**IN THE SUPREME COURT**
**STATE OF MISSOURI**

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| **IN RE:** | ) | |
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| **ROY KING, JR.** | ) | |
| | ) | **Supreme Court # SC89442** |
| | ) | |
| **Respondent.** | ) | |

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# RESPONDENT'S BRIEF

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**RESPONDENT**

# TABLE OF CONTENTS

**Pages**


TABLE OF CONTENTS ……. 1

TABLE OF AUTHORITIES …… 3

STATEMENT OF JURISDICTION …….. 4

STATEMENT OF FACTS …… 5

The Respondent's Representation and Complaint and …… 5

Background History …… 5

POINTS RELIED UPON …….. 14

I. …… 14

II. …… 15

ARGUMENT . …….. 16

CONCLUSION ……. 33

CERTIFICATE OF SERVICE ……. 36

CERTIFICATION: Rule 84.06(c) ……. 37

## TABLE OF AUTHORITIES


**CASES** …… PAGE(S)

In Re Belz No. SC. 88985 (2008 ……. 29

In Re Cupples, 979 S.W. 2d 933 (Mo banc 1998) ……. 12

In Re Crews 159 S.W. 3d 355 (Mo banc 2005) ……. 21

In Re Oberhellman 873 S.W. 2d 851 (Mo banc 1994) ..... 21

In Re Snyder, 35 S.W. 3rd 380 (Mo banc 2000) …… 21

In Re Warren 888 S.W. 2d (Mo banc 1994) …….. 21

**STATUTES** ……..…….. 4

Section 484.040 Revised Statutes of Missouri (2000)

**RULES** ..……... 10-17

Rule 4 – 1.1 …… 10-17

Rule 4 – 1.3 …… 10-17

Rule 4 – 1.4 …… 10-15

Rule 4 – 8.4 (d) …….. 10-13

**OTHER AUTHORITIES**

West Key Number Digest, Attorney and Client (53) (2) ….…… 22

A.B.A. Standards for Imposing Lawyer Sanctions, Black Letter

Rules (Amended 1992) ……..……..…….. 21

## STATEMENT OF JUSRISDICTION

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

## BACKGROUND HISTORY OF CASE

Respondent had known the Complainant for over 15 years, both personally and professionally *(Exhibit #18)*. [1]

This is vitally important because at the very beginning of the Disciplinary Panel Hearing proceeding, (hereinafter referred to as "DHP"), Mr. Gotschall, the Special Representative, asked the complainant about our first meeting and he stated he only "knew of me" *App. 12 (TR 17-19), App. 41 (TR 10-25) and App. 42 (TR 1)*.

Several years before this incident, complainant engaged counsel on a replevin/recovery matter. He wanted his engagement ring back from his now ex-fiancée *App. 412 (TR 10-23)*.

[1] **The facts contained herein are drawn from the testimony elicited and the exhibits admitted into evidence at the hearing in this matter held on May 18, 2007. 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 pleadings and trial exhibits are denoted by the appropriate Appendix page reference.**

There were choice and conflict of law issues because he lived in Missouri and she lived in Kansas. There was also a question of delivery of said ring, whether in Kansas or Missouri. Complainant during this ordeal was as usual sarcastic, stubborn and rude. He was still somewhat bitter about a relationship that I had with his sister years ago. At, any rate, I successfully persuaded the young lady to give back the ring *App. 41 (TR 21-25) & App. 42 (TR 1)* and I told myself never to represent him again. I did not hear from him professionally for approximately 3 years but saw and spoke to him on numerous occasions among mutual friends and acquaintances during that period. It became very clear from that point on that credibility was a central issue.

On or about December 29, 2003, Mr. Phenix contacted me by phone, came to my office about an incident that occurred on December 26, 2003, between his 1990 Lincoln Continental and one Michael Straws.

The first document I prepared in his presence was a Missouri Department of Revenue Traffic Accident Report form (DOR-1140 (1-01) *(Respondent Exhibit # 1).* Mr. Phenix and I then discussed his possible lawsuit and the "facts" surrounding this incident. Once Complainant's police report became available about a week later, I then prepared a letter along with a check and forwarded it to the Missouri Department of Revenue Traffic Accident Division in Jefferson City for processing *(Respondent Exhibit #1).* He admits to this in his testimony

partially. After that, I did not here from Complainant for more than three (3) months formally, although I seen him often driving his brand new 2004 Lincoln Continental shortly after New Years. *(Respondent Exhibit #5).*

On or before March 26, 2004, Complainant phoned my office to give me an update of his situation and to set-up another office consultation. He told me of his small claims case problem and stated had decided finally it was time to get a lawyer**.** I summarized for him the circuit court's jurisdictional and monetary limits, both Associate and Circuit. I summarized compensatory and punitive damages as well as civil judgments, executions, garnishments and judicial liens. The defendant, Mr. Straws, had just gotten out of prison and was detailing new and used cars at Molle's Chevrolet in Blue Springs, Missouri *(Exhibit #19) Kansas City Missouri Police Report.* I did not believe he was judgment or collectible worthy.

Mr. Phenix was angry from the beginning because of an alleged mishap involving the Municipal Court computer's notice system to him and Judge Reed's decision. He claimed he was told by mail of one date and one time, while the defendant and the Court had a different one. Judge Reed found the defendant on a plea guilty and ordered the defendant to pay the Complainant over $800.00 in restitution. I went down to Municipal Court and purchased the Court's tape

recording of the proceeding and had the ticket in question, copied front and back. I made a copy of both and gave one copy of each to Mr. Phenix.

I filed a petition for damages on April 26, 2004 *(Exhibit #12).* As with all of my clients, I called Phenix and told him of my filing. He either came into my office to retrieve a copy or I mailed it to him. I cannot remember which one it was.

To the best of my knowledge, the next time I met with Mr. Phenix was in Mid-May, 2004. He was still trying to persuade his insurance company, Shelter Insurance, that he did not care about the blue book value of his automobile or the fact the enhances he made to his automobile would not be covered by his insurance policy. He lost that argument also. He finally gave in that summer.

Any so-called negative statements concerning his case would be met with sarcasm and rudeness. Mr. Phenix was correct when he said I threatened or maybe I should say I promised to withdraw from his case of that date. I warned him, I would not tolerate any more of that behavior. I informed him that was his last warning. Mr. Phenix literally tells the complete opposite in his testimony.

I filed Mr. Phenix's petition on April 26, 2004. I was informed by the circuit court's case initiation department either by mail or fax that our case was assigned to Division 8, Judge Peggy Stevens-McGraw. On the date of filing, Division 8 was on an in-active civil trial docket status *(Daily Record # 1A).* I informed Mr. Phenix about our case not being placed on the division's active civil

trial docket until sometime after Labor Day. Mr. Phenix was a little upset initially but after he checked it out on the Court's website and the Daily Record that I had provided; he was resigned to waiting it out. We did not have a choice *App. 67 (TR 12-25 & App. 68 (TR 1-7), Exhibit #8 ("I know this process stakes time)".* After that, he was comfortable with the short wait.

I saw Mr. Phenix on numerous occasions during the summer at various social events. Everything was fine between us. Then, just before Labor Day weekend, out of nowhere, Mr. Phenix, phoned going berserk about his case and other things which I cannot remember. He stated I had done "nothing" for him and he was considering getting a new lawyer. So, I made up his mind for him. As I stated before, I had warned him back in Mid-May about this sort of behavior. I informed him I was terminating our attorney-client relationship and I would be drafting and delivering to him a letter outlining my position within the near future.

Approximately eight (8) days later, I ran into Mr. Phenix at a mutual friend's home. I was reconsidering my withdrawing as counsel until he got rude over something minor. I decided to leave to avoid a scene. As I was walking away, Mr. Phenix grabbed my left armed and jerked me backwards. I naturally became extremely upset and told him what I thought. What he did constituted an assault and battery and I am a firm believer in self-defense. I prevented a very

embarrassing incident and left. Mr. Phenix was not trying to be malicious but that was not a smart thing to do.

I next heard from Mr. Phenix on or about September 12, 2003. He phoned and wanted to know about his case as if nothing had happened the week before. I told him I had received nothing in the mail or by fax yet from the Court. Again, I informed him I was still withdrawing from his case and he needed to secure new counsel. I informed him again he and be receiving a letter from me within a week. Mr. Phenix then demanded "all of his monies back" ($850.00)*(Exhibit #8, 9, & 10).* I told him no way but I was willing to a partial refund because I would not be trying his case. I felt a one-third refund was appropriate. Mr. Phenix had no complaint(s) with my service other than I was not going to try his case. I grew quickly tired of arguing with him on the phone. I told Mr. Phenix that in preparing and filing his petition, the insurance work, filing fees, research and office visits; he was not entitled to a full refund. I informed him then I would be preparing a Statement of Account *(Exhibit #16)*. I informed him any fee dispute we may have with each other should be resolved by the Kansas City, Missouri Bar Association's Fee Dispute Committee *(Exhibit # 1B)*. Rather, like clients in the past and probably in the future, they rather file with the OCDC alleging, ethical and misconduct issues to bolster their claim(s).

I mailed my withdrawal letter to Mr. Phenix on or about September 18, 2004, as promised. His only response was continually that he only wanted "all of his monies back". For about a week, between September 13, 2008 to September 20, 2008, he would call and leave phone message or faxes angrily demanding his $850.00 *(sometimes twice a day).* Again, he never complained about my services other than he wanted me to complete his case. He threatened to take to the Bar Committee but little did he know that I've been through this process several times before therefore, those types of threats do not intimidate or anger me. I was somewhat relieved to get rid of him. All Mr. Phenix had to do was to half apologize, but that was not in his nature. I did not see or hear from Mr. Phenix until November 6, 2004. On September 20, 2004, Mr. Phenix by certified mail, agreed with me to terminate our attorney-client relationship *(Exhibit #10).* Mr. Phenix eventually filed a complaint with the KCMBA Fee Dispute Committee *(Exhibit #A2)*

On or about October 12, 2004, I received notice that our first trial docket call would be on November 29, 2008, at 9:00 AM in Division 8, Judge Peggy Stevens-McGraw. I immediately wrote Mr. Phenix informing him of the good news *(Exhibit #14).* I had already mailed him a copy of my Application to Withdraw a day or two earlier *(Exhibit #12).*

I had avoided the place of our first confrontation of September 4, 2004 for approximately two (2) months. I just didn't feel like arguing with him. A mutual acquaintance of ours was having a birthday celebration and I believed was everything between Mr. Phenix and I was okay. I had not as November 4, 2008, received any correspondences from either the KCMBA Fee Dispute Committee or the OCDC. I hadn't heard from him since September 20, 2004 via fax.

When I arrived at the event, I spoke to everyone, including Mr. Phenix. He was fine at first, but after about thirty (30) minutes had elapsed he came over to me and again began asking about his $850.00. He started raising his voice in an attempt to embarrass me. It was late and I was tired. I simply was not up to arguing with anyone. I decided to leave. As I proceeded to leave, Mr. Phenix followed me up the stairs, out of the house through the back and front yard. Mr. Phenix comically began blocking my exit and path continuously as I attempted to make my way to my car. Mr. Phenix was a big guy and it was about 2:30 am. Again, as I began making my way to the street Mr. Phenix darted in front of me just as got to the hilly part of the front yard. We went into a serious slide as if we were on ice. Our noses and upper bodies touched. I was at first of course terrified as we slid down the embankment. Then we stopped as we approach the sidewalk. I emotions went from fear to anger. I am only human. I cursed him and threatened him in a sudden heated passion and the impulse to defend myself

against a physical attack. Anyone would have re-acted the same thing. The whole incident lasted between thirty ten and twenty seconds. I got in my girlfriend's car and left. There was no fight and no public to witness anything.

The next time I saw Mr. Phenix was around November 20, 2008. I had heard from a mutual acquaintance he had been involved in a couple of serious run-ins with the defendant Michael Straws. I know different now though, it was something else. I decided to be the bigger person. I offered a truce. I told him we needed to put this thing behind us and go our separate ways. He agreed to this. We shook hands and I thought that was the last of it. The on or about November 25, 2004, I receive both an Order of Protection and the Missouri Advisory Committee's Complaint from Mr. Phenix. He later testified I came to offer an apology at the DHP hearing. I again did not feel like arguing about that at the DHP hearing *App. 62 (TR. 9-25).*

I told the DHP I did everything by the book but apparently that was not sufficient for some of us. This was a slam dunk case. The only thing pending was the amount of damages he would receive. He could have tried the matter himself but was afraid of Mr. Straws. His case was finally dismissed on January 31, 2005 by Judge Torrence for lack of prosecution.

## POINTS RELIED ON

**I.**

**RESPONDENT DID NOT VIOLATE ANY RULES OF PROFESSINAL CONDUCT IN HIS REPRESENTATION OF HIS CLIENT INCLUDING BUT BY NOT LIMITED TO ENGAGING IN CONDUCT PREJUDICIAL THE ADMINISTRATION OF JUSTICE. THE RESPONDENT MORE THAN REASONABLY COMMUNICATED WITH HIS CLIENT AND DILIGENTLY HANDLED THE MATTER FOR WHICH HE WAS RETAINED.**

CASES ……

In Re Warren 888 S.W. 2d (Mo banc 1994)

In Re Frick, 9694 S.W. 2d 473 (Mo banc 1985)

RULES ..……...

Rule 4 – 8.4 (d) Engaging in conduct prejudicial to the administration of justice

Rule 4 – 1.4 Communication

Rule 4 – 1.3 Diligence

Rule 4 – 1.1 Competence

## POINTS RELIED ON

## II.

**THE SUPREME COURT SHOULD DISMISS ALL VIOLATIONS WITH PREJUDICE FILED BY INFORMANT AGAINST RESPONDENT.**

*Standards for Imposing Lawyer Sanctions* (1991 ed.)

***OTHER AUTHORITIES***

Black Letter Rules (Amended 1992) ……..……..……..

West Key Number Digest, Attorney and Client (53) (2) ….……

In Re Belz No. SC. 88985 (2008)

## ARGUMENT

### I.

It is well settled that the findings and conclusions of law made by the Disciplinary Hearing Panel are advisory. *In re Cupples*, 979 S.W. 2d, 933 (Mo banc 1998). In a disciplinary proceeding, this court reviews the evidence de novo, independently determining all issues pertaining to credibility of witness and the weight of the evidence, and draws its own conclusions of law. *In re Snyder*, 35 S.W. 3d 380 (Mo banc 2000). In the instant case, Respondent submits that the findings of fact, conclusions of law and disciplinary recommendation made by the Panel were not supported by clear and convincing evidence as stated in Informant's brief *(App. 13)* or by the preponderance of the evidence which is the standard this Court utilizes.

In fact, Respondent's brief will prove by clear and convincing evidence that Informant's case only revealed the Complainant's total disregard for the truth, motivated by a now apparent long brewing personal vendetta against the Respondent. Furthermore, Complainant knew when he came to the DHP hearing on May 18, 2007 and could be lie with impunity and nothing could and or would be done to him. He was a civilian in this war between the Special Representative, the DHP and me. Now, Mr. Phenix also has immunity.

Violation of Rule 4-8.4(d)

First and foremost there was no fighting. There is nothing in the record to remotely suggest there was a fight. Someone has turned night into day. Secondly, the incident of November 6, 2008 happened outside at approximately 2:30 am and the only witness to that incident was a young man I believe named "Jerome" who Mr. Phenix has erroneously described as a "security guard". There was no "public social gathering" outside at that time.

The Disciplinary Hearing Panel improperly found that Respondent's conduct toward his client, constituted verbal harassment and physical confrontations. In fact, Respondent will prove the opposite. Respondent's first letter to Complainant, dated September 17, 2004, stated that he Complainant "attempted to talk to me with your hands" and attempted to physically restrain me". *(Exhibit #18)* Complainant never denied these allegations. Mr. Phenix only wanted his entire $850.00 back *(Exhibit #10)*. There were no allegations about neglect, failure to communicate *(except by way of faxes from September 3 – 20),* competency, diligence or any other violations before the Court.

Informant cites many cases, including the Frick and Warren cases. In those cases the attorneys were engaging and initiating threatening childish conduct in which the Court considered moral turpitude among other things. In the case before

the Court today, it should be clear the Complainant initiated both verbal and physical contact with Respondent or at the minimum.

Mr. Phenix was a big man who had weighed well over two hundred and fifty pounds *(250 lbs)* at one time. I could not break his neck with three hands. Those were words used were figures of speech only. It is only because of my athleticism and luck neither of us was seriously injured. Concerning both confrontations, the DHP and Mr. Gotschall must be super-humans, in that they have no emotions such as fear, anger and self-defense. They're holding me to a much higher standard of which I believe they themselves could not adhere to. My reaction to the stimuli I was subjected to was quite normal and squarely in the realm of my constitutional and common law right to self-defense and preservation. I reacted well, I believe, under the circumstances with an emotional flavor.

Next, Mr. Phenix claimed he called the Kansas City, Missouri Police Department in the early morning of November 6, 2004 *App. 27 (TR 1-3).* One would have thought the Informant would have produced and offered into evidence the police report and or a computer log sheet to support Mr. Phenix's accusation. There was no call, and or report because the incident *(fight or weapon allegation)* never occurred. Mr. Phenix never mentioned this allegation in any documents until the hearing.

Violation of Rule 4-1.4 (COMMUNICATION)

Informant states Respondent, after filing a Petition for Damages April 26, 2008 *(Respondent's Exhibit # 3)* and events thereafter, was either so stupid, and or insane, enough as to not inform his client about this filing and other documents until almost more than six (6) months later. As stated by both Complainant and Respondent, he came to my office in Mid-May, 2004. What could we be talking about except his petition? Complainant apparently convinced Mr. Gotschall and the DHP, I back dated letters and other documents; and mailed to him on November 10, 2004 *App. 24 (TR 14-25).*

Yet upon questioning by Ms. Vanita Massey, DHP Chairperson, Complainant's two (2) faxes to Respondent, revealed it was clear that he knew about his case and its status all through the summer through the 16th Circuit Court website *(Case.net)*, which I gave him at the Mid-May office meeting *App. 66 (TR 14-25), App. 67 (TR 1-25)* and *App. 68 (TR 1-23).*

Mr. Phenix had to later admit Respondent faxed to him the defendant's answer around Mid-June of 2004 *App. 51 (TR 21-25) & Ap.p 52 (TR 1-6).* This refutes his earlier statements and testimony. Mr. Phenix and I also spoke by telephone at least several times week during the summer regarding his on-going battle with his insurance company (Shelter). In one of his faxes to me he mentions his "lawsuit is pending" (*Respondent's Exhibit #5).*

Mr. Phenix's three (3) faxes between September 13, 2004 and September 20, 2004, only begged the one same question "I want my $850.00 back". My answer was always the same, "not the whole amount". Every time before that Mr. Phenix called or faxed something to me I responded promptly.

Violation of Rule 4-1.3 (DILIGENCE)

Informant states Respondent procrastinated and delayed my client's cause of action (DILIGENCE). The DHP found I violated Rule 4.11 (COMPETENCE). There seems to be a conflict here. Mr. Phenix's case was filed at the circuit court level because of his desired monetary damages and due to attorney's trial strategy decision. I waited nearly three (3) weeks before I filed my Application to Withdraw after my letter dated September 17, 2004 *(Exhibit #18).*

Mr. Phenix mailed or faxed his compliant to the OCDC, on or about October 13, 2004. I filed my Application to Withdraw on October 8, 2008. Therefore, I had no motive to be angered on his November 9th, 2004 Petition for Order of Protection as he stated. I had no knowledge of Mr. Phenix's OCDC complaint until on or about November 25, 2004. Again, after I filed the Application to Withdraw, I called Division 8 about a hearing date. I was told by a court's or the law clerk my Application would not be taken up until November 29th docket. I assumed Mr. Phenix would obtain new counsel. A normal person would not have wanted their trial lawyer to be the same person whom they have taken out an Order of Protection against earlier. When asked by the Respondent about this ridiculous position, Mr. Phenix essentially stated "His $850.00 was apparently somewhat worth it" *App. 63 (TR 1-25) & App. 64 (TR 1-9).*

Respondent had drafted an Application for Continuance to protect both client and attorney due to a previously retained matter in Nebraska. Client, then shows up in Court before Judge McGraw and inform her he still wants Respondent to represent him. He does not tell the judge about the two (2) prior physical confrontations or the Order of Protection involving him and the Respondent *(Exhibit #13).* Judge McGraw denies Respondent's Application to Withdraw. Respondent never received her Order and only found out about it on or about December 12, 2004. Respondent then contacted the Court and faxed them the "Order of Protection Complaint". Complainant admits to this in his testimony he did not inform the Court of our troubles *App. 65 (TR 2-25).*

Mr. Phenix's assertion about the November 10, 2004, mailing in the brown envelope was equally shameful. The Special Representative did not offer the "envelope" into evidence. Mr. Phenix kept it in his lap during the whole examination although the transcript states he briefly held it up. No one was allowed to view the "envelope" and Complainant then testified under direct examination from Mr. Gotschall that the date of mailing was unfortunately not readable on said envelope. It was not my envelope and everyone knew it. It was not marked and offered into evidence. *App. 69 (TR 16-25).* There is a clear reason why. This fraud would have been easily discovered. Respondent failed to press the

Complainant or Mr. Gotschall. I felt everyone present knew the whole thing was a sham. This incident related to both Rule 4-1.3 and Rule 4-1.4.

Mr. Phenix in his fax to Respondent dated September 13, 2004, stated "I know this process takes time", demonstrates that he was comfortable with the wait because he knew it would soon be placed on a trial docket *(Exhibit #8).* Therefore diligence and or competency were not an issue until the Special Representative made them one.

## ARGUMENT

### II.

THE SUPREME COURT SHOULD DISMISS ALL VIOLATIONS WITH PREJUDICE FILED BY INFORMANT AGAINST RESPONDENT.

This Court has relied on the *ABA's Standards for Imposing Lawyer Sanctions* to determine the appropriate discipline to be imposed in attorney discipline cases. *See, e.g., In re Crews*, 159 S.W.3d 355, 360-61 (Mo banc 2005); *In re Warren*, 888 S.W.2d334 (Mo banc 1994); *In re Griffey*, 873 S.W.2d 600 (Mo banc 1994); *In re Oberhellman*, 873 S.W. 2d 851 (Mo banc 1994). It is also true that the Court has rejected some parts of the ABA's standards.

ABA Standard 3.0 states that the courts should consider four primary factors when imposing sanctions after a finding that a lawyer has committed professional misconduct:

a) The duty violated;

b) The lawyer's mental state;

c) The potential or action injury caused by the lawyer's misconduct; and

d) The existence of aggravating and mitigating factors.

Lawyers as officers of the Court and must abide by substantive and procedural rules, which shape the administration of justice. The problem with Informant's case was that testimony and exhibits elicited at the DHP hearing

showed no evidence of misconduct at all. The Complainant had outright lied and was caught lying on several occasions and adopted multiple positions throughout his testimony.

**§ 102. Admissibility of evidence – Weight and sufficiency**

**West's Key Number Digest**

West's Key Number Digest, **Attorney and Client 53(2)**

In a disciplinary proceeding, all proper intendments are in favor of the attorney and reasonable doubts should be resolved in his or her favor, but testimony which tends to show misconduct by the attorney should not be discredited for insufficient reasons.

In a disciplinary proceeding, all proper intendments are in favor of the attorney and reasonable doubts or conflicts in the evidence should be resolved in the attorney's favor. Evidence bearing the earmarks of private spite should be accepted with extreme caution and scrutinized most carefully. Where proved facts may give rise to equally valid inferences tending to conclusions of guilt and innocence, the inference tending to innocence generally will be accepted. However, this rule does not apply unless equal reasonableness of the inferences appears in the light of the entire record.

Respondent did not get a 50/50 chance or a even break when it came to this guideline.

RULE 4-8.4(d)

The allegations leveled against Respondent by Complainant were purely personal and unreasonable. Inconsistencies in his statements were common and numerous. Respondent did not violate any duty owned to Complainant. Duty and loyalty are concepts I believe in strongly, especially if I'm paid in full and in advance.

Respondent's mental state was one of knowing that on that date in late August of 2004, Complainant knew he might be receiving a letter from the OCDC and r the KCMBA Fee Dispute Committee. Any injury, whether potential or actual was brought on solely by Complainant's behavior. Complainant was charged only $850.00 because of previous non-existence personal and professional relationships between client and attorney. He recovered $800.00 plus fine *(judgment)* in Municipal Court to which I was not a party. I secured the administrative judgment from the Missouri Department of Revenue for $3,200.00. Mr. Phenixs' insurance company paid him $4,200.00 *(four thousand and two hundred dollars)* the Blue Book value. It took him seven (7) months to figure that out the hard way that what he wanted meant nothing in the real world *App. 70 (TR 10-18).*

Therefore, when it came to our lawsuit, the Associate Court wouldn't work with him because he wanted three (3) times his value of the automobile. Once a

civil case is filed at the circuit level there is no quick fix. He waited his turn excluding exigent circumstances just like everyone else *(Rule 4-1.1).* The Special Representative and the DHP found the Respondent guilty, somehow, anyway. They then outlined aggravating circumstances:

- Respondent had been the subject of prior violations of discipline, most of them not very significant, *App. (TR 159-166).* Respondent was reprimanded in 1996 for violating Rule 4 – 1.16(d) Failing to return third party fund held in trust.
- Between February 1998 to March 1999, a period of fourteen (14) months, Respondent was cited three (3) times for failing to have a written fee agreement. Up until this period of time, Respondent did not know a written contingency fee agreement was mandatory for all of those years. Three of those cases came upon me during that short time period. Therefore, before Respondent knew what hit him, he had a jacket full of petty violations. A couple of the disputes had nothing to do with fee arrangements initially. Twice, Responded was cited for failing to return third party funds held in trust *(fee disputes).* When Respondent first read these violations, he did not know what they truly meant. The other two violations were in the forms of diligence and communications. I call these the catch-all-violations along

with Rule 4. One time I was given an admonition because I did not have $200.00 to return to a client due to poverty.

- Respondent was Administratively suspended for two (2) weeks for failing to timely comply with the Missouri's Bar CLE requirement for 2006 to 2007 and 1990 to 1992 ethics requirement which was "newly discovered". I wasn't given any due process in that matter, which occurred in March, 2008. I guess once you've had as many complaints as I have constitutional due process is not due.
- Respondent cannot and will not acknowledge any wrongful conduct. I was performing by the "book" and I was defending myself as a result of Mr. Phenix's physical contacts directed towards me. The DHP recommend that Respondent be suspended from the practice of law for one (1) year, provided, however, that said suspension be stayed and in lieu of enforcement thereof, Respondent be placed on probation for a period of one (1) year. The terms of probation recommended by the panel include, inter alia, appointment of a probation monitor and mentor, quarterly reporting to the OCDC, attendance at the Ethics School developed by the OCDC and the Missouri Bar, certification of client trust account activity and maintenance of legal malpractice insurance. Respondent feels all of this is unnecessary. When I needed a mentor ten (10) years ago, there was no one to be found. A

monitor under these circumstances is insulting. My practice is finally going well and steady. I learned civil trial practice "flying by the seat of my pants" from 1996 to 1999. Mr. Phenix did not complete his case because he was too cheap to get another lawyer and was afraid of Mr. Straws.

**Mitigating factors would be the following:**

A) Absence of dishonest or selfish motives on the part o the Respondent;

B) Timely good faith to diffuse a potentially continuous violent situation *App. 16 (TR9-25),* apparently to know avail. He stated first I made no attempt to rectify, *App. 34 (TR 3-11), and App. 62 (TR 9-25);*

C) Full and free disclosure to disciplinary board or cooperative attitude towards the proceedings. I should have declared open warfare but had nothing to be concerned about concerning my conduct.

D) Delay in the Court's disciplinary proceedings. The DHP hearing occurred on March 18, 2007 and a written decision wasn't arrived at until March 13, 2008.

Respondent rejected the discipline recommended by the Disciplinary Hearing Panel but submitted a counter recommendation in hopes to appease both the Panel and Complainant even though the Respondent knew in his heart he had not committed any misconduct. History has shown us many times that appeasement can backfire on you. In light of In Re Belz No SC 889, (2008), the OCDC does not believe in mitigating factors, period.

# CONCLUSION

Respondent committed no professional misconducts and therefore request that all violations leveled against him be dismissed with prejudice. Respondent has demonstrated by clear and convincing evidence that Complainant lied consistently to the DHP and his testimony was filled with numerous inconsistencies. Respondent has been commended in the past for his candor in previous alleged violation proceedings. Respondent can only take responsibility for being stupid enough to represent Mr. Phenix again promising himself not to. I know now I should have sent my letters certified to Mr. Phenix and taped my phone conversations. I wish also now the DHP was videotaped. Other than that, Respondent competently and diligently handled Complainant's matter and invoked his right to self-defense although there was no "fight". Mr. Phenix needed to watch what he said to me and kept his hand and body to himself.

After Mr. Phenix's direct, cross and redirect examinations, he was allowed to leave the hearing. I thought that was very strange and improper but made no objection. Still, I never bad mouthed him during my direct examination by Mr. Gotschall and the DHP. I felt justice would be done and I simply told the truth about what had occurred. I was certain that nobody believed him. Informant's brief submits that the findings of fact, conclusions of law and disciplinary recommendations made by the Panel were supported by "clear and convincing

evidence". No one at that hearing in good conscience could have arrived at that conclusion.

On or about March 5, 2005, I received a letter Rick D. Holtsclaw, Division II, Chair for the Missouri Supreme Court Region IV Disciplinary Committee. In part it asks me to please be specific as to what type of weapon was displayed "A 3". That let me know from that point on that fairness and objectivity were going to be critical in this protracted proceeding.

# CERTIFICATION: RULE 84.06 (c)

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

1. Includes information required by Rule 55.03
2. Complies with the limitations contained in Rule 84.06 (b)
3. Contains 5,880 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. That *(McAfee Antivirus Version 8.5)* software was used to scan the disk for viruses and that it is virus free.

_____

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RESPONDENT

## CERTIFICATE OF SERVICE

I, hereby that on this 29th day of September, 2008, two copies of Respondent's Brief and a diskette containing the brief in Microsoft Word Format was hand-delivered to:

Mr. Allan D. Pratzel, Esq.
Chief Disciplinary Counsel
3335 American Avenue
Jefferson City, Missouri 65109

_____

**Roy King, Jr.** **MBE #35005**

# TABLE OF CONTENTS

**PAGE**


TABLE OF CONTENTS …… 1

EX A 1 LETTER ……... 2

EX A 2 K C MO POLICE DEPARTMENT

FIELD REPORT …… 3

EX A 3 KCMBA LETTER …….. 7

EX A 4 PHOTOGRAPHS ……..….. 8

EX A 5 LETTER …….. 9

EX A 6 LETTER TO KC MO POLICE DEPARTMENT .. 10

EX A 7 LETTER TO DIVISION 8

JACKSON COUNTY CIRCUIT COURT ……. 11

# I N D E X


| | PAGE |
|---|---|
| TABLE OF CONTENTS | 1 |


## **E X H I B I T S**


| EXHIBIT NOS | | PAGE |
|---|---|---|
| A 1 | …….. | 2 |
| A 2 | …….. | 3 |
| A 3 | …….. | 7 |
| A 4 | …….. | 8 |
| A 5 | …….. | 9 |
| A 6 | …….. | 10 |
| A 7 | …….. | 11 |