

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

RICHARD JOSEPH MAGEE

200 S. Hanley Rd., Suite 500

Clayton, MO 63105

Missouri Bar No. 29943

Respondent.

)
)
)
)
)
)
)
)

Supreme Court No. SC97592

INFORMANT'S BRIEF

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL

SHEVON L. HARRIS #47017
SPECIAL REPRESENTATIVE
REGION X DISCIPLINARY COMMITTEE
1515 North Warson Road, Ste. 249
St. Louis, Missouri 63132
Telephone: (314) 997-7700
Fax: (314) 997-7705
slhatty@aol.com

ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

COVER PAGE	1
TABLE OF CONTENTS	2
TABLE OF AUTHORITIES.....	3
STATEMENT OF JURISDICTION	5
STATEMENT OF FACTS.....	6
PROCEDURAL HISTORY.....	6
BACKGROUND AND DISCIPLINARY HISTORY	6
KELVIN RICHARDSON REPRESENTATION	7
<i>The First Dismissal of Mr. Richardson’s Petition</i>	8
<i>The Second Dismissal of Mr. Richardson’s Petition</i>	10
THE DISCIPLINARY HEARING PANEL’S DECISION	14
POINTS RELIED ON	
I.	17
II.	18
ARGUMENT	
I.	19
II.	23
CONCLUSION	35
CERTIFICATE OF SERVICE.....	36
CERTIFICATION: RULE 84.06(C)	37

TABLE OF AUTHORITIES

CASES

<i>In re Coleman</i> , 295 S.W.3d 857 (Mo. banc 2009).....	18, 23, 24, 26
<i>In re Crews</i> , 159 S.W.3d 355 (Mo. banc 2005).....	17, 19, 20
<i>In re Ehler</i> , 319 S.W.3d 442 (Mo. banc 2010)	17, 18, 20, 21, 24, 26
<i>In re Kazanas</i> , 96 S.W.3d 803 (Mo. banc 2003)	18, 23
<i>In re Snyder</i> , 35 S.W.3d 380 (Mo. banc 2000).....	17, 19
<i>In re Wiles</i> , 107 S.W.3d 228 (Mo. banc 2003)	18, 23, 24, 28, 32, 33, 34

OTHER AUTHORITIES

ABA <i>Standards for Imposing Lawyer Sanctions</i> Rule 2.7	28, 34
ABA <i>Standards for Imposing Lawyer Sanctions</i> Rule 3.0	24
ABA <i>Standards for Imposing Lawyer Sanctions</i> Rule 4.42(b)	25
ABA <i>Standards for Imposing Lawyer Sanctions</i> Rule 4.52	25, 26
ABA <i>Standards for Imposing Lawyer Sanctions</i> Rule 4.53(a).....	25, 26
ABA <i>Standards for Imposing Lawyer Sanctions</i> Rule 4.63	25
ABA <i>Standards for Imposing Lawyer Sanctions</i> Rule 9.1	26
ABA <i>Standards for Imposing Lawyer Sanctions</i> Rule 9.21	26
ABA <i>Standards for Imposing Lawyer Sanctions</i> Rule 9.22(a).....	26
ABA <i>Standards for Imposing Lawyer Sanctions</i> Rule 9.22(c).....	26
ABA <i>Standards for Imposing Lawyer Sanctions</i> Rule 9.22(d)	26, 27
ABA <i>Standards for Imposing Lawyer Sanctions</i> Rule 9.22(e).....	27
ABA <i>Standards for Imposing Lawyer Sanctions</i> Rule 9.22(i)	26, 27

ABA <u>Standards for Imposing Lawyer Sanctions</u> Rule 9.32(e).....	27
--	----

RULES

RULE 4-1.1	17, 19, 20, 23, 24, 25, 26, 33, 35
RULE 4-1.3	17, 19, 20, 21, 23, 24, 25, 26, 27, 33, 35
RULE 4-1.4	17, 19, 21, 22, 23, 24, 26, 33, 35
RULE 4-1.4(a)(1)	21
RULE 4-1.4(b)	21
RULE 5.225, RULES FOR DISCIPLINARY PROCEEDINGS	18, 23
RULE 5.225(a)(2), RULES FOR DISCIPLINARY PROCEEDINGS	27, 28
RULE 5.225(g), RULES FOR DISCIPLINARY PROCEEDINGS	30

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

PROCEDURAL HISTORY

April 27, 2018	Information
May 27, 2018	Respondent's Answer to Information
June 7, 2018	Appointment of Disciplinary Hearing Panel
October 22, 2018	Disciplinary Hearing Panel (DHP) Hearing
November 16, 2018	DHP Decision
November 21, 2018	Acceptance of DHP decision by Informant
November 29, 2018	Acceptance of DHP decision by Respondent
January 28, 2019	Missouri Supreme Court Order activating briefing schedule

BACKGROUND AND DISCIPLINARY HISTORY

This attorney disciplinary matter reaches the Court following an evidentiary hearing conducted by the appointed Disciplinary Hearing Panel. **App. 177.**¹ In its written decision, the Disciplinary Hearing Panel found that Respondent Richard J. Magee

¹ The facts contained herein are drawn from the testimony elicited and the exhibits admitted into evidence at the disciplinary hearing in this matter conducted on October 22, 2018. Citations to the trial testimony before the Disciplinary Hearing Panel are denoted by the appropriate Appendix page reference followed by the specific transcript page reference in parentheses, for example “**App. ____ (Tr. ____)**”. Citations to the Information, Respondent's Answer to the Information and the trial exhibits are denoted by the appropriate Appendix page reference.

(“Respondent”) was guilty of violating several Rules of Professional Misconduct. **App. 184-185.** The Disciplinary Hearing Panel recommended that Respondent’s law license be indefinitely suspended with no leave to apply for reinstatement for six months but that such suspension be stayed during a one-year period of probation. **App. 177.** Both the Office of Chief Disciplinary Counsel and the Respondent accepted the Disciplinary Hearing Panel’s recommendation, which adopted the parties’ stipulations. **App. 196-197.**

Respondent was licensed as an attorney on or about April 26, 1980. **App. 159.** Respondent has been a solo practitioner since November 2015. **App. 54 (Tr. 11).** The name of Respondent’s law firm is Magee Law Firm, LLC. **App. 54 (Tr. 11).** Respondent primarily concentrates his practice in the areas of labor and employment, real estate, and construction law. **App. 54 (Tr. 11).** Respondent has been practicing in the area of labor and employment law for approximately seven or eight years. **App. 54 (Tr. 11).** Respondent’s law license is in good standing and he has a prior disciplinary history. **App. 54 (Tr. 11), 159.** Specifically, Respondent accepted an Admonition pursuant to Rule 5.11 on July 12, 2017 for violation of Rule 4-1.3 (Diligence) and Rule 4-1.4 (Communication) on July 17, 2017. **App. 54 (Tr. 11-12), 159.**

KELVIN RICHARDSON REPRESENTATION

The relevant factual allegations in this case were stipulated to by the parties in their Partial Joint Stipulation of Facts, Joint Proposed Conclusions of Law, and Joint Recommended Discipline. **App. 158-164.**

On November 3, 2014, Kelvin Richardson filed charges of race and retaliation discrimination with the Equal Employment Opportunity Commission (“EEOC”) and

Missouri Commission on Human Rights (“MCHR”). **App. 159.** Thereafter, on November 5, 2014, Mr. Richardson retained Respondent to represent him in his race and retaliation discrimination case against St. Louis County and entered into a written fee agreement with Respondent’s law firm. **App. 54 (Tr. 12), 159.** Mr. Richardson received right to sue letters from the EEOC and MCHR on November 5, 2014 and December 1, 2014, respectively. **App. 159.**

On February 27, 2015, Respondent filed an action against St. Louis County on behalf of Mr. Richardson in the Circuit Court of St. Louis County, Cause No. 15SL-CC00732, alleging that St. Louis County engaged in unlawful employment practices and retaliation against Mr. Richardson under Sections 213.055 and 213.070 of the Revised Statutes of Missouri. **App. 54 (Tr. 13), 159-160.** The defendant filed an Answer to the Petition on April 21, 2015. **App. 55 (Tr. 14), 160.**

The First Dismissal of Mr. Richardson’s Petition

Rule 37.1 of the Local Rules of the St. Louis County Circuit Court provides:

"The Circuit Court shall place a case on the dismissal docket 90 days after the date of filing if there has been no proof of service file or alias summons requested. Notice of the dismissal shall be mailed or electronically transmitted to the party and set two weeks from the date of notice. Request for removal from the dismissal docket must be made to the court and must include the next proposed court date. If service is not obtained or the date extended by the court, the case will be dismissed without prejudice."

St. Louis County Circuit Court, Local Rule 37.1

On December 30, 2015, notwithstanding the previously filed answer by the defendant, the Court placed Mr. Richardson's cause of action on the dismissal docket. **App. 55 (Tr. 14), 160.** The Court issued an electronic Notice of Dismissal via the Court's eFiling System notifying the parties that the case would be dismissed without prejudice on January 13, 2016, if the case was not removed from the dismissal docket prior to the January 13, 2016 date. **App. 55 (Tr. 14-15), 160.** The Notice of Dismissal was also mailed via United States Mail to Respondent and the defendant. **App. 55 (Tr. 14), 160.** The Notice specifically provided that in order to have the case removed from the dismissal docket, Respondent had to appear prior to January 13, 2016, and provide the court with an update as to the current status of the litigation and the circumstances causing a delay in the proceedings. **App. 161.** Respondent, however, did not appear in court prior to January 13, 2016 to remove the case from the dismissal docket. **App. 55 (Tr. 15), 160.** In explaining his failure to appear in court before January 13, 2016, Respondent testified at the Disciplinary Hearing, "I just moved into new offices, my office was disorganized. And I did not follow my practice of immediately going to the court after I received such a notice." **App. 55 (Tr. 15).**

On or about February 4, 2016, the court dismissed Mr. Richardson's Petition for failure to prosecute. **App. 55 (Tr. 15), 160.** Respondent received electronic notice of the court's Order and Judgment of dismissal from the Missouri Courts eFiling System. **App. 160.** Prior to the dismissal of Mr. Richardson's case, the parties filed no additional pleadings with the court and Respondent had not served any formal discovery upon the defendant, St. Louis County. **App. 55 (Tr. 15), 160.** Respondent testified at the

disciplinary hearing that Mr. Richardson had provided him with his entire personnel file and therefore Respondent believed that he “could hold off on discovery to see what the county was going to do.” **App. 55 (Tr. 15-16).**

On or about February 25, 2016, Respondent filed a “Motion to Set Aside the Court’s Judgment of February 4, 2016”. **App. 55 (Tr. 16), 161.** Respondent stated in his Motion, *inter alia*, that “discovery has been prepared and will be pursued provided the Court’s Judgment is set aside.” **App. 55 (Tr. 16), 161.** On March 3, 2016, the Court granted Respondent’s Motion, set aside the dismissal, and reinstated the case under Cause No. 15SL-CC00732-01. **App. 55 (Tr. 16), 161.** Respondent never informed Mr. Richardson that his case was dismissed on February 4, 2016 and subsequently reinstated on March 3, 2016. **App. 55 (Tr. 17), 161.**

The Second Dismissal of Mr. Richardson’s Petition

As of October 25, 2016, after the court’s March 3, 2016 reinstatement of Mr. Richardson’s case, Respondent had still not served any formal discovery requests upon the defendant despite Respondent’s statement to the court in his February 25, 2016 Motion that “discovery has been prepared and will be pursued.” **App. 55 (Tr. 16), 161-162.** On October 25, 2016, approximately seven months after reinstatement of the case, the court entered an Order continuing the case to December 1, 2016 and, again, placed Mr. Richardson’s case on the court’s dismissal docket. **App. 55 (Tr. 17), 161.** The Order was electronically filed and served via the Court’s eFiling System and was received by Respondent. **App. 55 (Tr. 17), 161.** Respondent took no action to remove Mr. Richardson’s case from the Court’s December 1, 2016, dismissal docket. **App. 56**

(Tr. 18), 161. On or about December 14, 2016, the Court again dismissed Mr. Richardson’s Petition for failure to prosecute. **App. 56 (Tr. 18), 161.** The court noted in her December 14, 2016 Order and Judgment that, since the reinstatement of the case on March 3, 2016, Respondent had not filed any motions or pleadings with the Court. **App. 161.** The court further noted that, “[t]he court has received no response from counsel and they have not requested the matter be removed from the dismissal docket despite the additional 13 days since the actual docket day.” **App. 161-162.** In explaining his failure to remove the case from its second dismissal setting, Respondent testified during the disciplinary hearing that his attention was focused upon another client with several significant cases. **App. 56 (Tr. 18).** Respondent stated that “it slipped through the cracks in light of my singular focus.” **App. 56 (Tr. 18).**

On or about January 16, 2017, Respondent filed with the court his Motion to Amend and Set Aside the Court’s Judgment of December 14, 2016. **App. 56 (Tr. 20), 162.** Respondent argued in his January 16, 2017 Motion that the court’s dismissal without prejudice operated as a dismissal with prejudice because of the applicable statute of limitations in Section 213.111, RSMo.² **App. 56 (Tr. 21), 162.** The Motion stated

² Section 213.111 provides, in pertinent part that “[a]ny action brought under this section shall be filed within ninety days from the date of the commission’s notification letter to the individual, but not later than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party.”

further that Respondent was “submitting interrogatories and requests for production at the time of filing this Motion.” **App. 57 (Tr. 22), 162.**

Respondent, however, did not serve any discovery upon the defendant at the time of the filing of the January 16, 2017 Motion. **App. 57 (Tr. 22), 162.** At the disciplinary hearing, Respondent stated that he believed that he used the previous Motion and failed to remove the language pertaining to the service of discovery. **App. 57 (Tr. 22).** Respondent maintained that it was his belief that the fact that the county had not conducted any discovery was advantageous to Mr. Richardson’s case. **App. 56 (Tr. 19).**

Respondent set his Motion to Amend and Set Aside the Court’s Judgment of December 14, 2016 for hearing on February 16, 2017 at 9:00 am. **App. 57 (Tr. 23), 162.** Respondent, however, failed to appear on February 16, 2017 for the 9:00 am hearing on his Motion. **App. 57 (Tr. 23), 162** Defendant’s counsel, however, was present at the hearing. **App. 162.** On February 16, 2017, the Court entered its Order denying Respondent’s Motion to Amend or Set Aside the Court’s Judgment of December 14, 2016. **App. 58 (Tr. 26), 163.**

Respondent thereafter received electronic notice of the court’s February 16, 2017 ruling on his Motion. **App. 58 (Tr. 27).** On March 1, 2017, Respondent filed another Motion to Amend or Set Aside the Court’s Judgment of February 16, 2017. **App. 58 (Tr. 28), 163.** In this Motion, Respondent stated that he received an email on February 7, 2017, from the Missouri Courts eFiling System notifying Respondent of the Court’s electronic entries pertaining to filings on February 4, 2016 and March 3, 2016. **App. 163.** The February 4, 2016 filing information contained the following text in the description

box: "Hearing/Trial Cancelled". **App. 163.** The March 3, 2016 filing information contained the following text in the description box: "Motion Hearing Held". **App. 163.** Respondent stated in his Motion that he was confused by the February 7, 2017 email and believed that his February 16, 2017 hearing had been cancelled. **App. 57 (Tr. 23), 163.**

Respondent never set his March 1, 2017 Motion for hearing and made a decision not to appeal the Court's December 14, 2016 Order and Judgment of dismissal. **App. 58 (Tr. 28), 163.** Respondent did not consult Mr. Richardson before making a decision not to appeal the Court's December 14, 2016 dismissal regarding Mr. Richardson's options, desires or instructions as to the handling of his claims against St. Louis County. **App. 58 (Tr. 29), 163.** The dismissal of Mr. Richardson's case and the election not to appeal that dismissal resulted in Mr. Richardson being unable to pursue any claims under either the Missouri Human Rights Act or Title VII for race discrimination and retaliation against St. Louis County. **App. 58 (Tr. 29), 163.**

Respondent did not inform Mr. Richardson of the Court's December 14, 2016 Order of dismissal until June 2017. **App. 56 (Tr. 19-20), 163.** Respondent did not advise Mr. Richardson of his decision not to file a timely appeal of the dismissal of his claims against St. Louis County. **App. 58 (Tr. 29), 164.** In or about July 2017, Mr. Richardson retrieved his file from Respondent and Respondent's representation of Mr. Richardson ceased. **App. 62 (Tr. 44-45).**

During the disciplinary hearing, Respondent testified that he had been practicing as a solo practitioner since November 2015. **App. 66 (Tr. 61).** Prior to becoming a solo practitioner, Respondent had never had any law practice management responsibilities.

App. 66-67 (Tr. 61-62). Respondent testified that in early 2018 he began implementing changes to improve his law practice management. **App. 67 (Tr. 63).** Respondent hired a qualified and experienced legal secretary and moved into a larger office space. **App. 66-67 (Tr. 60-63).** Respondent retained, Richard Abrams, an experienced law practice management consultant with whom he was meeting with on a bimonthly basis. **App. 67 (Tr. 64), 69 (Tr. 73).** Respondent further testified that he and his secretary are transitioning from a paper calendaring system to an electronic calendaring system. **App. 68 (Tr. 66).**

Respondent further submitted six (6) affidavits from professional peers and a former client during the disciplinary hearing attesting to Respondent's honesty, integrity, and his professional and moral character. **App. 148-157.**

THE DISCIPLINARY HEARING PANEL'S DECISION

Following a full evidentiary hearing on Informant's Information, the disciplinary hearing Panel filed its Findings of Fact, Conclusions of Law and Recommendation on November 16, 2018 with the Advisory Committee. **App. 254.** In its written decision, the Disciplinary Hearing Panel adopted the parties' Joint Partial Stipulation of Facts, Conclusions of Law and Recommendation Discipline. **App. 254.** The Panel concluded that:

1. Respondent is guilty of professional misconduct as a result of violating Rules 4-1.1 and 4-1.3 in that Respondent failed to provide competent representation in representing Mr. Richardson and failed to act with reasonable diligence and promptness, in that:

a. Respondent allowed Mr. Richardson's case to be dismissed twice resulting in a dismissal with prejudice of his claims under the Missouri Human Rights Act for race discrimination and retaliation against St. Louis County; and,

b. Respondent failed to conduct any formal discovery during the more than two-year period of his representation of Mr. Richardson.

2. Respondent is guilty of professional misconduct as a result of violating Rule 4-1.4, in that:

a. Respondent failed to keep Mr. Richardson reasonably informed about the status of his matter by failing to promptly notify him of the Court's February 4, 2016 dismissal and the December 14, 2016 dismissal which resulted in a dismissal with prejudice; and,

b. Respondent did not consult with Mr. Richardson prior to deciding not to file a timely appeal regarding Mr. Richardson's options, desires or instructions as to the handling of his claims against St. Louis County.

App. 261-262.

In aggravation, the Panel found certain aggravating factors, including a prior disciplinary history, a pattern of misconduct, and substantial experience in the practice of law. **App. 264.** In mitigation, the Panel found that Respondent exhibited no selfish motive in his misconduct, Respondent was cooperative with the disciplinary proceedings, and, Respondent's character. **App. 264.** The Panel recommended that Respondent be suspended indefinitely with no leave to apply for reinstatement for six months, that the suspension be stayed, and that Respondent be placed on probation for a

period of one year. **App. 254.** Informant's statement of acceptance of the Disciplinary Hearing Panel decision was filed with the Advisory Committee on November 21, 2018. **App. 274.** Respondent's statement of acceptance of the Disciplinary Hearing Panel decision was filed with the Advisory Committee on November 29, 2018. **App. 275.**

On January 29, 2019, the Supreme Court entered an Order activating a briefing schedule. **App. 276.**

POINTS RELIED ON

I.

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE THE UNDISPUTED FACTS ESTABLISH THAT RESPONDENT ENGAGED IN PROFESSIONAL MISCONDUCT IN REPRESENTING HIS CLIENT KELVIN RICHARDSON BY VIOLATING THE FOLLOWING RULES WHICH CAUSED INJURY TO MR. RICHARDSON: COMPETENCE [RULE 4-1.1]; DILIGENCE [RULE 4-1.3]; AND, COMMUNICATION [RULE 4-1.4].

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

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010)

In re Snyder, 35 S.W.3d 380 (Mo. banc 2000)

Rule 4-1.1, Rules of Professional Conduct

Rule 4-1.3, Rules of Professional Conduct

Rule 4-1.4, Rules of Professional Conduct

POINTS RELIED ON

II.

THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, RULE 5.225, AND CASE LAW SUPPORT THAT AN INDEFINITE SUSPENSION WITH NO LEAVE TO APPLY FOR REINSTATEMENT UNTIL AFTER SIX MONTHS, STAYED, WITH TWELVE MONTHS OF PROBATION IS THE APPROPRIATE SANCTION IN THIS CASE BECAUSE IT BEST SERVES THE DUAL PURPOSES OF LAWYER DISCIPLINE IN THAT THE CHANGES IMPLEMENTED BY RESPONDENT IN HIS LAW PRACTICE MANAGEMENT COMBINED WITH THE CLOSE MONITORING OF RESPONDENT'S PRACTICE AND THE LAW PRACTICE MANAGEMENT EDUCATION COMPONENT OF THE TERMS OF PROBATION SERVE TO PROTECT THE PUBLIC AND THE PROFESSION FROM THE RECURRENCE OF SIMILAR MISCONDUCT OF WHICH RESPONDENT IS CHARGED.

In re Coleman, 295 S.W.3d 857 (Mo. banc 2009)

In re Ehler, 319 S.W.3d 442 (Mo. 2010)

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

In re Wiles, 107 S.W.3d 228 (Mo. banc 2003)

ABA Annotated Standards for Imposing Lawyer Sanctions (2015 ed.)

Rule 5.225, Rules for Disciplinary Proceedings

ARGUMENT

I.

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE THE UNDISPUTED FACTS ESTABLISH THAT RESPONDENT ENGAGED IN PROFESSIONAL MISCONDUCT IN REPRESENTING HIS CLIENT KELVIN RICHARDSON BY VIOLATING THE FOLLOWING RULES WHICH CAUSED INJURY TO MR. RICHARDSON: COMPETENCE [RULE 4-1.1]; DILIGENCE [RULE 4-1.3]; AND, COMMUNICATION [RULE 4-1.4].

Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed. *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005), citing *In re Snyder*, 35 S.W.3d 380, 382 (Mo. banc 2000). In this matter, the parties stipulated to facts underlying Respondent's violations of Rules 4-1.1 (Competence), 4-1.3 (Diligence), and 4-1.4 (Communication), during his representation of Kelvin Richardson. **App. 158-164.**

Competent representation requires legal knowledge, thoroughness and preparation reasonably necessary to complete the representation of one's client. Rule 4-1.1, see also, *Crews*, 159 S.W.3d at 359. The practice of labor and employment law was not a novel area for Respondent. Respondent testified that in his near forty-year history of a practicing attorney, he had been practicing in that area for seven to eight years. **App. 54 (Tr. 11).** Notwithstanding his experience in the area of labor and employment law,

Respondent failed to exercise the minimal amount of competency when he failed to file any formal discovery over the two-year period in which he represented Mr. Richardson and when he allowed Mr. Richardson's case to be dismissed twice resulting in a dismissal with prejudice of his claims under the Missouri Human Rights Act for race discrimination and retaliation against St. Louis County. **App. 160-163.** As a result, Mr. Richardson's claims under the Missouri Human Rights Act and Title VII for race discrimination and retaliation (against St. Louis County) are now barred. **App. 163.** Respondent's lack of thoroughness and preparation violated Rule 4-1.1.

Rule 4-1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Rule 4-1.3, see also, *In re Crews*, 159 S.W.3d at 359. The diligent representation of a client is particularly important because "[a] client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed." Rule 4-1.3, Comment [3], see also, *In re Ehler*, 319 S.W.3d 442, 449 (Mo. banc 2010).

In *In re Crews*, this Court found that Mr. Crews violated Rule 4-1.3 by failing to adequately investigate the plaintiffs' claim, failing to diligently pursue the plaintiffs' claim, failing to respond to the summary judgment motion, and failing to prepare an acceptable appellate brief. *Crews*, 159 S.W.3d at 359. Similarly, in this case, the undisputed facts demonstrate that during the more than two-year period of his representation of Mr. Richardson, Respondent failed to adequately investigate Mr. Richardson's cause of action in that Respondent took no depositions and failed to serve

any interrogatories, requests for production of documents or requests for admissions upon the defendant. **App. 55 (Tr. 16), 56 (Tr. 19), 161-162.**

In addition, Respondent allowed Mr. Richardson's case to be dismissed twice resulting in a dismissal with prejudice of his claims under the Missouri Human Rights Act for race discrimination and retaliation against St. Louis County. **App. 56 (Tr. 21), 163.** Respondent's lack of diligence over the two-year period of representing Mr. Richardson resulted in the "destruction" of Mr. Richardson's legal position. Mr. Richardson has lost the ability to prosecute his race discrimination and retaliation claims against the defendant and is precluded from presenting what may have been meritorious claims under Title VII or the Missouri Human Rights Act. See, In re Ehler, 319 S.W.3d at 449 (finding Ehler's conduct constituted a violation of Rule 4-1.3 when she failed to provide her client with the interrogatories to answer resulting in the client being denied an opportunity to put forth a defense, thereby destroying her client's legal position). Respondent neglected his client's case and thereby violated Rule 4-1.3.

Rule 4-1.4(a)(1) requires a lawyer to "keep the client reasonably informed about the status of the matter;" and 4-1.4(b) requires that a lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 4-1.4. Respondent is also guilty of professional misconduct as a result of violating Rule 4-1.4 in that Respondent failed to keep Mr. Richardson reasonably informed about the status of his matter. Respondent admits that he failed to promptly notify Mr. Richardson of the court's February 4, 2016 dismissal and the December 14, 2016, dismissal which resulted in a dismissal with prejudice. **App. 56 (Tr.**

21), 163. Respondent also admits that he failed to consult with Mr. Richardson regarding Mr. Richardson's options, desires or instructions as to the handling of his claims against St. Louis County, prior to Respondent's decision to not file a timely appeal of the court's Order of dismissal. **App. 58 (Tr. 29), 163.** Such conduct violated Rule 4-1.4.

ARGUMENT

II.

THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, RULE 5.225, AND CASE LAW SUPPORT THAT AN INDEFINITE SUSPENSION WITH NO LEAVE TO APPLY FOR REINSTATEMENT UNTIL AFTER SIX MONTHS, STAYED, WITH TWELVE MONTHS OF PROBATION IS THE APPROPRIATE SANCTION IN THIS CASE BECAUSE IT BEST SERVES THE DUAL PURPOSES OF LAWYER DISCIPLINE IN THAT THE CHANGES IMPLEMENTED BY RESPONDENT IN HIS LAW PRACTICE MANAGEMENT COMBINED WITH THE CLOSE MONITORING OF RESPONDENT'S PRACTICE AND THE LAW PRACTICE MANAGEMENT EDUCATION COMPONENT OF THE TERMS OF PROBATION SERVE TO PROTECT THE PUBLIC AND THE PROFESSION FROM THE RECURRENCE OF SIMILAR MISCONDUCT OF WHICH RESPONDENT IS CHARGED.

There being no dispute that Respondent violated Rules 4-1.1, 4-1.3 and 4-1.4, this Court's analysis must turn to the appropriate disciplinary sanction for Respondent's misconduct. It is well settled that the fundamental dual purpose of discipline is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession. *In re Kazanas*, 96 S.W.3d 803, 807-808 (Mo. banc 2003), *In re Wiles*, 107 S.W.3d 228-229 (Mo. banc 2003), *In re Coleman*, 295 S.W.3d 857, 869 (Mo. banc 2009).

This Court is often guided by the ABA Annotated Standards for Imposing Lawyer Sanctions (“ABA Standards”), (2015 ed.) in determining appropriate (*i.e.* direct or indirect) discipline. *In re Coleman*, 295 S.W.3d at 869.

ABA Standards Analysis of the Appropriate Level of

Discipline for Respondent’s Violations of Rules 4-1.1, 4-1.3, and 4-1.4.

The ABA Standards for Imposing Lawyer Sanctions provide a theoretical framework to guide courts in imposing disciplinary sanctions and allow courts flexibility to select the appropriate sanction in each particular case misconduct. Section II, Theoretical Framework, ABA Standards. In determining an appropriate sanction for misconduct, the Court considers “the duty violated, the lawyer’s mental state, the actual or potential injury caused by the lawyer’s conduct, and the existence of aggravating or mitigating factors.” ABA Standards, Rule 3.0, see also, *In re Wiles*, 107 S.W. 3d at 229 (the Court considers the gravity of the attorney’s misconduct, as well as any mitigating or aggravating factors that tend to shed light on the attorney’s moral and intellectual fitness as an attorney).

The ABA Standards do not account for a lawyer’s multiple charges of misconduct. Section II, Theoretical Framework, ABA Standards. The ultimate sanction imposed, however, “should be at least consistent with the sanction for the most serious instance of misconduct among a number of violations....” *Id.*, see also, *In re Ehler*, 319 S.W.3d 442, 451 (Mo. Banc 2010), quoting *Coleman*, 295 S.W.3d at 870.

In this case, Respondent violated Rule 4-1.4 (communication) when he failed to keep Mr. Richardson reasonably informed about the status of his matter by failing to

promptly notify him of the Court's February 4, 2016 and December 14, 2016 dismissals and failing to consult with Mr. Richardson regarding Mr. Richardson's options, desires or instructions as to the handling of his claims against St. Louis County prior to deciding not to file a timely appeal of the Court's December 14, 2016 Order of dismissal. **App. 56 (Tr. 21), 58 (Tr. 29), 161, 163.** ABA Standard 4.63 should be considered when determining the applicable sanction for Respondent's communication violation. ABA Standard 4.63 provides that, absent aggravating or mitigating circumstances, a reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information and causes injury or potential injury to a client. ABA Standards, Section 4.63.

Respondent's actions in allowing Mr. Richardson's case to be dismissed twice, resulting in a dismissal with prejudice of his client's claims, and in failing to conduct any formal discovery during the more than two-year period of his representation of Mr. Richardson violated the basic duties of competence (Rule 4-1.1) and diligence (Rule 4-1.3). **App. 161-163.** ABA Standard 4.42(b) is most applicable to Respondent's diligence violation. ABA Standard 4.42(b) provides that, absent aggravating or mitigating circumstances, a suspension is generally appropriate when a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. ABA Standards, Section 4.42(b).

ABA Standards 4.52 and 4.53(a) should be considered when determining the applicable sanction for Respondent's competence violation. ABA Standard 4.52 provides that, absent aggravating or mitigating circumstances, a suspension is generally

appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client. ABA Standards, Section 4.52. ABA Standard 4.53(a) provides that, absent aggravating or mitigating circumstances, a reprimand is generally appropriate when a lawyer fails to understand relevant legal doctrines or procedures, and causes injury or potential injury to a client. ABA Standards, Section 4.53(a). In light of Respondent's multiple charges of conduct in this case, however, suspension is the applicable sanction as it is consistent with the applicable sanction of suspension for Respondent's most serious instance of misconduct, his violation of Rule 4-1.3. Section II, Theoretical Framework, ABA Standards, see also, *In re Ehler*, 319 S.W.3d 442, 451 (Mo. Banc 2010), quoting *Coleman*, 295 S.W.3d at 870.

ABA Standards, Rule 9.1 provides that after misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose. ABA Standards, Rule 9.1. ABA Standards, Rule 9.21 provides that aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. ABA Standards, Rule 9.21. Under the ABA Standards, applicable aggravating factors include: prior disciplinary offenses; a pattern of misconduct; multiple offenses; and, substantial experience in the practice of law. See, ABA Standards, 9.22(a), (c), (d), and (i). In this case, Respondent has a prior disciplinary in that Respondent accepted an Admonition on July 12, 2017 for violation of Rules 4-1.4 and 4-1.3. **App. 159.** See, ABA Standards, 9.22(a). Respondent also committed multiple violations of professional misconduct (Rules 4-1.1, 4-1.3, and 4-1.4)

during his representation of Mr. Richardson. See, ABA Standards, 9.22(d). Further, Respondent has been practicing law for nearly forty years (Respondent was licensed to practice in 1980) and has been practicing in the area of labor and employment law for seven or eight years. **App. 54 (Tr. 11), 159.** See, ABA Standards, 9.22(i).

Standard 9.31 provides that mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. *Id.*, Standard 9.31. In this case, Respondent remained cooperative with the Regional Disciplinary Committee and Informant throughout the course of the disciplinary proceedings. **App. 68 (Tr. 69).** See, ABA Standards, 9.32(e). Respondent exhibited no selfish motive in his misconduct and Respondent presented substantial evidence of his good character via six affidavits of testimony from his professional peers and a former client. **App. 148-157.** See, ABA Standards, 9.22(e), (g).

Here, consideration of the aggravating and mitigating circumstances warrants neither an increase or decrease in the level of discipline for Respondent's most serious Rule 4-1.3 instance of misconduct. As set forth above, suspension is the appropriate level of discipline for the multiple violations of which Respondent is charged.

Respondent Should Receive Probation Along with a Stayed Suspension

Rule 5.225(a)(2) provides that a lawyer is eligible for probation if he or she is: (a) unlikely to harm the public during the period of probation and can be adequately supervised, (b) is able to perform legal services and able to practice law without causing the courts or profession to fall into disrepute, and (c) has not committed acts warranting

disbarment. Rule 5.225(a)(2). Probation can be imposed alone or along with a sanction of reprimand, admonition or suspension. *ABA Standard* 2.7, Commentary.

In re Wiles was a reciprocal disciplinary proceeding resulting from Mr. Wiles' violation of professional rules in Kansas which facts stipulated to during a disciplinary action warranted discipline in Missouri. *In re Wiles*, 107 S.W.3d at 228-229. In the Kansas matter, Mr. Wiles was "disciplined for complaints relating to diligence, communication, fees, safekeeping property and competence." *Id.* at 230, n. 1. This Court found Mr. Wiles eligible for probation under the three-prong analysis of Rule 5.225 where, *inter alia*, Mr. Wiles could be strictly monitored on probation and also possessed the required abilities to continue to perform his duties as an attorney without causing the courts or profession to become the subject of disrepute as evidenced by his longstanding practice. *Id.* at 229. This Court also noted that Mr. Wiles had practiced for nearly three decades without a reported incident. *Id.* Finally, this Court found that while Mr. Wiles' violations were serious, he had not committed acts that would rise to a level of disbarment. *Id.* at 230.

As in *In re Wiles*, Respondent meets the eligibility requirements of probation under Rule 5.225. Respondent is unlikely to harm the public during the period of probation and can be adequately supervised. The proposed conditions of probation ensure appropriate supervision and oversight of Respondent's practice during the probationary term. The relevant proposed conditions of Respondent's probation include the following:

2. Quarterly Reporting Responsibility:

a. Respondent shall submit written quarterly reports to the probation monitor concerning the status of Respondent's practice of law and the extent and nature of Respondent's compliance with the conditions of probation. The quarterly reports shall be due as of March 31, June 30, September 30, and December 31 of each calendar year during the probation term. If the first report would cover less than thirty (30) days, that report shall be submitted on the following quarter and shall cover the extended period. Each quarterly report shall include:

- (1.) any address change;
- (2.) any arrests of Respondent;
- (3.) any criminal charges brought against Respondent;
- (4.) any criminal conviction of Respondent;
- (5.) any civil lawsuit filed against Respondent;
- (6.) any civil judgment entered against Respondent;
- (7.) a description of any disputes with clients;
- (8.) a written statement under penalty of perjury regarding whether Respondent has complied with the Rules of Professional Conduct and all conditions of probation during the preceding calendar quarter;
- (9.) Notification to the OCDC of any investigation of the Respondent, or any action taken by the Respondent, which

would raise a question as to Respondent's fitness to practice law; and

(10.) A report on the status of conditions 3-5.

- b. In addition to all quarterly reports, a final report containing the same information, is due no earlier than thirty (30) days or less than fifteen (15) days prior to the last day of the probation period. With the final report, Respondent may file an application with the Court for an order of successful completion of probation as set forth in Rule 5.225(g). The application shall be accompanied by an affidavit that Respondent has complied with all terms of probation. A copy of the application and affidavit shall be served on the Office of Chief Disciplinary Counsel.

3. Compliance with Rules of Professional Conduct:

- a. Respondent shall not engage in conduct that violates the Rules of Professional Conduct;
- b. Receipt of a complaint by the OCDC during the probation term alleging that Respondent has violated the Rules of Professional Conduct does not, in itself, constitute a violation of the terms of probation;
- c. In the event that the OCDC receives a complaint during the Respondent's participation in the probation program, the term of the probation shall be extended until such charge has been investigated and a determination made by the OCDC regarding disposition of such charge.

4. Keeping Your Law Practice on Track. During the term of probation, Respondent shall attend and fully participate in all aspects of the program known as “*Keeping Your Law Practice on Track*” developed and offered by The Missouri Bar and the OCDC. Participation includes, but is not limited to, attendance at all in-person and webinar sessions, and all follow-up programs such as the Practice Improvement Discussion Group. Attendance may be counted toward the CLE requirements set forth in Rule 15.05.

5. Mentor:

- a. Respondent shall, within fourteen (14) days of the Court’s order of probation, propose to the probation monitor a mentor attorney to serve as Respondent’s mentor for law practice management and organization;
- b. The probation monitor shall have the authority to accept or reject the mentor proposed by the Respondent. If rejected, the Respondent and probation monitor shall make every effort to agree to a mutually acceptable mentor. If they cannot agree within sixty (60) days of the date of the Court’s order placing Respondent on probation, at that time they shall request that the coordinator of the Missouri Bar’s mentoring program designate a mentor for Respondent;
- c. Respondent shall meet with the mentor at least once every month;
- d. Upon designation of the mentor, Respondent shall execute a release permitting the mentor to advise the probation monitor at least once every three months regarding Respondent’s implementation of the

suggested law practice management and organization changes recommended by the mentor.

- e. The mentor shall advise the probation monitor at any time of conduct the mentor becomes aware of that raises a substantial question as to the Respondent's honesty, trustworthiness or fitness as a lawyer.

App. 171-174.

Under the proposed conditions of probation, Respondent is required to report quarterly to the Probation Monitor. **App. 171.** Respondent must also obtain a mentor to assist him with his law practice management and organization, and must meet with the mentor not less than once per month. **App. 173-174.** During the probationary term, the mentor will report quarterly to the Probation Monitor regarding Respondent's progress. **App. 174.** The proposed conditions also include an educational component requiring Respondent's participation in various programs, including in-person and webinar sessions and discussion groups related to, *inter alia*, law practice management. **App. 173.**

Respondent is also able to perform legal services and able to practice law without causing the courts or profession to fall into disrepute. Respondent has been a practicing attorney since 1980 without any reported discipline prior to the July 12, 2017 Admonition. **App. 159.** Further, as in the *Wiles* case, Respondent possesses the ability to continue to perform his duties as an attorney without causing the courts or profession to become the subject of disrepute. This is evidenced by Respondent's one Admonition in his near forty-year history of practice. **App. 159.**

Further, Respondent testified that in early 2018 he began implementing changes to improve his law practice management after his transition into solo practice. **App. 67 (Tr. 63).** Respondent hired a qualified and experienced legal secretary and moved into a larger office space. **App. 66-67 (Tr. 60-63).** Respondent stated that he and his secretary are transitioning from a paper calendaring system to an electronic calendaring system. **App. 68 (Tr. 66).** Respondent also retained Richard Abrams, an experienced law practice management consultant, with whom he has been meeting on a bimonthly basis. **App. 67 (Tr. 64), 69 (Tr. 73).** Finally, Respondent's Rule 4-1.1, 4-1.3 and 4-1.4 violations, although serious in nature and damaging to Mr. Richardson, do not rise to the level of disbarment.

In re Wiles also supports that an indefinite suspension with no leave to apply for reinstatement until after six-months, stayed, with twelve months of probation are appropriate terms for Respondent's misconduct in this case. As stated above, this Court imposed upon Mr. Wiles a stayed six-month suspension and placed Mr. Wiles on a closely monitored probation for twelve months for Mr. Wiles' ethical transgressions relating to competence, communication, diligence, fees and safekeeping of property. See, In re Wiles, 107 S.W.3d at 229-230. There are no allegations of trust account issues in the case at bar as were implicated in the Wiles case. Further, Wiles had an extensive disciplinary history in that he had been previously admonished for four diligence rule violations, five communication rule violations, one safeguarding client property rule violation, and one violation of the rule against engaging in conduct prejudicial to the administration of justice. *Id.* at 229. Mr. Wiles had also been admonished twice in

Kansas. *Id.* In this case, Respondent’s prior disciplinary history during his nearly four decades of practice includes one diligence violation and one communication violation. **App. 159.** Respondent should not receive a harsher sanction than that received by Mr. Wiles.

Probation, as part of a stayed suspension, has been utilized since the rule was adopted and put into effect in 2003. This Court, the disciplinary system, the Bar and the public have all benefited from conditional discipline as a tool to protect the public and maintain the integrity of the profession. In this case, an indefinite suspension with no leave to apply for six months, stayed, pending completion of a twelve-month term of probation, with probationary conditions specifically tailored to correct the deficiencies in Respondent’s solo practice (failures in diligence, communication, and competence) is an appropriate sanction to discipline Respondent for his misconduct while addressing the concerns of protecting the public and preserving the integrity of the legal profession. See, ABA Standards, 2.7, Commentary³, see also, *In re Wiles*, 107 S.W.3d at 228-229 (“The purpose of attorney discipline is to protect the public and maintain the integrity of the legal profession.”).

³ ABA Standards, 2.7, Commentary reads in relevant part, “[p]robation is a sanction that should be imposed when a lawyer’s right to practice law needs to be monitored or limited rather than suspended or revoked....” “Probation is appropriate for conduct which may be corrected, e.g.,....lack of timely communication with clients!....”

CONCLUSION

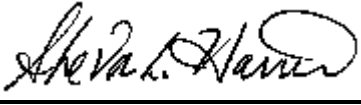
For the reasons set forth above, the Chief Disciplinary Counsel respectfully requests this Court:

- (a) to find that Respondent is guilty of professional misconduct with respect to his representation of Mr. Richardson as set forth in the Information and to find that Respondent has violated Missouri Supreme Court Rules 4-1.1; 4-1.3, and 4-1.4;
- (b) to suspend Respondent's law license for an indefinite period of time with no leave to apply for reinstatement until after the expiration of six (6) months, but to stay such suspension and place Respondent on probation for one year under the stringent requirements proposed by the parties and adopted by the disciplinary hearing panel; and,
- (c) to tax all costs in this matter to Respondent, including the \$1,500.00 fee pursuant to Rule 5.19(h).

Respectfully submitted,

ALAN D. PRATZEL
Chief Disciplinary Counsel

#29141

By: 
Shevon L. Harris #47017
Special Representative, Region X
1515 North Warson Road, Ste. 249
St. Louis, MO 63132
Phone: (314) 997-7700
Fax: (314) 997-7705
Email: slhatty@aol.com

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2019, a copy of Informant's Brief is being served upon Respondent and Respondent's counsel through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08.

Richard Magee #29943
200 S. Hanley Rd., Suite 500
Clayton, MO 63105
Rmageelawyer@gmail.com
Respondent

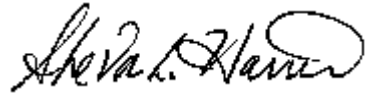
Sara Rittman, #29463
2208 Missouri Blvd Ste 102 #314
Jefferson City MO 65109-4742
srittmman@rittmanlaw.com
Attorney for Respondent


Shevon L. Harris

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. The brief was served on Respondent and Respondent's counsel through the Missouri electronic filing system pursuant to Rule 103.08;
3. Complies with the limitations contained in Rule 84.06(b);
4. Contains 7,418 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Shevon L. Harris