Mr. Almoghrabi's chance of recovery. **App. 22 (Tr. 79-80)**. Respondent did not advise Mr. Almoghrabi that he had failed to file the MHRA cause of action against GoJet within the statute of limitation or that the Court had dismissed Mr. Almoghrabi's MHRA GoJet claim. **App. 29 (Tr. 105); 43 (Tr. 161-62); 50 (Tr. 191)**. Respondent did not advise Mr. Almoghrabi that the dismissal of the MHRA GoJet claim significantly reduced Mr. Almoghrabi's chance of recovery. **App. 29 (Tr. 105); 43 (Tr. 161-62); 50 (Tr. 191)**.

On March 11, 2015, Respondent sought leave to amend Mr. Almoghrabi's Complaint to add a Section 1981 claim. In his Motion, Respondent stated, "undersigned counsel seeks to add additional claims which were unknown to *Pro Se* Plaintiff at the time of filing his Complaint." **App. 164**.

On May 8, 2015, the Court granted Respondent's Motion to file an Amended Complaint. **App. 165-65; 187-88**. The Court further ordered Respondent to file the exhibits referenced in the Amended Complaint by May 15, 2015. **App. 188**.

On May 8, 2015, the Court also dismissed Count III of the Amended Complaint sua sponte, finding that the claim was untimely. **App. 189**. Count III addressed Mr. Almoghrabi's MHRA claim against the Union. **App. 187**. This was an error on the part of the Court as the claim had been made within 90 days of the MHRC's issuance of the "Right to Sue Letter". **App. 25-26 (Tr. 92-93)**. Respondent did not take any action to have the MHRA claim against the Union reinstated. **R. Vol. 4 pp 675-872 – Vol. 5 pp. 928**.

Respondent objected to and failed to answer all interrogatories propounded by GoJet. **R. Vol. 4 pp. 840-852**. As a result, GoJet filed a Motion to Compel. **R. Vol. 4 pp. 827-829**. At the hearing on the matter, the parties advised that all issues raised in the Motion to Compel had been worked out except for GoJet's discovery requests relating to Mr. Almoghrabi's medical records. On May 12, 2015, the Court ordered Mr. Almoghrabi to respond to the medical records' discovery requests within 30 days. The Court granted GoJet's attorney fees of $200. **App. 190-191**.

Respondent did not pay the attorney fees, nor did he advise the Firm that the Court had imposed such against him. He also did not produce the medical records. **App. 27 (Tr. 97)**.

Respondent's Resignation From The Firm

On May 15, 2015, before regular business hours, Respondent moved his personal belongings from the Firm and left a note, dated May 14, 2015, in the Springfield managing principal's chair, which stated, "I hereby tender my resignation effective immediately." **App. 11 (Tr. 33); 208**. Respondent did not provide any prior notice of his resignation. **App. 11 (Tr. 33)**.

When Respondent resigned, Respondent did not indicate whether he planned upon taking Mr. Almoghrabi's case with him. **App. 74 (Tr. 287)**. Respondent did not provide any type of summary setting forth the status of the case. **App. 27 (Tr. 99)**. The only information the Firm had about the status of the case was an outdated "punch list" Respondent had given to the Springfield managing principal on April 21, 2015, and any knowledge Respondent's administrative assistant may have had about the case. **App. 11 (Tr. 34); 209-210**.

There were numerous tasks which needed to be completed on Mr. Almoghrabi's case either immediately or within a few weeks of Respondent's resignation. The Court had ordered that the exhibits to the First Amended Complaint be filed by no later than May 15, 2015. **App. 200**. Respondent had not paid the $200 in attorney fees assessed by the Court on May 12, 2015. Respondent had not produced the medical records the Court had ordered produced by no later than June 12, 2015. **App. 27 (Tr. 97); 190-191**. The court-ordered

mediation had to be completed by no later than June 30, 2015. **App. 27 (Tr. 98); 199**. Except for selecting a mediator, Respondent had not taken any action in preparation of the mediation. **App. 27 (Tr. 98)**. Per the case management order, discovery had to be completed by August 31, 2015. **App. 198**. Respondent had not taken, or scheduled, any depositions and Respondent had not gathered background information on the GoJet employee who had fired Mr. Almoghrabi. **App. 27 (Tr. 98)**.

After learning of Respondent's resignation, one of the attorneys at the Springfield office of the Firm went into Respondent's office and found Mr. Almoghrabi's file. **App. 11 (Tr. 34)**. The attorney asked Respondent's administrative assistant about the status of the case and learned that the exhibits to the Amended Complaint had to be filed that day. **App. 11 (Tr. 34)**. There was no attorney at the Springfield office of the Firm who was licensed in the Eastern District so the Firm's St. Louis managing principal, Michael Ward, entered his appearance and filed the exhibits. **App. 11 (Tr. 34)**.

On May 18, 2015, Mr. Ward sent a series of emails to Respondent inquiring about Mr. Almoghrabi's case. Mr. Ward advised Respondent that he was the only attorney familiar with the case and Respondent's duties to Mr. Almoghrabi continued unless, and until, the Court granted Respondent permission to withdraw. **App. 206-207**.

In the email communications with Mr. Ward, Respondent indicated that he did not intend to represent Mr. Almoghrabi any longer. To protect Mr. Almoghrabi's interest, the Firm decided it had to take over the representation even though the Firm did not usually handle plaintiffs' employment discrimination cases. **App. 206-207**.

Respondent did not notify Mr. Almoghrabi that he was ceasing his representation until Mr. Ward insisted Respondent do so. On May 19, 2015, Respondent emailed Mr. Almoghrabi and advised that he could not continue to represent him and suggested Mr. Almoghrabi should have the Firm handle the representation. **App. 28-29 (Tr. 104-05); 205**. Respondent never sought leave to withdraw from the case even though the Firm sent Respondent a certified letter with a prepared motion to withdraw. **App. 207**.

Because Mr. Ward was not an employment law attorney, Ms. Vaporean took over Mr. Almoghrabi's case shortly after Respondent resigned. She met with Mr. Almoghrabi and explained the problems with the case. **App. 53 (Tr. 202-04)**. She engaged in extensive discovery and attempted to obtain a favorable outcome for Mr. Almoghrabi but was unable to overcome a motion for summary judgment due to the much higher causation standard required under Title VII causes of action. **App. 27-30 (Tr. 97-112)**. At the hearing, Ms. Vaporean testified that if Respondent had timely filed Mr. Almoghrabi's MHRA claim against GoJet in State Court, she would have been able to overcome a motion for summary judgment and would have had "a pretty good shot" of winning the case. **App. 28 (Tr. 104); 34 (Tr. 126)**.

II. THE DISCIPLINARY HEARING PANEL' S DECISION

On July 31, 2017, The Advisory Committee served the Panel's Decision on Informant and Respondent. In its decision, the Panel found that Respondent violated Rules 4-1.1 (competent representation), 4-1.3 (diligence), 4-1.4 (communication), 4-1.16(d) (protecting client's rights upon termination of representation), and 4-3.3(a) (making a false statement to a tribunal). **App. 214-240**. The Panel recommended an indefinite suspension

with no leave to apply for reinstatement for six months. **App. 214-240**. Both Informant and Respondent rejected the DHP's Decision. **R. Vol. 6 pp. 1296-1298**.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO PROVIDE COMPETENT REPRESENTATION TO A CLIENT IN VIOLATION OF RULE 4-1.1 IN THAT RESPONDENT:

1. **FILED THE CLIENT'S CASE IN FEDERAL COURT INSTEAD OF STATE COURT AND INCLUDED A TITLE VII CLAIM WITH THE MHRA CLAIM; AND**
2. **FAILED TO MEET THE STATUTE OF LIMITATION FOR THE MHRA CLAIM.**

In re Shelhorse, 147 S.W.3d 79, 80 (Mo. banc 2004)

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (U.S. 1973)

Daugherty v. City of Maryland, 231 S.W.3d 814 (Mo. banc 2007)

Attorney Grievance Comm'n of Maryland v. Sperling, 69 A.3d 478 (Md. 2013)

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS IN VIOLATION OF RULE 4-1.3 IN THAT RESPONDENT FAIED TO:

1. **FILE THE CLIENT'S MHRA GOJET CLAIM WITHIN THE STATUTE OF LIMITATION;**
2. **OBTAIN ADMISSION TO THE EASTERN DISTRICT BEFORE FILING THE CLIENT'S LAWSUIT; AND**
3. **RESPOND TO OPPOSING COUNSEL'S DISCOVERY REQUESTS IN A TIMELY MANNER.**

Attorney Grievance Comm'n of Maryland v. Brown, 44 A.3d 344 (Md. 2012)

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO KEEP HIS CLIENT REASONABLY INFORMED ABOUT THE STATUS OF A MATTER IN VIOLATION OF RULE 4-1.4(a) IN THAT RESPONDENT FAILED TO ADVISE HIS CLIENT THAT:

1. **THE COURT HAD DISMISSED THE CLIENT'S MHRA GOJET CLAIM DUE TO A MISSED STATUE OF LIMITATION AND, AS A RESULT, THE CLIENT'S CHANCE OF RECOVERY WAS GREATLEY DIMINISHED;**
2. **THE COURT HAD IMPOSED SANCTIONS AGAINST RESPONDENT FOR FAILURE TO COMPLY WITH DISCOVERY REQUESTS; AND**
3. **RESPONDENT HAD LEFT THE FIRM AND WAS TERMINATING HIS REPRESENTATION OF THE CLIENT.**

Attorney Grievance Comm'n of Maryland v. Brown, 44 A.3d 344 (Md. 2012)

IV.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO ADEQUATELY PROTECT HIS CLIENT'S INTEREST UPON THE TERMINATION OF REPRESENTATION IN VIOLATION OF RULE 4-1.16(d) IN THAT RESPONDENT DID NOT:

1. **NOTIFY HIS CLIENT IN A TIMELY MANNER OF HIS DEPARTURE FROM THE FIRM; AND**
2. **TAKE STEPS TO ENSURE THAT HIS FORMER LAW FIRM WAS AWARE OF THE STATUS OF THE CASE.**

Kentucky Bar Ass'n v. An Unnamed Attorney, 205 S.W.3d 204, 208 (Ky. 2006)

In re Rabb, 415 A.2d 1168 (N. J. 1980)

V.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT KNOWINGLY MADE A FALSE STATEMENT OF FACT TO A TRIBUNAL IN VIOLATION OF RULE 4-3.3(a) IN THAT HE ARGUED TO THE COURT THAT EQUITABLE TOLLING SHOULD BE APPLIED TO A STATUTE OF LIMITATION BECAUSE THE CLIENT WAS PRO SE AND MAY HAVE BEEN CONFUSED BY THE STATUTE OF LIMITATION WHEN, IN FACT, RESPONDENT WAS REPRESENTING THE CLIENT, RESPONDENT HAD PREPARED THE LAWSUIT, AND RESPONDENT DECIDED WHEN TO FILE THE LAWSUIT.

In re Carey, 89 S.W.3d 477, 498 (Mo. banc 2002)

VI.

THIS COURT SHOULD SUSPEND RESPONDENT'S LICENSE BECAUSE RECENT MISSOURI SUPREME COURT CASE LAW SUGGESTS THAT SUSPENSION IS AN APPRORIATE LEVEL OF DISCIPLINE FOR AN ATTORNEY WHO MAKES A FALSE STATEMENT TO A JUDGE IF THERE ARE COMPELLING MITIGATING CIRCUMSTANCES

In re Caranchini, 956 S.W.2d 910 (Mo. banc 1997)

In re Storment, 873 S.W.2d 227 (Mo. banc 1994)

In re Carey, 89 S.W.3d 477 (Mo. banc 2002)

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

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO PROVIDE COMPETENT REPRESENTATION TO A CLIENT IN VIOLATION OF RULE 4-1.1 IN THAT RESPONDENT:

(1) FILED THE CLIENT'S CASE IN FEDERAL COURT INSTEAD OF STATE COURT AND INCLUDED A TITLE VII CLAIM WITH THE MHRA CLAIM; AND

(2) FAILED TO MEET THE STATUTE OF LIMITATION FOR THE MHRA CLAIM.

In matters of attorney discipline, the DHP's decision is only advisory. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004). This Court reviews the evidence de novo and reaches its own conclusions of law. *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). Professional misconduct is established by a preponderance of the evidence. *Id.* An attorney must comply with the Rules of Professional Conduct as set forth in Supreme Court Rule 4 as a condition of retaining his license. *In re Shelhorse*, 147 S.W.3d at 80. Violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *Id.*

Rule 4-1.1 states that a lawyer shall provide competent representation to a client. It goes on to note that competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Comment 5 to

Rule 4-1.1 further explains that competent handling of a matter by an attorney includes inquiry into and analysis of the factual and legal elements of the problem and the use of methods and procedures meeting standards of competent practitioners.

In the Instant Case, Respondent failed to provide competent representation when he filed Mr. Almoghrabi's lawsuit in Federal Court and brought claims under both the Missouri Human Rights Act, Section 213.01 et seq., RSMo and Title VII of the Civil Rights Act of 1964.

To understand why Respondent exhibited a lack of competency in handling Mr. Almoghrabi's case it is necessary to look at historical case law interpreting the MHRA and Title VII. "From 1984 until 2007, MHRA claims were litigated in a framework nearly identical to that used by federal courts in employment discrimination cases." Dane C. Martin, *The Employees' Decade: Recent Developments Under the MHRA and the Employers' Potential Rebound*, 75 Mo. L. Rev 1349, 1355-356 (2010); *See also Midstate Oil Co. v. Missouri Comm'n on Human Rights*, 679 S.W.2d 842, 845 (Mo. banc 1984).

In most employment discrimination cases, evidence is circumstantial based upon inferences rather than direct evidence because very few employers openly admit that they discriminate. *E.E.O.C. v. Liberal School District*, 314 F.3d 920, 923 (8th Circ. 1993). Prior to 2007, under both the MHRA and Title VII, an employee had the same burden of proof when there was circumstantial evidence of discrimination. The burden of proof was set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (U.S. 1973). This burden shifting analysis first required the employee to establish a prima facie case of discrimination. Then the burden of production, but not persuasion, shifted to the

employer to proffer a legitimate, non-discrimatory reason behind the adverse employment action. Finally, if the employer's burden of production was sufficient, the employee had to show that the stated reasons were merely pretextual for the adverse employment action. Dane C. Martin, *supra*, at 1355-356. This became known as the "motivating factor" standard of proof.

The "motivating factor" burden of proof was very difficult for an employee to meet and both Federal and State Courts routinely granted summary judgment in favor of the employer. *See Torgerson v. City of Rochester*, 643 F.3d 1031, 1043 (8th Circ. 2011); *See also* Joseph V. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases,* 2009 U. Ill. L. Rev. 1101, 1032 (study showing courts granted 80 percent of summary judgment motions in employment discrimination cases).

However, beginning in 2007 with this Court's decision in *Daugherty v. City of Maryland,* 231 S.W.3d 814 (Mo. banc 2007), it became considerably easier for employees to prevail in State Court on MHRA discrimination claims than it was to prevail on the same claim under Title VII in Federal Court. Cohen, Joan & Diel, John, *Pending Legislation: Bringing the MHRA Back in Line with Federal Law,* 21 No. 2 Mo. Emp. L. Letter 1 (April 2011). In *Daugherty*, this Court applied the "contributing factor" causation standard. 231 S.W.3d at 819. Under this causation standard, *any amount of discrimination, no matter how slight*, was a violation of the MHRA. In *Daugherty,* this Court also held that claims under the MHRA will survive "summary judgment if there is a genuine issue of material

fact as to whether the [protected status of the plaintiff] was a 'contributing factor' to the defendant's adverse employment action." *Id.* at 820.

Besides providing a lower causation standard, the MHRA offered other benefits to employee plaintiffs. Title VII limits compensatory and punitive damages to a combined total of $50,000 to $300,000 depending upon the employer's size. Martucci, William, 37 Missouri Practice Series, *Employment Law & Practice*, Section 114 (2016 update). The MHRA imposed no limits on compensatory damages and the punitive damages limitation was the greater of $500,000 or 5 times the net amount of the judgment. *Id.*

While a MHRA claim could be brought along with a Title VII claim in Federal Court, generally Federal Courts interpret the "contributing factor" standard of the MHRA to require more evidence than State Courts do. **App. 36 (Tr. 133)**. In addition, in Federal Court a unanimous verdict is required while in State Court only nine of the twelve jury members must agree. Fed. R. Civ. P. 48; Mo. Const., Art. 1, Section 22(a). Thus, it was commonly known by Missouri employment law practitioners that employment law cases should be brought under the MHRA, not under Title VII, and suit should be filed in State Court rather than Federal Court. *See* O'Toole, Daniel, *Runaway Missouri Juries*, 18 No. 3 Mo. Empl. L. Letter 1 (2008); O'Toole, Daniel, *Missouri Human Rights Act Update: Adapting to a Changing Landscape*¸ Missouri Employment Law Letter (Jan. 2007).

If Respondent had filed Mr. Almoghrabi's claims against GoJet only under the MHRA and filed in State Court, he would have: (1) had a much easier causation standard to meet, (2) faced much less risk of having the case dismissed via summary judgment, (3) needed only nine of the twelve jury members to find for Mr. Almoghrabi, and (4) had the

potential for larger compensatory and punitive damages.[4] While Respondent was an inexperienced attorney when he filed suit on behalf of Mr. Almoghrabi, inexperience does not lessen an attorney's duty to provide competent representation. As Comment 2 to Rule 4-1.1 notes, a lawyer can provide adequate representation in a wholly novel field through necessary study. Unfortunately, Respondent did not engage in the necessary study to know that he should have filed Mr. Almoghrabi case in State Court and only brought a claim under the MHRA.

Competent representation requires an attorney to act with requisite preparation and thoroughness. *See Attorney Grievance Comm'n. Of Maryland v. Mitchell,* 126 A.3d 72, 78 (Md. 2015). Accordingly, an attorney violates Rule 4-1.1 when he fails to research what the applicable statute of limitation is or how the statute of limitation is applied. *Attorney Grievance Comm'n of Maryland v. Sperling*, 69 A.3d 478 (Md. 2013) (attorney violated competent representation rule when he did not research whether legal means to circumvent running of statute of limitations existed). Respondent testified in this case that he knew that Mr. Almoghrabi's lawsuit had not been filed within 90 days of MHRC's "Right to Sue Letter" but assumed that he could piggyback the MHRA claim onto the Title VII claim and

[4] If Respondent had filed both a MHRA claim and a Title VII claim in State Court, Mr. Almoghrabi's employer could have removed it to Federal Court due to the Title VII claim creating federal question jurisdiction. **App. 21 (Tr. 76)**. Ms. Vaporean testified that while federal judges purported to apply the "contributing factor" standard to MHRA claims, they often required more evidence of discrimination than state judges did. **App. 36 (Tr. 133)**.

circumvent the MHRA's statute of limitation. Respondent's assumptions were not valid. Respondent failed to adequately research the issue and is in violation of Rule 4-1.1.

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS IN VIOLATION OF RULE 4-1.3 IN THAT RESPONDENT FAILED TO:

(1) FILE THE CLIENT'S MHRA GOJET CLAIM WITHIN THE STATUTE OF LIMITATION;

(2) OBTAIN ADMISSION TO THE EASTERN DISTRICT BEFORE FILING THE CLIENT'S LAWSUIT; AND

(3) RESPOND TO OPPOSING COUNSEL'S DISCOVERY REQUESTS IN A TIMELY MANNER.

Rule 4-1.3 provides that a lawyer shall act with reasonable diligence and promptness in representing a client. This duty includes fulfilling all obligations the representation requires within a reasonable time and not neglecting any matters involved in a representation. ABA/BNA Lawyer's Manual on Professional Conduct, *Diligence*, 31:401 (2017). Comment 2 to Rule 4-1.3 provides that a lawyer needs to control his or her workload so that each matter can be handled competently. In its extreme form, neglect of a client matter can result in a missed statute of limitation. *See Attorney Grievance Comm'n of Maryland v. Brown*, 44 A.3d 344 (Md. 2012) (an attorney shows lack of diligence if the lawyer fails to protect against the expiration of the statute of limitation).

Respondent demonstrated a lack of diligence when he failed to file Mr. Almoghrabi's MHRA GoJet claim within 90 days of the issuance of the "Right to Sue

Letter". Even if there had been case law supporting Respondent's belief that the MHRA claim could be piggybacked onto the Title VII claim, a diligent attorney would not have chanced delaying past the date of the MHRA statute of limitation and would have filed both the MHRA and Title VII claims before the expiration of the statute of limitation for the MHRA claim.

Respondent also demonstrated a lack of diligence by delaying in obtaining admission to the Eastern District. **App. 83 (Tr. 322)**. Respondent began representing Mr. Almoghrabi in 2012. **App. 49 (Tr. 185-86)**. Respondent, however, did not seek admission to the Eastern District until May 29, 2014, and was not admitted to the Eastern District until August 20, 2014. **App. 84 (Tr. 326); 96**. From March 19, 2014, when Respondent filed Mr. Almoghrabi's Complaint, until August 20, 2014, Respondent was unable to take any action in the Eastern District regarding Mr. Almoghrabi's lawsuit. The delay could have resulted in great harm to Mr. Almoghrabi. Rule 4 of the Federal Rules of Civil Procedure required service on the defendants within 120 days after filing the complaint.[5] Because Respondent was not the attorney of record in the case he could not request that the Court issue summons in the case or request that defendants waive service. On August 13, 2014, the Court issued an Order to Mr. Almoghrabi to show cause why his lawsuit should not be dismissed for lack of service on GoJet. **R. Vol. 4 pp. 703-04**.

[5] In 2015, Rule 4 was amended to require service within 90 days of the filing of the Complaint.

Similarly, Respondent was unable to respond in a timely manner[6] to the Motion to Dismiss filed by the Union on May 15, 2014, because he had not obtained admission to the Eastern District.

Finally, Respondent also showed a lack of diligence when he failed to respond to GoJet's interrogatories by a means other than objecting. Respondent's delay resulted in GoJet filing a Motion to Compel and the Court awarding attorney fees to GoJet. As the Maryland Supreme Court noted in *Attorney Grievance Comm'n of Maryland v. Brown*, a lawyer who causes discovery sanctions to be imposed against his client for failure to answer discovery requests violates Rule 4-1.3. *Id.* at 355.

[6] Local Rule 7-4.01 required Mr. Almoghrabi to file a response to the Motion to Dismiss within seven days.

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO KEEP HIS CLIENT REASONABLY INFORMED ABOUT THE STATUS OF A MATTER IN VIOLATION OF RULE 4-1.4(a) IN THAT RESPONDENT FAILED TO ADVISE HIS CLIENT THAT:

1. **THE COURT HAD DISMISSED THE CLIENT'S MHRA GOJET CLAIM DUE TO A MISSED STATUE OF LIMITATION AND, AS A RESULT, THE CLIENT'S CHANCE OF RECOVERY WAS GREATLEY DIMINISHED;**
2. **THE COURT HAD IMPOSED SANCTIONS AGAINST RESPONDENT FOR FAILURE TO COMPLY WITH DISCOVERY REQUESTS; AND**
3. **RESPONDENT HAD LEFT THE FIRM AND WAS TERMINATING HIS REPRESENTATION OF THE CLIENT.**

Rule 4-1.4(a) provides that a lawyer shall keep a client reasonably informed about the status of a matter and shall explain a matter to the extent reasonably necessary to permit a client to make an informed decision regarding the representation. The duty to communicate with a client includes the duty to disclose the attorney's own errors to the client, if the errors are substantial and may prejudice the client's rights or claims. 2015 North Carolina Ethics Opinion 4, Disclosing Potential Malpractice to a Client; *See also Attorney Grievance Comm'n of Maryland v. Brown*, 44 A.3d 344 (Md. 2012) (attorney

failed to keep a client adequately informed when the attorney failed to inform the client of the dismissal of a claim and the issuance of discovery sanctions). As Comment 7 to Rule 4-1.4(a) sets forth, a lawyer may not withhold information to serve the lawyer's own interests.

Accordingly, Respondent violated Rule 4-1.4(a) when he failed to advise Mr. Almoghrabi that the Court had dismissed Mr. Almoghrabi's MHRA GoJet claim because of the missed statute of limitation, and as a result, Mr. Almoghrabi's chance of recovery was greatly diminished; and (4) the Court had imposed $200 in sanctions due to Respondent's failure to comply with discovery requests.

The attorney's duty to communicate with a client also extends to situations whereby the attorney is leaving a law firm. As noted in ABA Formal Opinion No. 99-414 (1999), an attorney leaving a law firm has an ethical duty to notify any firm client for which the attorney has played a principal role in the delivery of the client's legal services of his departure from the firm. *See also* Kentucky Bar Association Ethics Op. KBA E-424 (2005); Alaska Bar Association Ethics Op. 2005-2(2005); and Colorado Ethics Op. 116 (2007).

Respondent was the only Firm attorney who had done any work on Mr. Almograbi's case. **App. 10 (Tr. 30)**. Respondent did not notify Mr. Almoghrabi of his departure from the Firm until after he left and not until Firm management insisted he do so. **App. 29-30 (Tr. 104-05); 205**. This notification was critical so that Mr. Almoghrabi was aware that he was without representation and that he needed to find new representation.

IV.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO ADEQUATELY PROTECT HIS CLIENT'S INTEREST UPON THE TERMINATION OF REPRESENTATION IN VIOLATION OF RULE 4-1.16(d) IN THAT RESPONDENT DID NOT:

1. **NOTIFY HIS CLIENT IN A TIMELY MANNER OF HIS DEPARTURE FROM THE FIRM; AND**
2. **TAKE STEPS TO ENSURE THAT HIS FORMER LAW FIRM WAS AWARE OF THE STATUS OF THE CASE.**

Rule 4-1.16(d) provides that upon termination of representation of a client, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest such as giving reasonable notice to the client, allowing for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of a fee.

The requirements of Rule 4-1.16(d) apply both when the attorney has a solo practice and terminates the attorney/client relationship and when the attorney is a member of a firm and the attorney leaves the firm. When an attorney leaves a firm both the departing lawyer and the law firm must take reasonable steps to ensure that the client's interests are protected. ABA/BNA Lawyers' Manual on Professional Conduct, *Withdrawal and Termination*, 31:1214 (2017); Kentucky Bar Association Ethics Opinion KBA E-424 (2005). This duty includes notifying the client that the attorney is leaving the firm and informing the attorneys

in the firm who may be taking over the representation about the status of the client's case. *Kentucky Bar Ass'n v. An Unnamed Attorney*, 205 S.W.3d 204, 208 (Ky. 2006).

As discussed above, when Respondent left the Firm on May 14, 2015, he did not notify Mr. Almoghrabi of his departure until Firm management insisted he do so. **App. 28-29 (Tr. 104-05); 205**. Although Respondent assumed that the Firm would take over Mr. Almoghrabi's representation, Respondent did not inform the Firm of the status of the case. Respondent had provided the Firm with a "punch list "of his cases on April 21, 2015, but it did not list any of the current deadlines for the case. **App. 11 (Tr. 34); 209-10**.

Respondent's failure to provide the Firm with information regarding the status of the case could have been very harmful to Mr. Almoghrabi. No other Firm attorney had worked on the case or had any familiarity with the case. **App. 10 (Tr. 30)**. There were many pressing deadlines with the case. **App. 191-92; 206**. The exhibits to the First Amended Complaint had to be filed by May 15, 2015. **App. 200**. Mr. Almoghrabi's medical records had to be produced by no later than June 12, 2015. **App. 27 (Tr. 98)**. The court-ordered mediation had to be completed by June 30, 2015. **App. 27 (Tr. 98); 199**. Respondent had not made any arrangements for the mediation, except to pick a mediator. **App. 27 (Tr. 98); 199**. Discovery had to be completed by August 31, 2015, and Respondent had not taken, or scheduled, any depositions or gathered background information on the GoJet employee who had fired Mr. Almoghrabi. **App. 27 (Tr. 98); 199**.

Fortunately for Mr. Almoghrabi, the Firm's attorneys jumped into action, reviewed the case file, and made sure that all deadlines were met. However, even though Mr. Almoghrabi was not harmed, this does not exonerate Respondent from his violation of Rule

4-1.16(d). *In re Rabb*, 415 A.2d 1168 (N. J. 1980) (A lawyer may be disciplined under Rule 1.16(d) for failure to take steps to protect a client's interests even though the client suffers no harm as a result.)

V.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT KNOWINGLY MADE A FALSE STATEMENT OF FACT TO A TRIBUNAL IN VIOLATION OF RULE 4-3.3(a) IN THAT HE ARGUED TO THE COURT THAT EQUITABLE TOLLING SHOULD BE APPLIED TO A STATUTE OF LIMITATION BECAUSE THE CLIENT WAS PRO SE AND MAY HAVE BEEN CONFUSED BY THE STATUTE OF LIMITATION WHEN, IN FACT, RESPONDENT WAS REPRESENTING THE CLIENT, RESPONDENT HAD PREPARED THE LAWSUIT, AND RESPONDENT DECIDED WHEN TO FILE THE LAWSUIT.

Rule 4-3.3(a) provides that a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. "The duty of candor to the courts is implicit in a lawyer's role as an officer of the court." ABA/BNA Lawyers' Manual on Professional Conduct, *Candor Toward Tribunal*, 61:306 (2017). A misrepresentation to a court is "an affront to the fundamental and indispensable principle that a lawyer must proceed with absolute candor towards the tribunal. In the absence of that candor, the legal system cannot properly function." *In re Carey*, 89 S.W.3d 477, 498 (Mo. banc 2002) (quoting *In re Caranchini*, 956 S.W.2d 910, 919-20 (Mo. banc 1997). A violation of Rule 4-3.3(a) occurs even without the fact finder being deceived. ABA/BNA Lawyers' Manual on Professional

Conduct, *supra* at 61:308. There are circumstances where failure to make a disclosure is the equivalent of an affirmative representation. Cmt. 3 to Rule 4-3.3(a).

Respondent violated Rule 4-3.3(a) when he argued to the Court that equitable tolling should be applied to the MHRA statute of limitation because Mr. Almoghrabi, as a pro se party, may have been confused about the 90-day statute of limitation. **App. 144-46**. On March 19, 2014, when Mr. Almoghrabi's Complaint was filed, Respondent was representing Mr. Almoghrabi and had been representing him since 2012. **App. 49 (Tr. 185-86); 74 (Tr. 288)**. Respondent prepared the Complaint, Respondent decided when to file the Complaint, and Respondent physically took the Complaint to the courthouse for filing. **App. 50 (Tr. 189-90); 52 (Tr. 199)**. The only reason Respondent was not listed as attorney of record is because he was negligent in obtaining admission to the Eastern District and could not file the case under his name. Tr. 190, 225. Missing the MHRA statute of limitation on the GoJet claim fell squarely on Respondent's shoulders. To argue that the GoJet claim had not been filed timely because of any action, inaction or confusion on the part of Mr. Almoghrabi, was blatantly false.

VI.

THIS COURT SHOULD SUSPEND RESPONDENT'S LICENSE BECAUSE RECENT MISSOURI SUPREME COURT CASE LAW SUGGESTS THAT SUSPENSION IS AN APPRORIATE LEVEL OF DISCIPLINE FOR AN ATTORNEY WHO MAKES A FALSE STATEMENT TO A JUDGE IF THERE ARE COMPELLING MITIGATING CIRCUMSTANCES

When determining an appropriate penalty for the violation of the Rules of Professional Conduct, this Court assesses the gravity of the misconduct, as well as mitigating or aggravating factors that tend to shed light on Respondent's moral and intellectual fitness as an attorney. *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). Since its decision in *In re Storment*, 873 S.W.2d 227 (Mo. banc 1994), this Court has often turned to the ABA Standards for Imposing Lawyer Sanctions (1991) ("ABA Standards") for guidance in deciding what discipline to impose. ABA Standard 3.0 states that a court should look at four primary factors in determining which sanction is appropriate. The factors are: (1) the duty violated; (2) the lawyer's mental state; (3) the potential or actual injury caused by the conduct; and (4) aggravating and mitigating circumstances. Injury, per the ABA Standards, includes harm to the legal system or the profession. See Definitions of ABA Standards. If there are multiple violations, the Standards provide that the sanction imposed should, at a minimum, be consistent with the sanction for the most serious instance of misconduct and generally should be greater than that sanction. See Theoretical Framework of ABA Standards.

The most serious violation in this case concerned Respondent making a false statement to the judge. *See In re Krigel*, 480 S.W.3d 294 (Mo. banc 2016). Per the ABA Standards, this type of rule violation falls under Section 6.0 - Violation of Duties Owed to the Legal System. ABA Standard 6.11 provides that disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, 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 proceedings. Standard 6.12 provides that suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding. Standard 6.13, in turn, provides that reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes and adverse or potentially adverse effect on the legal proceeding.

Respondent's conduct fits into the parameters of ABA Standard 6.11. Respondent clearly intended to deceive the judge about why Mr. Almoghrabi had missed the statute of limitation. Respondent's actions could have caused serious injury to GoJet if the Court had allowed Mr. Almoghrabi's MHRA time-barred claim to stand. Even though Respondent's conduct falls under ABA Standard 6.11, this does not mean that disbarment is the appropriate discipline. Per the ABA Standards, one must next review the

aggravating[7] and mitigating factors[8] and determine whether a lesser discipline than disbarment may be appropriate.

There are several aggravating factors in this matter. Respondent did have a prior admonition. ABA Standard 9.22(a). There were multiple rule violations in this case.

[7] ABA Standard 9.22 sets forth the following as aggravating factors: (a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) pattern of misconduct; (d) multiple offenses; (e) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; (h) vulnerability of victim; (i) substantial experience in the practice of the law; and (j) indifference to making restitution.

[8] ABA Standard 9.32 sets forth the following as mitigating factors: (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; (d) timely good faith effort to make restitution or to rectify the consequences of the misconduct; (e) full and free disclosure to the disciplinary board or cooperative attitude toward the proceedings; (f) inexperience in the practice of law; (g) character or reputation; (h) physical disability; (i) mental disability or chemical dependency when certain conditions are met; (j) delay in disciplinary proceedings; (k) imposition of other penalties or sanctions; (l) remorse; and (m) remoteness of prior offenses.

ABA Standard 9.22(d). Mr. Almoghrabi was a vulnerable victim in that he had lost his job and was suffering from severe financial distress while Respondent was representing him. ABA Standard 9.22(h).

In addition, there are two aggravating factors which are very troubling to Informant. First, Respondent has failed to acknowledge any wrongful conduct. ABA Standard 9.22(g). When Respondent learned that the Firm had filed a disciplinary report against him, Respondent denied any wrongdoing and alleged that the Firm had made false accusations against him. **App. 58 (Tr. 224)**. Then at the hearing, Respondent tried to push blame onto Mr. Almoghrabi for Respondent's untruthful statement to the Court by stating that Mr. Almoghrabi approved Respondent's Response. **App. 72 (Tr. 277)**.

Second, during the hearing, Respondent submitted false testimony to the Panel. ABA Standard 9.22(f). When asked by the Panel about the signatures on the Civil Cover Sheet and the Original Filing Form, Respondent admitted to signing the forms but repeatedly asserted that he signed his own name to the forms. **App. 79-80 (Tr. 306-12)**. A review of Respondent's signature on documents unrelated to this case and a review of Mr. Almoghrabi's signature, clearly shows that Respondent was attempting to mislead the Panel. **App. 107-09; 211 - 13**.

There are also several mitigating factors this Court should consider. Respondent was inexperienced in the law having just graduated from law school a few years before taking on the Almoghrabi case. ABA Standard 9.32 (f). **App. 64 (Tr. 248)**. In addition, because Respondent opened his own practice after law school he did not have the benefit

of adequate mentoring.[9] Respondent was under a great deal of stress with he and his wife having two sets of twins in 14 months and his law practice being financially unsuccessful. **App. 76 (Tr. 296)**. While not a mitigating factor set forth in the ABA Standards, Informant also believes that this Court should consider that Respondent has actively supported the Missouri Bar by serving on various committees and by presenting several continuing education programs on behalf of the Bar. **App. 70 (Tr. 272); R. Vol. 1 pp. 236-246**.

In addition to reviewing ABA Standards, Informant has also considered relevant Missouri Supreme Court case law. Generally, in the past, this Court has disbarred attorneys who provided false evidence to a court. *See In re Caranchini,* 956 S.W.2d 910 (Mo. banc 1997) (attorney used forged documents to support sexual harassment claim and made a false statement to the court regarding a client's residency); *In re Storment,* 873 S.W.2d 227 (Mo. banc 1994) (attorney elicited false testimony from his client to deceive a court). However, in *In re Carey,* 89 S.W.3d 477 (Mo. banc 2002), this Court imposed an indefinite suspension with no leave to apply for readmission for one year to an attorney who had made false representations to a court because there were many mitigating factors and it was unlikely the attorney would engage in similar conduct in the future.

[9] Respondent testified at the hearing that one of his two mentors surrendered his license and was disbarred. **App. 64 (Tr. 248)**.

Moreover, this Court in *In re Krigel*, 480 S.W.3d 294 (Mo. banc 2016), only imposed a six-month stayed suspension with a two-year probation against an attorney who, in an adoption matter, put on testimony which was technically truthful, but omitted essential information regarding the birth father's knowledge of the child's birth and the adoption proceedings. This Court, in a split opinion, noted that ABA Standard 6.11 suggested disbarment was the appropriate discipline. However, this Court only imposed a stayed six-month suspension with probation against the attorney. The Court reasoned that a lesser discipline was justified because the attorney did not have any prior Court imposed discipline and had practiced law for many years without issue.

In the instant case, Respondent is young, inexperienced and was under considerable stress when representing Mr. Almoghrabi, and during the disciplinary hearing.[10] Informant also notes that Respondent does not have any Court imposed prior discipline.[11] Because of these factors, Informant suggests that disbarment may be too harsh but cannot recommend a stayed suspension because Respondent provided false testimony to the Panel during the hearing. As a result, Informant recommends an indefinite suspension with no leave to apply for reinstatement for two years. An actual suspension will allow Respondent to reflect on his actions and emphasize the necessity of always providing accurate and truthful information to a Court.

---

[10] Respondent lost his job with the Secretary of State when his employer learned of the disciplinary action being brought against him. **App. 70 (Tr. 272)**.

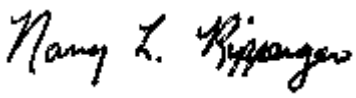
[11] The only discipline issued against Respondent was an admonition issued by Informant.

CONCLUSION

For the reasons set forth above, this Court should find that Respondent Jonathan D. McDowell violated Rules 4-1.1, 4-1.3, 4-1.4(a), 4-1.16(d), and 4-3.3(a), suspend Respondent's law license with no leave to apply for reinstatement for two years, and impose the $1,000 fee and costs provided for by Rule 5.19 (h) against Respondent.

Respectfully submitted,

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel



By: _____
Nancy L. Ripperger #40627
Staff Counsel
3327 American Avenue
Jefferson City, MO 65109
(573) 635-7400
(573) 635-2240 fax
Nancy.Ripperger@courts.mo.gov

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December 2017, a copy of Informant's Brief is being served upon Respondent through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08.

Jonathan McDowell
110 Fulkerson Street
Jefferson City, MO. 65101
lionheartesq@gmail.com

Nancy L. Ripperger

CERTIFICATION: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 10,985 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

Nancy L. Ripperger