IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
RODERICK E. SMITH,	**)**	**Supreme Court #88244**
	)	
Respondent.	**)**	

INFORMANT'S BRIEF

OFFICE OF
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This action is one in which Informant, the Office of Chief Disciplinary Counsel, is seeking to discipline an attorney licensed by the Missouri Bar 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 2000.

STATEMENT OF FACTS

Disciplinary History

Mr. Roderick Smith was admitted to Missouri's Bar on December 20, 1995. **(Ex. 1, par. 2; Ex. 2, par. 2)**. The Region IV Disciplinary Committee has issued ten admonitions to Mr. Smith. **(Ex. 4, pp. 1-26)**. He received his first admonition in 1999 and he received his most recent admonition in 2002. **(Ex. 4, pp. 1-26)**. The admonitions were issued for : (1) lack of diligence in handling client matters (Rule 4-1.3) (six violations); (2) lack of adequate client communications (Rule 4-1.4) (four violations); (3) charging clients unreasonable fees (Rule 4-1.5(a)) (two violations); (4) commingling trust funds with other funds (Rule 4-1.15(a)); and (5) taking an interest in client's property without meeting certain requirements (Rule 4-1.8(a)). **(Ex. 4, pp. 1-26)**.

On January 3, 2006, Informant filed an Information for Interim Suspension of Mr. Smith's license and Motion For Appointment of Trustee. On January 23, 2006, this Court interimly suspended Mr. Smith's license. (**Ex. 1, par. 4; Ex. 2, par. 4**). The Court appointed attorney John Osgood as a trustee to wind-up Mr. Smith's practice. **(Tr. 507)**.[1] Mr. Smith's license is currently suspended pursuant to this Court's order of January 23, 2006.

[1] The transcript of the hearing and the depositions introduced during the hearing (Exs. 6, 7, 8, 12, 24, 29, 32 and 37) can be found in the Appendix to this brief.

Facts Underlying Disciplinary Case

General Information Regarding Mr. Smith's Practice

From December 1995 until January 2004, Mr. Smith was a solo practitioner. (**Tr. 24-25**). Mr. Smith focused his practice predominately on criminal law and family law matters. (**Tr. 428**). Mr. Smith also handled some personal injury matters. (**Tr. 665**). In February 2004, Mr. Smith, along with several other attorneys, formed the firm of Fulcher, LaSalle, Brooks, Smith & Daniels, L.L.C ("the Firm"). (**Tr. 24-25**). The Firm struggled financially after its inception. (**Tr. 120**).

While Mr. Smith was a member of the Firm he did not have a good working relationship with Darren Fulcher, the managing partner of the Firm, or Elizabeth Springate,[2] the paralegal assigned to work with Mr. Smith. (**Tr. 23-136, 421-480**). Over time his relationship with the other partners and staff also deteriorated. (**Tr. 23-136; 421-480**).

While Mr. Smith was a member of the Firm:

(1) Members of the Firm and staff began receiving complaints from clients and court personnel that Mr. Smith failed to appear in court as scheduled; (**Tr. 31-32**)

(2) Mr. Smith spent less than 10 hours per week at the office and when in the office often spent time watching TV or playing video games; (**Tr. 34; 423**)

[2] After Ms. Springate left the Firm she changed her name to Elizabeth DeVoogd and the transcript identifies Ms. Springate as Elizabeth DeVoogd.

(3) Mr. Smith did not open mail on a timely basis and would not allow staff to open mail and calendar events for him; (**Tr. 426-428**)

(4) Mr. Smith did not properly account for client funds by placing the funds into a trust account; (**Tr. 44-46**)

(5) Members of the Firm and staff received numerous complaints from clients that Mr. Smith failed to communicate with them and that he did nothing on their cases; (**Tr. 35-37; 432**)

(6) Mr. Fulcher discussed with Mr. Smith the various complaints he was receiving regarding client representation and Mr. Smith did not improve his practice procedures; (**Tr. 36**)

(7) Because of the client complaints Mr. Fulcher received, Mr. Fulcher took over or asked other members of the Firm to take over approximately 50 of Mr. Smith's cases; (**Tr. 37**) and

(8) On August 25, 2004, the Firm provided written notification to Mr. Smith that he was violating the terms of the partnership agreement by his repeated failure to communicate with clients, and by his continued inattention to the business of the Partnership and to the interest of the clients of the partnership. (**Ex. 96**).

On April 15, 2005, Mr. Smith was expelled from the Firm by unanimous vote of the partners. (**Tr. 46, 86**). He did not vacate the Firm's office space and continued to practice out of the same office space until this Court suspended his license on January 23, 2006. (**Tr. 86**). Mr. Smith's dealings with the members of the Firm and the staff

became even more acrimonious than it had been before his expulsion and Mr. Smith filed suit against the members and Elizabeth Springate. (**Tr. 86-90; 560-61**).

Richard Hicks Matter
Count I of the Information

In 2003, Mr. Richard Hicks was convicted of eight counts of violating 18 U.S.C. 922(g)(8) (unlawfully possessing firearms and ammunition while subject to a domestic restraining order). (**Ex. 1, par. 9; Ex. 6, p. 5, Ex. 7, p. 3**). Mr. Hicks was sentenced to 180 months in prison. (**Ex. 1, par. 9; Ex. 6, p. 5, Ex. 7, p. 3**). Mr. Hicks requested that his mother, Ms. Geraldine Hicks, contact Mr. Smith about preparing a petition for certiorari to the United States Supreme Court on his behalf after receiving a recommendation from another inmate regarding Mr. Smith. (**Ex. 6, p. 2; Ex. 7, pp. 4-6**).

On January 9, 2005, Ms. Hicks contacted Mr. Smith about preparing the petition for certiorari on her son's behalf. Mr. Smith stated: (a) he would take the case, (b) his fees would be $20,000 and (c) he would require $10,000 be paid up front. Mr. Smith did not set any time frame by which the remaining $10,000 needed to be paid and did not enter into a written fee agreement with Richard Hicks or his parents. (**Ex. 6 pp. 6-8, 19**). On January 21, 2005, Ms. Hicks sent $10,000 to Mr. Smith. (**Ex. 5; Ex. 6, p. 8**). It was difficult for the Hickses to pay $11,000 to Mr. Smith. (**Ex. 6, p. 16**). They are farmers and had to forgo fertilizing their crops to pay the fees. (**Ex. 6, p. 16**).

The petition for certiorari was due on March 7, 2005. (**Ex. 20, p. 5**). On February 1, 2005, Gary Udashen, Mr. Hicks' former appellate counsel, wrote to Mr. Smith advising him that he would be happy to ship Mr. Hicks' files to him if Mr. Smith wished. Mr.

Smith did not respond to the letter. (**Ex. 12, p. 17; Ex. 15**). On February 3, 2005, Mr. Smith wrote to Mr. Mike Wynn, Mr. Hicks' former trial counsel, and requested that Mr. Wynn provide him with any and all documents regarding Mr. Hicks. (**Ex. 8**). Upon receiving the letter, a legal assistant from Mr. Wynn's office called Mr. Smith's office and advised Ms. Springate that Mr. Hicks' file consisted of approximately 50 bankers' boxes and inquired whether Mr. Smith really wanted them to ship all 50 boxes to him. Ms. Springate stated she would get back with Mr. Wynn's office. (**Ex. 8**). Mr. Smith nor his staff ever contacted Mr. Wynn's office again. (**Ex. 8**).

After Ms. Hicks paid Mr. Smith $10,000, she did not have any further contact with Mr. Smith until he called on February 23, 2005, to state he was coming to Dallas to pick up Mr. Hicks' files from his former attorneys and that she would need to pay him $1,000 for his travel expenses. (**Ex. 6, pp. 8-9**).

On or about February 24, 2005, Mr. Udashen received a call from someone at Mr. Smith's office informing him that Mr. Smith would be coming to Dallas the next day to pick up Mr. Hicks' file. (**Ex. 12, pp. 18-20**). Mr. Udashen advised that it was not necessary for Mr. Smith to come to Dallas as he would be happy to ship the files to Mr. Smith. (**Ex. 12, pp. 18-20**). The staff member stated she would relay this information on to Mr. Smith. (**Ex. 12, pp. 18-20**). The staff member called back a few minutes later and advised that Mr. Smith preferred to come to Dallas to retrieve the files. (**Ex. 12, pp. 18-20, 40**).

Mr. Hicks testified that Mr. Smith never communicated with him and that he became concerned about Mr. Smith's lack of communication so one of the counselors at

the prison allowed him to call Mr. Smith's office on five occasions from the counselor's phone. (**Ex. 7, pp. 6-7**). Mr. Smith submitted, over Informant's objection, an unauthenticated, hearsay letter from the supervisory attorney for the prison stating that Mr. Smith had subpoenaed recorded phone calls Mr. Hicks made to Mr. Smith's phone numbers and that the prison had no such records. (**Ex. 132**). Mr. Smith did not notify Informant that he was subpoenaing such records and Informant did not have an opportunity to question prison officials on issues such as whether the prison's review of phone records included phone calls that may have been placed from Mr. Hicks' counselor's office, as opposed to a phone designated for inmate calls, or whether prison officials reviewed records of calls Mr. Hicks may have made to Mr. Smith's cell phone as opposed to the Firm's main number. (**Tr. 752-53**). In response to Mr. Hicks' statement that he had no communication with Mr. Smith, Mr. Smith testified that all of his clients have his cell phone numbers, that staff at the Firm was instructed to give clients his cell phone number and that unless he was in court or asleep he always answered his cell phone. (**Tr. 756**).

On February 6, 2005, Mr. Smith met with Ms. Hicks in Dallas and Ms. Hicks paid Mr. Smith $1,000 to cover his travel expenses. (**Ex. 6, pp. 9-10; Ex. 5**). He also went to Mr. Udashen's office and picked up Mr. Hicks' files. (**Ex. 12, p. 12**). He did not go to Mr. Wynn's office to obtain Mr. Hicks' files from Mr. Wynn. (**Ex. 8**). Mr. Smith's wife testified he had a cold when he traveled to Texas and the Panel admitted into evidence, over Informant's objections, an unauthenticated medical form. The form purported to

show that Mr. Smith visited a doctor on March 7, 2005, because of cold symptoms. (**Ex. 130**).

Mr. Smith did not place the $1,000 fee for travel expenses into the Firm's trust or the trust account which he maintained while a solo practitioner. (**Tr. 447**). Instead he deposited the check into his personal account. (**Ex. 5**). Mr. Smith testified he did so because the Firm had not advanced him funds for the trip. (**Tr. 447**).

Mr. Smith spent very little time, if any, reviewing Mr. Hicks' files or preparing the petition for certiorari. (**Tr. 443**). Mr. Smith was not admitted to the United States Supreme Court and had never prepared a petition for certiorari to the Supreme Court before. (**Ex. 1, par. 9; Ex. 6, p. 5, Ex. 7, p. 3**). Mr. Smith had very little experience in other federal criminal appellate work. (**Tr. 52, 678-79, 740; Ex. 9**).

Mr. Smith filed an application for admission to the United States Supreme Court on March 7, 2005, the day Mr. Hicks' petition for certiorari was due. His application was incomplete and contained inaccurate information in that it did not disclose all of his prior discipline or the fact that there were currently disciplinary matters pending against Mr. Smith. (**Ex. 131**). The Supreme Court requested additional documentation from Mr. Smith which Mr. Smith never provided. (**Tr. 770-7; Ex. 9**).

Mr. Smith did not file a petition for certiorari with the United States Supreme Court. (**Ex. 10**). Instead, on March 7, 2005, the day that the petition was due, Mr. Smith filed a motion for extension of time. (**Ex. 10**). In his motion, Mr. Smith stated he was requesting additional time to file the petition because he had not received the legal file from previous counsel until February 26, 2005. (**Ex. 10**). In his motion, Mr. Smith did

not assert that he needed additional time to prepare the petition because he had been ill. (**Ex. 10**). The Court denied the motion for extension of time. (**Ex. 10**).

United States Supreme Court Rule 13.5 provides that motions for extensions of time for petitions of certiorari must be filed at least ten days before the petition is due unless there are extraordinary circumstances. (**Ex. 11**). Mr. Smith did not assert that there were extraordinary circumstances which prevented him from requesting the extension of time before the due date of the petition. (**Ex. 10**).

Both John Osgood and Gary Udashen, who are experienced federal criminal appellate practitioners, testified that the issues to be presented in the Hicks petition for certiorari were fairly simple and limited and the petition for certiorari would not have taken very long to prepare. (**Tr. 516-17**). Mr. Udashen testified that he could have prepared the petition for certiorari in the Hicks case in a day if necessary. (**Tr. 516-17; Ex. 12, p. 45**).

Mr. Smith did not inform Mr. Hicks or his parents that: (a) he had not filed the petition for certiorari; (b) he had filed a motion for extension of time instead; or (c) the Supreme Court had denied his motion. (**Ex. 6, p. 11-13; Ex. 7, p. 6**). On March 14, 2005, Ms. Hicks called Mr. Smith and asked Mr. Smith whether he had filed the petition. Mr. Smith informed her that "he had filed something" and then hung up on her. (**Ex. 6, p. 11-13; Ex. 7, p. 6**).

When Mr. Hicks' parents and sister learned from outside sources what had occurred they requested a refund from Mr. Smith. (**Ex. 6 pp. 12-13, Ex. 17**). Mr. Smith refused to refund any money to them. (**Ex. 6, 17**). Upon learning what had occurred, the

Firm did refund $4,000 to the Hickses. (**Tr. 51-53**). The $4,000 represented the share of the fees the Firm retained. (**Tr. 51-53; Ex. 6, p. 16**).

On April 5, 2005, Ms. Hicks called and asked if Mr. Smith would return files she had provided to Mr. Smith. (**Ex. 6, pp. 27-28**). Mr. Smith stated that he would do so but never returned the files. (**Ex. 6, pp. 27-28**).

Mr. Hicks' appeal was based, in part, on a challenge to the Federal Sentencing Guidelines and the fact that the district court judge had determined Mr. Hicks' sentence based upon facts not charged in the indictment and not found by the jury to be true, i.e. that Mr. Hicks had committed second degree murder. (**Ex. 12, pp. 8-13**). The Fifth Circuit had ruled against Mr. Hicks on December 7, 2004, but during oral arguments acknowledged that the United States Supreme Court had *United States v. Booker* under submission. (**Ex. 12, pp. 8-13**). The Fifth Circuit further acknowledged that if the Supreme Court ruled in favor of Mr. Booker the Supreme Court would surely grant certiorari to Mr. Hicks as Mr. Hicks' attorneys had properly preserved the issue. (**Ex. 12, pp. 11-15**).

On January 12, 2005, the Supreme Court issued its decision in *United States v. Booker*, 125 S. Ct. 738 (2005). The United States Supreme Court held, among other things, that: (i) the facts used in sentencing must be determined by a jury rather than a judge; (ii) the sentencing guidelines were advisory rather than mandatory; and, (iii) its ruling was applicable to all cases upon review whereby the issue had been properly preserved. (**Ex. 12, pp. 11-15; Ex. 13**).

Mr. Udashen testified that if Mr. Hicks' petition for certiorari had been timely presented to the United States Supreme Court, Mr. Hicks would have been guaranteed the right, at a minimum, to resentencing by the trial court with the trial court no longer bound by the mandatory federal sentencing guidelines. (**Ex. 12, pp. 8-15**). Mr. Udashen obtained certiorari on other cases similar to the Hicks case. (**Ex. 12, p. 32**).

Mr. Hicks' parents had to pay Mr. Udashen to handle the matter after the Supreme Court denied Mr. Smith's motion for extension of time. Ms. Hicks and her husband were distraught over Mr. Smith's failure to file the petition for certiorari. The Hickses are elderly and are concerned that they will not live to see their son released from prison. (**Ex. 6, pp. 13-17**). They had pursued the petition for certiorari to the Supreme Court with the hope that, at a minimum, their son would receive a shorter sentence upon resentencing and they would live to see him released. (**Ex. 6, pp. 13-17**).

On August 16, 2005, Mr. Hicks' former appellate counsel, Mr. Gary Udashen, moved the United States Supreme Court to accept Mr. Hicks' petition for certiorari out of time.[3] (**Ex. 12, p. 26; Ex. 20**). Mr. Udashen asserted that the Supreme Court should accept the petition based upon the Court's ruling in *Booker* and because Mr. Smith acted incompetently and fraudulently in representing Mr. Hicks. (**Ex. 20**). On January 9, 2006,

[3] Prior to filing his motion for the United States Supreme Court to accept Mr. Hicks' petition for certiorari out of time, Mr. Udashen filed a motion with the Fifth Circuit asking the Fifth Circuit to recall the mandate and filed a motion for rehearing. The Fifth Circuit denied both motions. (**Ex. 12, p. 26**).

the Court denied Mr. Udashen's motion. (**Ex. 12, pp. 26-28**). Mr. Udashen is certain that the Court turned down the petition solely because it was out of time. (**Ex. 12, pp. 30-31**). On a criminal matter the Court has discretion to take a late petition for certiorari. (**Ex. 12, pp, 30-31**). When Mr. Udashen moved the Court to accept the late petition, the Solicitor General filed a brief opposing Mr. Udashen's actions. (**Ex. 12, pp. 30-31**). In his brief, the Solicitor agreed that under the *Booker* ruling Mr. Hicks was entitled to resentencing but asserted that the Court had refused to grant certiorari in other cases whereby appointed counsel had failed to present the petition in a timely manner. (**Ex. 12, pp. 30-32**).

Mr. Smith did not cooperate with Mr. Hicks' counsel in attempting to gain certiorari for Mr. Hicks. Mr. Hicks' appellate counsel wrote to Mr. Smith on June 6, 2005, and requested that he return the files he had obtained from appellate counsel as appellate counsel had not kept copies of all of the documents he had given to Mr. Smith. (**Ex. 12, pp. 24-26; Ex. 18**). Mr. Smith did not return any of the files or respond to appellate counsel's letter. (**Ex. 12, pp. 24-26; Ex. 18**).

On June 27, 2005, Mr. Hicks made a compliant to Informant. (**Ex. 4, pp. 101-119**). On July 8, 2005, Informant's staff wrote to Mr. Smith requesting that he provide a written response to the complaint within ten days. (**Ex. 4a**). Mr. Smith did not provide his response until August 24, 2005, and did not request an extension of time in which to respond. In the cover letter accompanying the response, Mr. Smith's attorney apologized for the delay in making the response. (**Tr. 16-17; Ex. 4, p. 101-119; Ex. 4a**).

Roderick Criss Matter
Count II of the Information

Mr. Smith and Roderick Criss were friends. (**Tr. 275-77**). Mr. Criss previously served as a branch manager for Ameriquest Mortgage Company ("Ameriquest"), a mortgage lender, from 1996 until 1998. (**Tr. 275-77**). In 1998 he started a mortgage brokerage business called Express Mortgage with a friend which he operated for a short period of time. (**Tr. 275-77**).

In September 2002, Ameriquest brought a civil suit against Mr. Criss and a number of other defendants for mortgage fraud in United State District Court, Western District Court of Missouri. (**Ex. 27**). Mr. Criss, along with several other of the defendants, was initially represented by Brent Hankins. (**Tr. 277**). After the litigation began, Mr. Hankins withdrew from representing Mr. Criss due to a conflict of interest resulting from his representation of multiple defendants in the action. (**Tr. 277; Ex. 27**).

After Mr. Hankins withdrew, Mr. Criss hired Mr. Smith to represent him in the Ameriquest action. (**Tr. 277-78**). Mr. Smith never officially entered his appearance in the matter or filed any pleadings on Mr. Criss' behalf. (**Tr. 277-78, 281; Ex. 27**). The only action Mr. Smith took on Mr. Criss' behalf in the Ameriquest case was to attend Mr. Criss' deposition on February 18, 2004. (**Tr. 281; Ex. 27**). Mr. Smith allowed Mr. Criss to make his own determination as to whether he should take the Fifth Amendment with regard to particular questions. (**Tr. 281-82, 341-42; Ex. 97**). Jean Paul Bradshaw, the former United States Attorney for the Western District of Missouri, testified that defense counsel should not allow a client to make the determination as to whether the client

should take the Fifth Amendment when being deposed in a civil matter that is related to pending or possible criminal prosecution. (**Tr. 341-42**).

Mr. Smith received various items of correspondence from Ameriquest's attorney concerning the Ameriquest civil litigation. Mr. Smith failed to open much of the correspondence he received from Ameriquest. (**Tr. 542-46; Exs. 99-104**).

In August 2004, and again in February 2005, Mr. Criss was indicted in the United States Western District of Missouri and charged with two counts of violating 18 U.S.C. § 371 (conspiracy to defraud the United States), and with multiple counts of violating 18 U.S.C. § 2314 (interstate transportation of funds obtained with fraud). (**Tr. 282-84; Exs. 24-25**). The indictments were based upon Mr. Criss' action while at Ameriquest and Express Mortgage. (**Tr. 282-84; Exs. 24-25**).

In November 2004, Countrywide Home Loans, Inc. ("Countrywide") brought a civil suit in Jackson County Circuit Court against Mr. Criss and a number of other defendants for mortgage fraud based upon Mr. Criss' actions while at Express Mortgage. (**Tr. 278-81; Ex. 27a**). In December 2004, Mr. Criss was served with Countrywide's petition and summons in the Countrywide suit. (**Tr. 278-81**). Mr. Criss gave the petition and summons to Mr. Smith and, based upon his conversations with Mr. Smith, believed that Mr. Smith would represent him in the Countrywide action. (**Tr. 278-81**). Mr. Smith failed to file an Answer on Mr. Criss' behalf and a default judgment was entered against Mr. Criss. (**Tr. 278-81; Ex. 27a**).

Mr. Criss paid Mr. Smith $10,000 in fees over several months. (**Tr. 277**). It was Mr. Criss' understanding that these fees would cover Mr. Smith's representation of Mr. Criss in both the criminal cases and the civil cases. (**Tr. 279**).

Mr. Smith did not review the evidence the United States' Attorney had against Mr. Criss in the criminal cases or assess whether it would be best for Mr. Criss to plead guilty and obtain credit for cooperating with the government or whether it would be best for Mr. Criss to proceed to trial. (**Ex. 24, pp. 17-18**). Mr. Smith asserted it was not necessary for him to review the United States Attorney's evidence against Mr. Criss, as the evidence was the same as the evidence in the civil suit brought by Ameriquest. (**Ex. 2; Ex. 24, pp. 28-29**). However, Mr. Smith failed to open much of the correspondence he received from the attorneys representing Ameriquest. (**Exs. 99-104**).

Mr. Bradshaw and Judge Elena Franco, a former federal criminal defense attorney, testified that competent criminal defense counsel should review the prosecutor's evidence implicating their client and then advise the client whether it is in the client's best interests to go to trial or plead guilty and obtain a reduction in the sentence by providing "substantial assistance" to the government in the prosecution of the other defendants. (**Tr. 315-17; 325-30; Ex. 24, p. 13-14**). The United States Attorney's office had substantial evidence implicating Mr. Criss in the crimes charged and it would have been highly unlikely that Mr. Criss could have prevailed if he went to trial. (**Ex. 24, p. 12**).

While Mr. Smith spoke frequently with Mr. Criss, Mr. Criss testified Mr. Smith did not provide him with sufficient information about how he should proceed with the criminal cases. (**Tr. 285-87; 296-97**). According to Mr. Criss, Mr. Smith did not advise

of the evidence that the United States Attorney's office had against him, what the likelihood was that he would be convicted if the went to trial, what type sentence he could expect to receive if convicted, or any benefits that might exist if he pled guilty early in the proceedings and cooperated with the government. (**Tr. 285-87; 296-97**). Mr. Smith testified to the contrary on this matter. (**Tr. 761-62**). Mr. Criss did not have any prior experience with either civil or criminal litigation and did not know what should occur when he had an attorney to represent him. (**Tr. 279**).

On April 4, 2005, Mr. Smith failed to appear at a scheduling conference on Mr. Criss' behalf. (**Ex. 24, pp. 20-21; Ex. 26**). The April 4, 2005, court date had been announced previously in open court and Mr. Smith did not object to the date or time. (**Ex. 24, pp. 20-21; Ex. 26**). Approximately one month after the April 4, 2005, missed court date, Mr. Criss spoke with Mr. Smith and Mr. Criss fired him. Prior to that Mr. Smith had called Mr. Criss' cell phone several times but it was not until May 5, 2005, that the parties spoke. (**Ex. 128**).

While representing Mr. Criss, Mr. Smith attended two arraignments, a scheduling conference, an initial appearance, a deposition, and meet with the United States Assistant Attorney on one occasion. (**Ex. 24, pp. 31-32**). Mr. Smith was paid $10,000 for these services. (**Ex. 24, pp. 31-32**).

On June 13, 2005, Mr. Criss obtained new counsel, Jean Paul Bradshaw, and on July 22, 2005, Mr. Bradshaw negotiated a plea agreement with the United States Attorney's office. (**Tr. 323-36**). Because other defendants in the action had already cooperated with the United States Attorney's office prior to Mr. Criss entering his guilty

plea, the United States Attorney's office was unwilling to file a motion stating that Mr. Criss had substantially cooperated with the office and advocating that the court reduce Mr. Criss' sentence below that recommended by the federal sentencing guidelines. (**Tr. 323-36**).

Mr. Bradshaw has filed a motion for downward departure of the federal sentencing guidelines asserting that Mr. Criss should be treated like the other defendants in the case who provided "substantial assistance" to the government. (**Tr. 334-36**). Mr. Bradshaw has asserted that Mr. Criss missed out on the opportunity to cooperate with the government early in the case due to the incompetence of Mr. Smith. (**Tr. 334-36**). Mr. Bradshaw has never filed any motion similar to this before. (**Tr. 334**). The United States Attorney did not oppose the motion. (**Tr. 334-35**). At the time of the disciplinary hearing, Mr. Criss was awaiting sentencing.

Shawn Robinson Matter
Count III of the Information

In September 2003, Mr. Robinson was indicted in the United States District Court of the Eastern District of Missouri and charged with conspiracy to distribute, and possession with intent to distribute, heroine and cocaine. (**Ex. 28**). The case was a complicated case in which the federal government had charged Mr. Robinson, along with eleven other codefendants, with participating in a long-term drug conspiracy. (**Ex. 28; Ex. 29, pp. 7-9**). The government had done extensive wiretapping (30,000 wire taps) over many years. (**Ex. 29, pp. 7-9**).

On April 27, 2004, Shawn Robinson paid Mr. Smith $7,500 for Mr. Smith to represent him. (**Ex. 32, pp. 7-9; Ex. 33**). Mr. Smith's total fee was to be $15,000. (**Ex. 32, pp. 7-9**). Mr. Smith requested that $7,500 be paid as an initial retainer but did not specify when Mr. Robinson was to pay the remaining fees. (**Ex. 32, pp. 7-9**). The parties did not enter into a written fee agreement. (**Ex. 32, pp. 7-9; Ex. 33**).

Mr. Smith attempted to review the wire taps with Mr. Robinson one time while he was meeting with Mr. Robinson at the jail but was unable to retrieve the information from the CD because he was using an incompatible CD player. (**Ex. 32, p. 12**). Mr. Smith testified that at a later date he did listen to the information on the CD. (**Tr. 757**). Later, Mr. Robinson asked Mr. Smith about what was on the CD, and Mr. Smith could not tell Mr. Robinson. (**Ex. 32, pp. 12, 19**). While Mr. Robinson did not deny he was involved in the drug conspiracy, he did dispute his level of involvement in the conspiracy. (**Ex. 29, p. 8**). Mr. Robinson believed the wiretaps would provide Mr. Smith with valuable information about Mr. Robinson's actual level of involvement in the conspiracy. (**Ex. 29, p. 8**).

When Mr. Robinson asked Mr. Smith about the federal sentencing guidelines and where he would fall within the guidelines if convicted, Mr. Smith could not provide Mr. Robinson with an answer. (**Ex. 32, p. 26**). Mr. Smith would not return phone calls from Mr. Robinson and Mr. Smith was not providing Mr. Robinson with information about what Mr. Smith was doing in the case. (**Ex. 32, p. 17-18**).

On one occasion when Mr. Robinson was making a proffer to government officials, Mr. Smith slept during the meeting and Mr. Robinson had to act as his own

advocate. (**Ex. 32, p. 17-18**). Prior to the proffer meeting Mr. Smith instructed Mr. Robinson to provide false information to the government officials about the amount of drugs Mr. Robinson knew were being distributed. (**Ex. 32, pp. 16-42**).

In May 2004, Mr. Smith charged Mr. Robinson $500 for travel expenses. (**Ex. 32**).

On June 8, 2004, Mr. Robinson fired Mr. Smith because he was not satisfied with the representation being provided by Mr. Smith. (**Ex. 32, pp. 20-23**). Mr. Robinson requested a refund of Mr. Smith's unearned fees and Mr. Smith verbally agreed to make such refund. (**Ex. 32, pp. 20-23**). Mr. Robinson then wrote to Mr. Smith requesting an itemized bill and return of the unearned portion of the $7,500. (**Ex. 35**). Mr. Smith never provided Mr. Robinson with an itemized bill or made any type of refund to Mr. Robinson. (**Ex. 32, pp. 20-23**).

Mr. Robinson's new counsel, Richard Sindel, spoke with Mr. Smith on July 3, 2004, and wrote to Mr. Smith on July 9, 2004, and July 27, 2004, requesting that Mr. Smith provide Mr. Sindel with Mr. Robinson's file. (**Ex. 29, pp. 10-16; Exs. 30, 31**). Mr. Smith ignored Mr. Sindel's request. (**Ex. 29, pp. 10-16**). Consequently, the federal court ordered Mr. Smith to produce the files. (**Ex. 28, pp. 19-23**). Mr. Smith failed to produce the files so the Court entered a show cause order for Mr. Smith to appear and explain why he had not produced Mr. Robinson's file. (**Ex. 28, pp. 21-22**). Mr. Smith ignored the show cause order and did not appear. (**Ex. 29, pp. 20-23**). He told Mr. Fulcher and Ms. Springate that one of his children's activities prevented him from appearing for the show cause order. (**Tr. 62-63, 425-26, 450-53**). Mr. Smith testified

that he had previously directed his paralegal to send the requested documents to Mr. Sindel and was unaware the paralegal had not sent the documents until he received the show cause order from the court. (**Tr. 759**).

After Mr. Smith refused to turn over his file to Mr. Robinson's new attorney, Mr. Sindel then had to reconstruct Mr. Robinson's file from other sources. (**Ex. 29, pp. 12-14, 23-24**). Mr. Sindel needed Mr. Smith's notes from the proffer to see whether he should assert that Mr. Robinson should receive a reduced sentence because of providing "substantial assistance" to the government. Mr. Sindel never received Mr. Smith's notes. (**Ex. 29, p. 12**).

Mr. Robinson also became very stressed because he was concerned that Mr. Smith's refusal to turn over his file to Mr. Sindel would affect Mr. Sindel's ability to represent him. (**Ex. 29, p. 24**).

On September 23, 2004, Mr. Robinson made a complaint against Mr. Smith to Informant. (**Tr. 17-19; Ex. 4, pp. 121-34; Ex. 32, p. 31**). On October 27, 2004, Informant's staff wrote to Mr. Smith requesting that Mr. Smith provide a written response to the complaint. (**Tr. 17-19; Ex. 4, pp. 121-34; Ex. 32, p. 31**). Mr. Smith never provided the requested response to Informant. (**Tr. 17-19; Ex. 4, pp. 121-34; Ex. 32, p. 31**).

Jorge Herrera Matter
Count IV of the Information

Jorge Herrera was arrested in October of 2003 and charged with conspiracy to distribute a controlled substance with a detectable amount of cocaine, in violation of 21

U.S.C. §§ 841, 846. (**Tr. 226, 238; Ex. 38**). Mr. Herrera's wife, Clarita, paid Roderick Smith $10,000 to defend her husband against the charges. (**Tr. 227**). Mrs. Herrera raised the money with which to pay Mr. Smith by selling all of the family's vehicles and furniture, as well as by not paying her gas bill. (**Tr. 227-228**). After Ms. Herrera paid Mr. Smith, the family had no money left. (**Tr. 228**).

Mrs. Herrera had a lot of difficulty getting information from Mr. Smith about her husband's case. (**Tr. 228-230**). She got more information, such as hearing dates, from the family members of Jorge's co-defendants than from Mr. Smith. (**Tr. 228-230**). The one time that Mr. Smith appeared in court on Mr. Herrera's behalf, he told Mr. and Mrs. Herrera that their strategy would be to go to trial, because the prosecutor had told him she did not want to take it to trial. (**Tr. 235, 240**).

Catherine Connelly was the lead Assistant United States Attorney in the government's case against Mr. Herrera. (**Tr. 239**). The lawyers representing Mr. Herrera's three co-defendants approached Ms. Connelly about offering cooperation to the government in order to obtain a "downward departure" sentencing recommendation for their clients. (**Tr. 241-243**). Mr. Herrera was a good candidate for downward departure because he played a minor role in the conspiracy. (**Tr. 224**). Ms. Connelly did not offer downward departure to Mr. Herrera because his lawyer, Mr. Smith, never approached her about it or initiated any negotiation with her on Mr. Herrera's behalf. (**Tr. 244**). Ms. Connelly did offer a plea agreement to Mr. Herrera, through Mr. Smith, under the terms of which Mr. Herrera would serve 33-41 months in federal prison. (**Tr. 258-259, 311**).

Mr. Smith failed to appear at a pretrial conference scheduled in Mr. Herrera's case. Then, Mr. Smith failed to appear at a subsequent setting for a change of plea, set for April 15, 2004. (**Tr. 245-247, 308**). Mr. Herrera advised Judge Maughmer, before whom the Herrera matter was pending, that he had not communicated with Mr. Smith because Smith would not accept his phone calls. (**Ex. 38, p. 26**). Judge Maughmer thereafter, on April 19, 2004, issued an order dismissing Mr. Smith from the case as a consequence of his failure to appear and "strongly suggested" that Mr. Smith "review his fee arrangement with defendant Herrera and voluntarily return any portion of the retainer that has not been earned." (**Ex. 38, p. 26-27**). Mr. Smith has not refunded any of the $10,000.00 fee paid to him by the Herreras. (**Tr. 230-231**).

After Mr. Smith was dismissed as Mr. Herrera's counsel, Elena Franco was appointed to represent him. After reviewing the government's case against Mr. Herrera, Ms. Franco, now a Kansas City Municipal Court Judge, formed the opinion that Mr. Herrera should not enter into the plea agreement previously offered by Ms. Connelly. (**Tr. 309**). Ms. Franco concluded that Mr. Herrera's minimal role in the alleged crime was a strong weakness in the government's case that should be advanced on Mr. Herrera's behalf. Ms. Franco knew from reviewing the case that Mr. Smith had not negotiated with the government concerning this weakness in the government's case against Mr. Herrera. (**Tr. 310-311**). Ms. Franco succeeded in negotiating a plea agreement for Mr. Herrera whereby he was sentenced to 12 months imprisonment whereby he was given credit for nine months he had served prior to the plea agreement. (**Tr. 311-312**). Ms. Franco was so moved by the Herreras' plight at the hands of Mr.

Smith's representation that she prepared the complaint that was filed against Mr. Smith in the Herrera matter. (**Tr. 312-314**).

On August 11, 2004, the Honorable Elena Franco made a complaint to Informant on behalf of the Herreras. On September 2, 2004, Informant's staff requested that Mr. Smith provide a written response to the complaint within ten (10) days. Mr. Smith never provided the requested response. (**Tr. 19; Ex. 4, pp. 66-76**).

Chris Vidal-Dior McCain Matter
Count V of the Information

On April 26, 2005, Mr. Smith entered his appearance on behalf of the defendant in *State v. Chris Vidal-Dior McCain*, a case pending in the Circuit Court of Buchanan County. (**Ex. 40**). Before Mr. Smith entered his appearance, Mr. McCain had, in March, entered a guilty plea in the case. (**Tr. 484**). Circuit Judge Patrick Robb presided over the matter. (**Tr. 482-483**).

On May 16, 2005, Mr. Smith appeared before Judge Robb on Mr. McCain's behalf. (**Tr. 485**). Judge Robb announced in open court that he would continue the case to June 17, 2005. (**Tr. 485**). Mr. Smith did not voice an objection to that date. (**Tr. 485**).

Mr. Smith did not appear for the June 17, 2005, hearing. (**Tr. 486**). Mr. Smith did not communicate to the court that he would not appear on June 17. (**Tr. 486**). Mr. Smith did fax the Buchanan Prosecuting Attorney's Office a motion for continuance of the June 17 hearing. (**Tr. 486-487; Ex. 42**). The faxed motion was stamped received by the prosecuting attorney's office on June 16, 2005. (**Tr. 488**). The motion stated that a

discovery request from the Public Defender's office had been received on June 10, and it was necessary to prepare a motion to set aside Mr. McCain's guilty plea. (**Ex. 42; Tr. 487**). The motion Mr. Smith faxed to the prosecuting attorney's office was not filed with the court. (**Tr. 486, 488**).

When Mr. Smith failed to appear, without explanation to the court, on June 17, Judge Robb reset the matter for June 27, 2005, and directed his clerk to so notify Mr. Smith. (**Tr. 488-489**). On June 27, 2005, Mr. Smith did not appear for the hearing scheduled to begin at 8:45 a.m. (**Tr. 490**). Later on that same day, Judge Robb was made aware that Mr. Smith had faxed a continuance motion to the court at 7:58 that morning. (**Tr. 490**). The filing of the motion on the date the hearing was set to occur was not in compliance with local court rules, which require that a continuance motion be filed and noticed up for hearing at least five working days prior to the date for which the continuance is requested. (**Tr. 488, 491**).

Judge Robb reset the hearing to occur on July 5, 2005. (**Tr. 491**). Mr. Smith failed to appear for the July 5 hearing. (**Tr. 491-492**). In a letter dated July 5, 2005, from Judge Robb to Mr. Smith, the Judge advised Mr. Smith that he had reset Mr. McCain's case for hearing on July 19, 2005. Judge Robb's letter advised Mr. Smith that if he failed, for a fourth time, to appear for hearing, Judge Robb would cite him for contempt of court. (**Ex. 44; T. 492-93**).

On July 19, 2005, Mr. Smith appeared, tardily, for his client's hearing. (**Tr. 496; Ex. 41, p. 8**). At the July 19 hearing, Mr. Smith offered Judge Robb an explanation for not appearing for the June 17 hearing that was different than the reason stated in the

motion faxed to the prosecuting attorney's office for that hearing. (**Tr. 497**). Judge Robb filed a complaint with Informant regarding Mr. Smith's conduct because, aside from Mr. Smith, no lawyer practicing before Judge Robb has ever failed to appear three times, without appropriate explanation or communication, for noticed hearings. (**Tr. 497-498**). Mr. Smith testified in relation to the complaint made by Judge Robb that at no point did he intend to " thumb his nose" at the court. (**Tr. 762**).

On July 21, 2005, Informant's staff forwarded a copy of Judge Robb's complaint to Mr. Smith and asked for a written response within ten days. Mr. Smith never provided the written response. (**Tr. 19-20; Ex. 4, pp. 151-153**).

Judges Mesle and O'Malley's Testimony
Count VI of the Information

Cathryn Mesle is a circuit court judge in Jackson County, Missouri. (**Tr. 371**). Mr. Smith appeared on her docket numerous times when she presided over a domestic docket, approximately from 2000 to 2002. (**Tr. 372-373**). In Judge Mesle's experience, Mr. Smith was either late or failed to appear at all in more than 50% of his scheduled appearances in her court. (**Tr. 388-389**). It was not an unusual occurrence for Mr. Smith to file continuance motions and then not appear in court, even though the continuance request had not been granted. (**Tr. 384**). On one occasion, when Mr. Smith had filed a notice of engaged counsel, Judge Mesle contacted the court in which Mr. Smith was allegedly engaged and learned the matter had been continued. (**Tr. 383-385**). After that experience, Judge Mesle knew to monitor, or pay special attention, to Mr. Smith's motions. (Tr. 376).

In one of Mr. Smith's cases involving interstate custody issues, Judge Mesle was compelled to do considerable legal research to resolve some jurisdictional questions because Mr. Smith failed to identify and research the issues on his client's behalf. (**Tr. 378-379**). It was Judge Mesle's and her staff's, perception that, on several occasions, Mr. Smith had never met with his clients before appearing with them in her courtroom. (**Tr. 389-390**).

John O'Malley has been a circuit court judge in Jackson County since 1989. (**Tr. 329**). He is acquainted with Mr. Smith through his practice in Judge O'Malley's court. (**Tr. 393**). On September 13, 2005, a paternity case in which Mr. Smith represented the putative father was on Judge O'Malley's docket. Mr. Smith was not present the first two or three times Judge O'Malley called the case. (**Tr. 393-394, 400-401**). When Mr. Smith did eventually answer the docket call, after the judge had passed the case over several times, Mr. Smith advised Judge O'Malley that he was not ready to proceed. Then Mr. Smith announced that he was ready to proceed with the case. Mr. Smith was not prepared to go forward with the case. (**Tr. 395**). Mr. Smith's client in the matter expressed anger and frustration, and appeared agitated, as a consequence of Mr. Smith's tardiness and lack of preparation. (**Tr. 394-395, 400-401**).

Judge O'Malley does not recall Mr. Smith ever making a timely appearance for a criminal "A" docket call, and Judge O'Malley ran the docket for multiple years. (**Tr. 396**). The criminal "A" docket is a high volume, speedy, conditional appearance proceeding, where the defendants are brought in for felony arraignment and pleas. (**Tr. 396-397**). Mr. Smith's failure to appear for these dockets created enormous problems for

both his clients and the legal system. Plea negotiations are typically undertaken at this stage, and if nothing is resolved, the case will be set over for trial, whereas it might otherwise have been resolved. (**Tr. 397-398**).

Kelly Kirkland Matter
Count VII of the Information

On June 23, 2003, Kelly Kirkland was scheduled to go to trial on a criminal matter in Jackson County before Judge Justine Del Muro. (**Ex. 45**). Mr. Smith failed to appear at the trial. (**Ex. 45**). Mr. Smith had not requested a continuance on the matter. (**Ex. 45**). Mr. Smith informed Mr. Kirkland that he would be in court in Boonville, Missouri, and that Mr. Kirkland should request a continuance. (**Ex. 45**).

Mr. Smith had failed to appear two other times before Judge Del Muro without giving Judge Del Muro prior notice of his absence. (**Ex. 45**).

Ezequiel Flores Matter
Count VIII of the Information

The Ezequiel Flores family hired Mr. Smith to represent Mr. Flores in removal proceedings started by the Bureau of Citizenship and Immigrations Services. Mr. Flores had been imprisoned in Texas for a number of years for a drug related crime and was scheduled to be deported upon his release from prison. (**Tr. 68-74, 454-56; Ex. 46, pp. 47-50, 95-103**).

Mr. Smith never entered his appearance before the Immigration Court and did not appear at the hearing held on March 17, 2004, nor the hearing held on May 12, 2004. (**Tr. 72; Ex. 46, pp. 47-50, 95-103**). Mr. Flores had no representation during the March 17, 2004, and May 12, 2004, hearings and the immigration judge found that Mr. Flores

should be deported. (**Ex. 46, pp. 95-103**). The Flores family made repeated phone calls to Mr. Smith to complain about Mr. Smith's lack of representation. (**Tr. 454-55**).

Later Mr. Flores' family complained to the managing partner of the Firm about Mr. Smith's lack of representation and the managing partner instructed Mr. Smith to appeal the matter. (**Tr. 68-69**). On June 11, 2004, Mr. Smith filed a Notice of Appeal before the Board of Immigration Appeals but failed to brief the matter. (**Tr. 68-69**).

The Firm refunded the portion of the fees it had received ($1,000) from the Flores family. The Firm encouraged Mr. Smith to refund the fees he had received from the Flores family but Mr. Smith did not do so. (**Tr. 73-74**).

Toninicole Smith Matter
Count IX of the Information

In September of 2003, while Mr. Smith was a solo practitioner, Toninicole Smith hired Roderick Smith to represent her in obtaining a dissolution of marriage. (**Tr. 355**). Ms. Smith met with Mr. Smith in his downtown Kansas City office. (**Tr. 356**). Ms. Smith, who was visibly pregnant in September of 2003, explained to Mr. Smith that she wanted the dissolution to be finalized before the baby's birth. She explained that she had been artificially inseminated, so her husband was not the baby's father. (**Tr. 355-356**). Ms. Smith explained that it was very important to her not to have to put her husband's name on the baby's birth certificate, which she feared she would have to do if the baby was born during the marriage. (**Tr. 355-358**). Mr. Smith did not advise Ms. Smith that the fact that she was pregnant would make it very difficult to obtain a dissolution in Missouri. (**Tr. 358-359**). As a matter of long and well-settled law, it is almost

impossible for a pregnant woman to obtain a dissolution in Missouri. (**Tr. 380-381**). Rather, Mr. Smith told Ms. Smith that they needed to get the dissolution filed immediately to improve their chances of getting it done before the baby was born. (**Tr. 359**). Ms. Smith paid Mr. Smith an attorney fee of $500.00, and $155.00 for court costs, so that he could get the case filed right away. (**Tr. 359**). Mr. Smith testified that he did not tell Ms. Smith that she could receive a divorce while pregnant and that he was fully aware that it was virtually impossible to receive a divorce in the State of Missouri while pregnant. (**Tr. 736-37**).

Shortly thereafter, someone from Mr. Smith's office called Ms. Smith to tell her the court clerk's office would not accept the dissolution petition for filing because Ms. Smith was pregnant. Ms. Smith was told that Mr. Smith's office would file the dissolution petition for her after the baby was born. (**Tr. 361**). Ms. Smith was very surprised, because Mr. Smith had not warned her or said anything about the fact that her pregnancy might be an issue. (**Tr. 361**). Ms. Smith told the office person who called her that she did not want Mr. Smith to pursue the dissolution for her after the baby was born. (**Tr. 361-363**).

Ms. Smith attempted unsuccessfully several times to reach Mr. Smith by phone and wrote him several letters in an attempt to get her money back. Mr. Smith had not refunded either the fee or the filing costs as of the date of the disciplinary hearing, although he wrote disciplinary counsel a letter in April of 2005 saying that he would refund the filing fee. (**Tr. 363-365; Ex. 50**). At the hearing, Mr. Smith produced an enveloped post-marked January 4, 2006, addressed to Ms. Smith that was returned to Mr.

Smith and marked "unclaimed' by the post office.[4] (**Ex. 129**). Mr. Smith testified that immediately after Ms. Smith testified at the hearing, he presented her with a check in which he returned her filing fees. (**Tr. 739**).

Murtaza Gadit Matter
Count XI of the Information

In October 2003, before Mr. Smith joined the Firm, client Murtaza Gadit paid Mr. Smith to handle a traffic ticket he had received in August 2003. (**Tr. 430; Ex. 58, p. 10**). In May of 2004 Mr. Gadit began calling the Firm to see if Mr. Smith had resolved the matter. Then, in June 2004 Mr. Gadit called the Firm because a warrant had been issued for his arrest because Mr. Smith had not appeared on the matter. (**Tr. 430, 460-61**).

Mr. Smith had staff prepare and file a motion to withdraw the warrant and the court reset the matter for July 10, 2004. (**Tr. 430, 460-61**). Late in the afternoon of July 9, Mr. Smith called Ms. Springate, his paralegal, and requested that she call the court and have the matter reset again. (**Tr. 430, 460-61**). Ms. Springate informed him she would try but that she did not believe the court would reset the matter because the court had been upset by Mr. Smith's failure to appear at the prior hearing. (**Tr. 430, 460-61**). The Court refused to reset the matter. Mr. Smith did not call into the office to see if the matter had been reset and did not appear in Court on Mr. Gadit's behalf. (**Tr. 460-61**).

[4] Informant filed her Information for Interim Suspension on January 3, 2006, and had Informant's staff had advised Mr. Smith of her plans several days prior to January 3, 2006.

Homma Shaffee Matter
Count XIII of the Information

Mr. Smith represented Homma Shaffee in a slip and fall action which occurred on December 26, 1997. Mr. Smith filed a petition for damages on Ms. Shaffee's behalf on December 26, 2002, whereby he sued Wise Car Rental, Inc. and Stephen Lyle. The petition was filed on the last day before the statute of limitations ran, more than two years after Ms. Shaffee had hired Mr. Smith. (**Ex. 62, pp. 22, 53-56**).

On June 27, 2003, Mr. Smith requested that the Court set the matter for a default hearing. (**Ex. 62, p. 40**). On July 9, 2003, the Court set a default hearing for August 21, 2003. Mr. Smith failed to appear on August 21, 2003. Mr. Lyle appeared and the court advised him to obtain counsel. (**Ex. 62, pp. 29, 31-33, 39-40**).

The court granted leave to Mr. Lyle's attorney to file a responsive pleading out of time. On November 18, 2003, Mr. Lyle's attorney filed a Motion for Summary Judgment asserting that no corporation ever existed by the name Wise Car Rental, Inc. and that Mr. Lyle did not own the premises in question at the time of Ms. Shaffee's fall. (**Ex. 62, pp. 25-27**).

Mr. Smith did not file a responsive pleading to Mr. Lyle's Motion for Summary Judgment so on December 29, 2003, Mr. Lyle's attorney sent a letter to the Court and Mr. Smith asking the Court to grant Mr. Lyle's Motion for Summary Judgment. (**Ex. 62, p. 24**). Mr. Smith then requested an extension of time to respond to the Motion for Summary Judgment asserting he did not receive a copy of the Motion for Summary Judgment until December 29, 2003, even though opposing counsel claimed he had sent it

to Mr. Smith on November 18, 2003. (**Ex. 62, p. 22**). Mr. Lyle's attorney responded by providing a facsimile transmission sheet showing Mr. Lyle's Motion for Summary Judgment had been faxed to Mr. Smith on November 17, 2004. (**Ex. 62, pp. 19-21**). The court gave Mr. Smith until February 5, 2004, in which to file a response to the Motion for Summary Judgment. (**Ex. 62, p. 15**).

On December 31, 2003, the Court set the matter for trial on February 9, 2004, which was later reset to February 26, 2004. On January 21, 2004, Cross Reporting Services, Inc. provided notice to Mr. Smith that Mr. Lyle's attorney intended to take Ms. Shaffee's deposition on January 28, 2004. Prior to January 21, 2004, Mr. Lyle's attorney had called Mr. Smith and left messages requesting that Mr. Smith provide acceptable dates for the taking of Ms. Shaffee's deposition. Mr. Smith never returned the calls. (**Ex. 62, pp. 11-12**).

Mr. Smith failed to appear at the January 28, 2004, deposition and Mr. Lyle's attorney moved to strike Ms. Shaffee's pleadings. (**Ex. 67, pp. 11-12**). Mr. Smith did not file Ms. Shaffee's response to Mr. Lyle's Motion for Summary Judgment on February 5, 2004, as ordered to do so by the Court. Instead on February 17, 2004, he requested that the Court grant him until February 29, 2004, to file Ms. Shaffee's response. (**Ex. 62, pp. 606-07**).

On February 26, 2004, the court dismissed the action for lack of prosecution. Mr. Smith had failed to appear for the trial on the matter. (**Ex. 62, p. 4**). Mr. Smith did not inform Ms. Shaffee of the dismissal and Ms. Shaffee began complaining to personnel at the Firm regarding Mr. Smith's lack of action. (**Tr. 80, 84, 462**).

In an effort to appease Ms. Shaffee, another member of the Firm reviewed the file. (**Tr. 80-85**). The Firm member ascertained that Mr. Smith had sued the wrong party, that the statute of limitations had run in 2002, and, as a result, the correct party could not be named and the lawsuit could not be refiled. (**Tr. 80-85**).

The members of the Firm discussed the matter with Mr. Smith and asked that Mr. Smith disclose to the client that the matter had been dismissed for lack of prosecution, (**Tr. 80-85**), that Mr. Smith had named the wrong party in the original suit, and that the matter could not be refilled with the correct party names because the statute of limitations had run on the matter in 2002. (**Tr. 80-85**). Mr. Smith did not take the requested action. (**Tr. 80-85**).

Gerrie Herring Matter
Count XIV of the Information

In January or February 2003, Mr. Smith hired Gerrie Herring to do some construction work on a garage Mr. Smith was building at his home. Mr. Herring knew Mr. Smith because they attended the same church. (**Tr. 137**). At about the same time as he agreed to perform the work for Mr. Smith, Mr. Herring's wife informed him that she wanted a divorce. (**Tr. 137-38**). Mr. Herring asked Mr. Smith to represent him in the divorce and Mr. Smith agreed to do so. (**Tr. 138**).

Mr. Herring testified that in order to pay for Mr. Smith's services he drew up the plans for the garage, dug out the ground for the foundation, assisted with the framing of the first floor, and performed a mechanical inspection of Mr. Smith's home. He also replaced some decking on an existing pool at Mr. Smith's home. (**Tr. 139, 141**). Mr.

Smith presented testimony from Emanuel Maxwell Kind, Jr., a contractor who Mr. Smith hired to complete the garage. Mr. Kind testified that Mr. Herring did not do any work at all on the garage. (**Tr. 638-40**). Mr. Smith's wife, Glenda Smith, also testified that Mr. Herring only replaced rotting decking around the pool and did not do any work on the garage. (**Tr. 677-78**). In his response to Mr. Herring's complaint Mr. Smith admitted that Mr. Herring did some work concerning the excavating and the pouring of the garage floor and that Mr. Herring did in fact frame the garage but Mr. Smith was not satisfied with the quality of Mr. Herring's work. (**Ex. 4, pp. 94-95**). In addition to the construction work Mr. Herring did on Mr. Smith's home, Mr. Herring paid Mr. Smith $400 for his services. (**Tr. 164**).

Mr. Herring's wife filed her petition for dissolution on April 2, 2003, and Mr. Herring was served on April 8, 2003. (**Ex. 64, p. 1**). Mr. Smith did not file an Answer to the initial Petition within the allowed thirty days. (**Ex. 64, pp. 2, 85**). On June 9, 2003, Ms. Herring's attorney filed an Amended Petition for dissolution in which Ms. Herring added a request for maintenance to the relief she sought. (**Ex. 64, pp. 2, 85**).

On June 12, 2003, Mr. Smith filed an Answer to the original Petition and a Cross Petition but did not request leave from the Court to file out of time and did not have Mr. Herring verify the Cross-Petition as required by Section 452.310, RSMo. (**Ex. 64, pp. 20-21, 78-80**). Mr. Smith did not file an Answer to the Amended Petition in a timely manner. (**Ex. 64, pp. 20-21**).

Mr. Smith failed to appear in Court on August 14, 2003. (**Ex. 64, p. 2**).

On August 15, 2003, Ms. Herring's attorney filed a motion for interlocutory judgment alleging Mr. Herring was in default for failing to seek leave of the court to file his Answer to the initial petition out of time and for failing to answer the Amended Petition. Ms. Herring also filed a motion for temporary child support, maintenance and temporary attorney fees pendente lite on the same date. (**Tr. 145-146; Ex. 64, pp. 2, 20-21**).

Mr. Smith failed to appear in court on September 10, 2003. The Court reset the hearing on the matter to September 25, 2003. (**Tr. 148; Ex. 64, p. 3**). On September 24, 2003, Mr. Herring received a message from Mr. Smith stating that Mr. Smith was going to withdraw from the case on September 25, 2003. However, on the morning of September 25, 2003, Mr. Smith called Mr. Herring and assured him that he would be in court. (**Tr. 148-50**).

On September 25, 2003, Mr. Smith failed to appear on Mr. Herring's behalf for the hearing. Instead, based upon a notice of engaged counsel Mr. Smith had filed with the Court, the Court found Mr. Smith had withdrawn from the case. The Court refused to continue the matter or allow Mr. Herring to file his Answer to the Amended Petition. Mr. Herring was forced to proceed with the hearing pro se. The results were disastrous for Mr. Herring. (**Ex. 64, p. 4**).

On October 14, 2003, the Court entered its judgment decree of dissolution of marriage in which the Court gave primary physical custody of the children to Ms. Herring, ordered Mr. Herring to pay $774 per month in child support retroactive to May 1, 2003, and awarded the family home to Ms. Herring. (**Ex. 64, p. 4**). The children had

been living with Mr. Herring and continued to live with Mr. Herring after the court entered its order. (**Tr. 151**).

Mr. Herring hired new counsel to have the October 2003 judgment set aside. (**Tr. 152; Ex. 64, p. 4**). New counsel was able to get the judgment set aside on March 29, 2004. (**Ex. 64, p. 4**). Under the new decree, Mr. Herring was no longer obligated to pay future child support but was ordered to pay the past due child support that had accrued from May 2003 until March 2004. (**Ex. 64, p. 4**). The new attorney charged Mr. Herring $5,000 in attorney's fees. (**Tr. 152**).

Rebecca Shepherd Matter
Count XVIII of the Information

Ms. Rebecca Shepherd injured her ankle and back when she tripped and fell at the Midland AMC Theater on October 25, 2003. (**Tr. 576**). In February 2004, Ms. Shepherd hired Mr. Smith to represent her in a personal injury action against the theatre. (**Tr. 576-580**). When Ms. Shepherd hired Mr. Smith she had already completed medical treatment for the fall and was still having trouble ambulating. (**Tr. 578-80**). It was very important to Ms. Shepherd that she resolve the matter in a prompt manner as she was on a fixed income from disability and was caring for her grandchild suffering from leukemia. (**Tr. 579-80**). Mr. Smith was aware of Ms. Shepherd's financial condition and the need for him to work promptly on the matter. (**Tr. 578-80**).

From February 2003 until October 2004, Mr. Smith spoke with Ms. Shepherd only three times. (**Tr. 579-81**). During one of the conversations, Mr. Smith merely stated he was in court and would call her back. (**Tr. 579-81**). Mr. Smith did not return the call.

(**Tr. 579-81**). Ms. Shepherd called Mr. Smith's office weekly and left messages for him to call her regarding the progress he was making on her case. (**Tr. 579-81**).

Ms. Shepherd had provided releases for Mr. Smith to obtain medical records and provided Mr. Smith with the names of witnesses to the accident for Mr. Smith to contact and interview. (**Tr. 581-84**). Mr. Smith did not contact the witnesses. Mr. Smith did not obtain Ms. Shepherd's medical records in a prompt manner. (**Tr. 581-84**).

Ms. Shepherd filed a complaint with Informant regarding Mr. Smith's lack of communication in May 2004. After Ms. Shepherd made her complaint to Informant, Mr. Smith contacted Ms. Shepherd and promised to move forward with her action in a prompt manner. (**Tr. 586**). Mr. Smith then scheduled a meeting with the claims adjuster. During the meeting the adjuster asked Ms. Shepherd questions regarding the accident and taped Ms. Shepherd's answers. Mr. Smith slept through part of the interview. Mr. Smith did not prepare Ms. Shepherd for the meeting and Ms. Shepherd felt abandoned by Mr. Smith and was concerned that she might have said things that hurt her case. (**Tr. 587**).

After the meeting with the claims adjuster, Ms. Shepherd decided to fire Mr. Smith and find other counsel. Mr. Smith advised her he would place a lien on any settlement she might receive for ten billable hours or $2,500. (**Tr. 591**). Ms. Shepherd hired another attorney to represent her. The new attorney asked that Mr. Smith return Ms. Shepherd's file. Mr. Smith did not provide Ms. Shepherd with her file. (**Tr. 592**).

Jeffrey Gaumer Matter
Count XIX of the Information

In the fall of 2002, Jeffrey Gaumer and his wife Cathleen wanted legal assistance to redirect child support payments that Jeffrey was making on behalf of his daughter, Lindsey. Lindsey had moved in with the Gaumers, and they wanted to direct the payments he was already making to child support arrearages, rather than ongoing child support, inasmuch as Lindsey was living with them. (**Tr. 403-404**). The Gaumers paid Mr. Smith at least $500.00 for his services. (**Tr. 411**).

Mr. Smith filed a pleading on Mr. Gaumer's behalf on October 31, 2001, seeking, among other relief, a determination of Mr. Gaumer's paternity over Lindsey. (**Ex. 74**). Paternity of Lindsey was never an issue for the Gaumers. (**Tr. 407**). Mr. Smith never met with Mr. Gaumer prior to filing the petition. (**Tr. 407-408**).

Over the several months after the case was filed, Mrs. Gaumer contacted her husband, who was an over the road trucker, several times to say that Mr. Smith would not return her calls. (**Tr. 405-406**). Mr. Gaumer himself tried to reach Mr. Smith three or four times before he got through to him. (**Tr. 405**).

The court in which the Gaumer petition was pending scheduled a status hearing for March 6, 2002. (**Ex. 75**). The court dismissed the case, without prejudice, due to Mr. Smith's failure to appear for the case management hearing on March 6. (**Ex. 76**).

Procedural History of Case

On March 31, 2006, Informant filed a twenty-one count Information alleging that Mr. Smith violated various Rules of Professional Conduct. On April 21, 2006, Mr. Smith

filed his Answer to the Information. On May 9, 2006, the Chair of the Advisory Committee appointed a Disciplinary Hearing Panel to conduct a hearing on the matter. On July 19 through 22, 2006, the Panel held a hearing on the matter. Informant was represented by Nancy Ripperger and Sharon Weedin. Mr. Smith appeared pro se. Informant offered 65 exhibits into evidence and the Panel admitted 63 of the exhibits into evidence.[5]

More specifically, the Panel rejected Exhibits 37 and 84. (**Tr. 225, Ex. 37**). Exhibit 37 was the October 13, 2004, sworn statement of Jorge Herrera. Informant had taken the sworn statement prior to filing the Information and the Panel refused to admit it as the Rules of Professional Civil Procedure only allow the use of depositions at trial and do not address the use of sworn statements.[6] Informant put on fifteen live witnesses and seven witnesses through deposition testimony.

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[5] Informant offered the following exhibits into evidence: 1-2, 4-10, 12, 14-22, 24-36, 37, 38, 38a, 40-46, 50, 58, 62, 64, 66, 69, 71, 74-76, 84, 90, 96, 97-104, 4a, 27a, 37a. All of these exhibits were admitted into evidence except for Exhibits 37 and 84, which were rejected by the Panel.

[6] Mr. Smith had received notice of Informant's intent to take the sworn statement and had been invited to attend. In the statement Mr. Herrera testified: (a) he asked Mr. Smith to try to work out some type of better plea agreement than the United States Attorney's office was offering but Mr. Smith told Mr. Herrera he was too busy to talk with the prosecutor; (b) Mr. Herrera tried to call Mr. Smith on his cell phone and at his office number

At the close of Informant's case the pleadings were amended to conform to the evidence. Informant also dismissed Counts X, XII, XV, XVI, XVII, and XX of the Information without prejudice. (**Tr. 501-502; 599-600**).

Mr. Smith offered thirteen exhibits,[7] all of which were admitted into evidence, and put on testimony from twelve live witnesses.[8] In addition, Mr. Smith testified on his own behalf.

At the close of the hearing, the Panel requested that the parties provide the Panel with proposed findings. Each party provided proposed findings. In his proposed findings, Mr. Smith stated that the Panel should find "no probable cause" on the allegations and reinstate his license.

On November 6, 2006, the Disciplinary Hearing Panel issued its Decision. In its Decision, the Panel found fifty-six violations of the Rules of Professional Conduct and recommended that this Court disbar Mr. Smith.

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approximately ten times but Mr. Smith never returned the calls; (c) Mr. Herrera's wife tried several times to place a three way call to Mr. Smith but his wife was never able to get through to Mr. Smith; (d) Mr. Smith failed to show up for the hearing at which Mr. Herrera was scheduled to enter a guilty plea; and (e) Mr. Herrera fired Mr. Smith when he failed to show up for the second hearing. (**Ex. 37**).

[7] Mr. Smith's exhibits were numbered and included Exhibits 120 through 132.

[8] One of the live witnesses testified by phone.

Mr. Smith did not concur in the discipline recommended by the Panel. Therefore, Informant filed the record with this Court.

POINT RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE MR. SMITH'S LICENSE BECAUSE HE FAILED TO PROVIDE COMPETENT REPRESENTATION TO HIS CLIENTS IN VIOLATION OF RULE 4-1.1 IN THAT:

A. HE AGREED TO FILE A PETITION FOR CERTIORARI IN THE UNITED STATES SUPREME COURT WITHOUT FAMILIARIZING HIMSELF WITH THE RULES OF THE COURT;

B. IN FEDERAL CRIMINAL PROSECUTIONS HE FAILED TO EVALUATE THE GOVERNMENT'S CASE, ASSESS WHETHER HIS CLIENT SHOULD PLEAD GUILTY OR PROCEED TO TRIAL, AND THEN FAILED TO PROVIDE HIS CLIENT WITH NECESSARY INFORMATION TO MAKE AN INFORMED DECISION ABOUT HOW TO PROCEED; AND

C. IN CIVIL ACTIONS HE FAILED TO KNOW BASIC TENANTS OF THE SUBSTANTIVE LAW, FAILED TO CONDUCT NECESSARY RESEARCH BEFORE FILING ACTIONS AND DID NOT ADEQUATELY PREPARE FOR OR REPRESENT CLIENTS DURING THE LITIGATION.

Oklahoma Bar Assoc. v. Hensley, 661 P.2d 527 (Okla. 1983)

In re Dempsey, 632 F. Supp. 908 (N.D. Cal. 1986)

State v. Booker, 543 U.S. 220 (2005)

Madden v. Texas, 498 U.S. 1301 (1991)

Rule 4-1.1

Rule 4-1.15(a)(b)

Rule 4-3.2

Rule 4-3.3(a)

Rule 4-3.4(b)(c)

Supreme Court Rule 13.5

Section 210.822.1(1) RSMo

2A Federal Procedure, Lawyer's Edition *Applications for Extensions – What Is Good Cause* § 3:366 (2006)

Daniel Webert, *Understanding the "Knowledge" Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 Geo. J. Legal Ethics 915 (2002)

36 C.J.S. Federal Courts *Time to Apply for Writ – Request for Extensions* § 373 (2006)

John K. Villa, *Banking Crimes: Fraud, Money Laundering and Embezzlement*, 2 Banking Crimes Appendix 1A (2006)

Steven E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 Am. Crim. J. Rev. 1063 (2006)

9A Federal Procedure, Lawyer's Edition, *Requirement That Government Move for Departure* § 22:1617 (2006)

II.

THE SUPREME COURT SHOULD DISCIPLINE MR. SMITH'S LICENSE BECAUSE HE FAILED TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS IN REPRESENTING HIS CLIENTS IN VIOLATION OF RULE 4-1.3 IN THAT:

A. HE DID NOT PREPARE A PETITION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT IN A TIMELY MANNER;

B. WHEN REPRESENTING DEFENDANTS IN FEDERAL CRIMINAL PROSECUTIONS HE FAILED TO ENTER INTO PLEA NEGOTIATIONS IN A TIMELY MANNER SO HIS CLIENTS COULD BENEFIT FROM REDUCED SENTENCES BY PROVIDING "SUBSTANTIAL ASSISTANCE" TO THE PROSECUTION;

C. HE ROUTINELY FAILED TO APPEAR FOR ALL TYPES OF HEARINGS AND TRIALS; AND

D. IN CIVIL CASES HE ROUTINELY FAILED TO FILE PLEADINGS IN A TIMELY MANNER AND TO MOVE CASES ALONG.

Committee on Professional Ethics and Conduct v. Freed, 341 N.W.2d 757 (Iowa 1983)

Tiller v. Semonis, 635 N.E.2d 572 (Ill. Ct. App. 1994)

Rule 4-1.3

ABA/BNA Lawyer's Manual on Professional Conduct, *Diligence*, § 31:402 (2005)

Debra T. Landis, Annotation, *Negligence, Inattention or Professional Incompetency of Attorney In Handling Client Affairs In Criminal Matters as Grounds for Disciplinary Action*, 69 A.L.R. 4th 410 (1989)

III.

THE SUPREME COURT SHOULD DISCIPLINE MR. SMITH'S LICENSE BECAUSE HE FAILED TO ADEQUATELY COMMUNICATE WITH HIS CLIENTS IN VIOLATION OF RULE 4-1.4 IN THAT MR. SMITH ROUTINELY REFUSED TO TAKE OR RETURN PHONE CALLS FROM CLIENTS AND WHEN HE DID SPEAK WITH CLIENTS HE DID NOT PROVIDE THEM WITH ADEQUATE INFORMATION TO MAKE INFORMED DECISIONS ABOUT THEIR LEGAL MATTERS.

Strickland v. Washington, 466 U.S. 668 (1984)

Rule 4-1.4(a)

ABA/BNA Lawyer's Manual on Professional Conduct, *Communication* § 31:515 (2005)

IV.

THE SUPREME COURT SHOULD DISCIPLINE MR. SMITH'S LICENSE BECAUSE MR. SMITH VIOLATED RULE 4-1.16 WHICH REQUIRES AN ATTORNEY, AT A MINIMUM, TO PROVIDE REASONABLE NOTICE OF ITS INTENT TO WITHDRAW FROM A CASE, AND TO TAKE REASONABLE STEPS TO PROTECT THE CLIENT'S INTEREST AT THE END OF THE REPRESENTATION, IN THAT:

A. HE WITHDREW FROM MR. HERRING'S CASE WITHOUT PROVIDING MR. HERRING WITH REASONABLE NOTICE OF HIS INTENTION TO DO SO; AND

B. WHEN CLIENTS TERMINATED MR. SMITH'S SERVICES, MR. SMITH WOULD NOT TURN OVER THEIR FILES TO THE CLIENT OR THE CLIENT'S NEW COUNSEL.

In re Benjamin, 514 N.Y.S.2d 526 (NY Sup. Ct. App. Div. 1987)

In re Thomson, 499 P.2d 815 (Or. Sup. Ct. 1972)

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

Rule 4-1.16

Advisory Committee Formal Opinion #115

V.

THE SUPREME COURT SHOULD DISCIPLINE MR. SMITH'S LICENSE FOR CHARGING A NUMBER OF HIS CLIENTS UNREASONABLE FEES IN VIOLATION OF RULE 4-1.5 IN THAT MR. SMITH DID NOT PERFORM OR COMPLETE THE PROFESSIONAL REPRESENTATION FOR WHICH THE FEES WERE PAID AND ANY TIME HE SPENT ON THE REPRESENTATION WAS NOT BENEFICIAL TO THE CLIENT.

In re Gastineau, 857 P.2d 136 (Or. 1993)

Attorney Grievance Comm. v. McLaughlin, 813 A.2d 1145 (Md. 2002)

Cincinnati Bar Assoc. v. Weaver, 809 N.E.2d 1113 (Ohio 2004)

Rule 4-1.5

VI.

THE SUPREME COURT SHOULD DISCIPLINE MR. SMITH'S LICENSE BECAUSE MR. SMITH VIOLATED RULE 4-8.1(b) IN THAT MR. SMITH FAILED TO COOPERATE WITH INFORMANT'S LAWFUL REQUEST FOR RESPONSES TO COMPLAINTS MADE AGAINST HIM BY CLIENTS AND JUDGES.

Lake County Bar Assoc. v. Vala, 693 N.E.2d 1083 (Ohio 1998)

In re Cutting, 671 N.W.2d 173 (Minn. 2003)

In re Donaho, 98 S.W.3d 871 (Mo. banc 2003)

In re Staab, 719 S.W.2d 780 (Mo. banc 1986)

Rule 4-8.1(b)

VII.

THIS COURT SHOULD DISBAR MR. SMITH BECAUSE:

A. DISBARMENT IS APPROPRIATE WHEN A LAWYER DOES NOT UNDERSTAND FUNDAMENTAL LEGAL DOCTRINE;

B. DISBARMENT IS APPROPRIATE WHEN A LAWYER ENGAGES IN A PATTERN OF NEGLECT WITH RESPECT TO CLIENTS' MATTERS;

C. DISBARMENT IS APPROPRIATE WHEN A LAWYER KNOWINGLY DECEIVES A CLIENT WITH THE INTENT TO BENEFIT THE LAWYER; AND

D. THERE ARE MANY AGGRAVATING FACTORS WHICH SUGGEST MR. SMITH SHOULD RECEIVE THE MOST SEVERE DISCIPLINE.

In re Stewart, 782 S.W.2d 390 (Mo. banc 1990)

In re Leon Sutton, Supreme Court Case No. SC87525

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

Cincinnati Bar Assoc. v. Weaver, 809 N.E.2d 1113, 1116 (Ohio 2004)

Rule 4-5.1

Rule 4-5.3

ABA Standards for Imposing Lawyer Sanctions (1991)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE MR. SMITH'S LICENSE BECAUSE HE FAILED TO PROVIDE COMPETENT REPRESENTATION TO HIS CLIENTS IN VIOLATION OF RULE 4-1.1 IN THAT:

A. HE AGREED TO FILE A PETITION FOR CERTIORARI IN THE UNITED STATES SUPREME COURT WITHOUT FAMILIARIZING HIMSELF WITH THE RULES OF THE COURT;

In matters of attorney discipline, the Disciplinary Hearing Panel'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.[9] *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). Professional misconduct is established by a preponderance of the evidence. *Id.*

As a condition of retaining his or her license an attorney must comply with the Rules of Professional Conduct as set forth in Supreme Court Rule 4. *In re Shelhorse*, 147 S.W.3d at 80. Violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *Id.*

[9] The standard of review is the same for all of the Points Relied On in this Brief. Consequently, Informant has only set forth the standard for review under Point I of this Brief and incorporates the standard of review into the other Points.

Rule 4-1.1 provides that a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. *Id.* In criminal matters, a defendant's right to competent counsel is so important that the United States Supreme Court has stated "if the right to counsel guaranteed by the Constitution is to serve a purpose, defendants cannot be left to the mercies of incompetent counsel." *Momann v. Richardson,* 397 U.S. 751, 771 (1970). Pursuant to Rule 4-1.1, when an attorney undertakes a given matter, he will be expected to understand the substantive principles governing the relevant area of law. Daniel Webert, *Understanding the "Knowledge" Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 Geo. J. Legal Ethics 915, 919 (2002). For example, this Court found that attorney Eric Snyder violated Rule 4-1.1 when he "demonstrated a total lack of understanding of the basic tenants of bankruptcy law." *In re Snyder,* 35 S.W.3d 380, 384 (Mo. banc 2000).

The amount of attention and preparation an attorney must give to a legal matter is determined in part by what is at stake. Rule 4-1.1 cmt. More serious matters will require more attention and preparation. "While a lawyer need not necessarily have special training or prior experience to handle legal problems of a type to which the lawyer is unfamiliar, he must be willing to associate with a member of the Bar who is competent in the area of law or undertake the necessary study to ensure he becomes well-versed in the area of law." Rule 4-1.1 cmt. The research required may include making inquiries into those specific rules bearing on a client's matters. For example, in *Oklahoma Bar Assoc. v. Hensley*¸ 661 P.2d 527 (Okla. 1983), the attorney in question agreed to handle a

probate matter but was not familiar with the state's probate code and did not research the code as part of her representation. The court stated:

> "A cursory examination of the statutes of Oklahoma would have … revealed to Respondent that a distribution of the estate to the minor's heir's mother was not authorized by law…"
>
> * * *
>
> The minimal research which Respondent was required as an attorney at law to engage was not peculiar to probate law and procedure, a field in which Respondent had limited experience, but relates to her competency as an attorney to engage in the practice of law in *any* field of the law. Her unexplained failure to ascertain what she knew to be basic and statutorily defined points of law readily ascertainable by any member of the bar constitutes the handling of a legal matter without preparation adequate in the circumstances and a gross neglect of a legal matter entrusted to her."

Id at 530. In addition to researching the substantive law, a lawyer is expected to know the rules of the court before which the lawyer practices. For instance, in *In re Dempsey*, 632 F. Supp. 908, 925-26 (N.D. Cal. 1986), an attorney's license was disciplined for being unfamiliar with the rules of federal trial practice. The court found:

> "A member of the bar shall not accept employment or continue representation in a legal matter when the member knows that the member does not have sufficient time, resources and ability to perform the matter with competence. . . . Mr. Dempsey did not know enough about practice in

> federal court to effectively conduct the *Aaltamiran* trial. Proceedings in that trial were often interrupted while the trial judge tried to explain rules of procedure, constitutional law, the relationship between state and federal proceedings, and the federal rules of evidence. Mr. Dempsey should have acquired such information before appearing in federal court. Such knowledge would be expected of any attorney of ordinary skill and learning who appeared before this court."

Id. at 921.

In the instant case, Mr. Smith agreed to file a petition for certiorari to the United States Supreme Court on Mr. Hicks' behalf (Count I). Mr. Smith had no experience in preparing such petition and did not undertake the necessary study to learn what was required of him. (**Tr. 740**).

It was extremely important to Mr. Hicks that Mr. Smith provide competent representation in the matter as the petition for certiorari was Mr. Hicks' last chance to obtain a new trial or resentencing. A few weeks before Mr. Hicks' petition was due, the United States Supreme Court had ruled in *State v. Booker*, 543 U.S. 220 (2005) that the federal sentencing guidelines[10] were advisory in nature rather than mandatory and that the

[10] The federal sentencing guidelines are rules that set out a uniform sentencing policy for convicted defendants in the United States federal court system and are the product of the United States Sentencing Commission. Pursuant to the guidelines, a sentence is

Court's ruling in *Booker* was applicable to all cases upon review whereby the issue had been properly preserved. Mr. Hicks' trial attorney had properly preserved the issue regarding the federal sentencing guidelines. Thus, if Mr. Smith had properly prepared and submitted a petition for certiorari Mr. Hicks would have been guaranteed resentencing and may have been able to obtain a new trial. (**Ex. 12, p. 32**).

Mr. Smith did not prepare a petition for certiorari though. He prepared and filed a motion for extension to file the petition on March 7, 2005, the day the petition was due in which he stated he needed additional time because he had just received the file from prior counsel on February 26, 2005. The Court denied the motion and Mr. Hicks lost his opportunity to be resentenced because of Mr. Smith's incompetence. (**Ex. 10**).

If Mr. Smith had reviewed the applicable Supreme Court Rules he would have known that Supreme Court Rule 13.5 provides that an application for an extension of time to file a petition for certiorari must be filed with the clerk of the court at least ten days before the petition is due, except in extraordinary circumstances. Mr. Smith did not allege in his motion that there were any extraordinary circumstances that prevented him from filing his motion ten days before the due date of the petition. (**Ex. 10**).

In addition, if Mr. Smith had reviewed the Supreme Court Rules he also would have known that Rule 13.5 specifically provides "an application to extend the time to file a petition for a writ of certiorari is not favored." Moreover, if he had done even a quick

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determined primarily based upon two factors: (1) the conduct associated with the offense, and (2) the defendant's criminal history.

review of case law or treatises on the subject he would have known that the Court almost never grants a motion for extension of time, especially where the only reason given for the extension is a change in counsel. *See Madden v. Texas*, 498 U.S. 1301 (1991) (Judge Scalia granted extension of time in death penalty case because of change of counsel but explicitly stated he would not grant extensions in similar circumstances in the future.);[11] *See also* 2A Federal Procedure, Lawyer's Edition *Applications for Extensions – What Is Good Cause* § 3:366 (2006) (death of parent of attorney preparing petition for certiorari will not be "good cause" for court to grant extension); 36 C.J.S. Federal Courts *Time to Apply for Writ – Request for Extension* § 373 (2006) (extension will not ordinarily be granted to give counsel more time to review the record). Accordingly, if Mr. Smith had undertaken the necessary study to educate himself about the procedural aspects of filing a petition for certiorari he would have known that it was imperative that he filed the petition on March 7, 2005, instead of filing a motion for extension of time. Mr. Smith did not do this and Mr. Hicks suffered due to Mr. Smith's ineptness.

B. IN FEDERAL CRIMINAL PROSECUTIONS HE FAILED TO EVALUATE THE GOVERNMENT'S CASE, ASSESS WHETHER HIS CLIENT SHOULD PLEAD GUILTY OR PROCEED TO TRIAL, AND THEN FAILED TO PROVIDE HIS CLIENT WITH NECESSARY INFORMATION TO MAKE AN INFORMED DECISION ABOUT HOW TO PROCEED; AND

[11] Judge Scalia handles motions originating from jurisdictions within the Fifth Circuit. See Exhibit 10.

Former United States Attorney for the Western District of Missouri, Jean Paul Bradshaw, is now a federal criminal defense attorney with extensive experience in both prosecution and defense work. The Honorable Elena Franco previously had an extensive federal criminal practice prior to becoming a Kansas City Municipal Judge. Both of these attorneys testified that at the beginning of a federal criminal defense prosecution it is essential that the criminal defense attorney:

(1) review the evidence the government has against the client;

(2) speak with the Assistant United States Attorney handling the case about possible plea agreements and the defendant cooperating with the prosecution;

(3) explain to the client procedurally how criminal prosecutions work, what evidence the government has, and what sentence the client could expect to receive under the federal sentencing guidelines if convicted; and

(4) advise the client whether they believe it would be in the client's best interest to plead guilty and cooperate with the prosecution or go to trial on the matter.

(**Tr. 315-19; 323-336**). Both Mr. Bradshaw and Judge Franco also explained that it in a multiple defendant prosecution it was critical for the defendant to decide very early in the prosecution whether the defendant will cooperate with the government and plead guilty or will proceed to trial. (**Tr. 311; 317; 323-32**). A defendant who cooperates early in the prosecution can earn "downward departure" from the federal sentencing guidelines, or

the opportunity to receive a reduced sentence by providing "substantial assistance"[12] to the government. (**Tr. 311; 317; 323-32**). In order for the client to provide "substantial assistance" to the government the client must usually agree to cooperate early in the prosecution, that is, before information or testimony which the client may have to offer becomes less valuable to the government by reason of the government's detailed investigation or the fact that the government already has other witnesses or defendants willing to testify or provide evidence. John K. Villa, *Banking Crimes: Fraud, Money Laundering and Embezzlement*, 2 Banking Crimes Appendix 1A (2006). Assistant United States Attorneys Catherine Connelly and Linda Marshall also testified to the importance of a criminal defendant agreeing to cooperate with the government very early in the prosecution if the defendant wants to receive a reduced sentence.[13] (**Tr. 242-44; Ex. 24, pp. 13-15**).

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[12] The United States Sentencing Commission's sentencing guidelines contain a policy statement allowing a federal court to depart from the guidelines and impose a lesser sentence if the government files a motion stating that the defendant has provided "substantial assistance" to it in investigation of another person who has committed an offense. Such motion may be part of the plea agreement with the government. United States District Court, District of Massachusetts website.

[13] For a more extensive discussion of federal plea bargaining see Mary Patrice Brown and Steven E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 Am. Crim. J. Rev. 1063 (2006).

Mr. Smith has demonstrated a total lack of understanding of the basic tenants needed to represent federal criminal defense clients. When representing Mr. Criss (Count II) in two separate cases of mortgage fraud, Mr. Smith failed to review the evidence the government had against Mr. Criss, even though the prosecution urged him to do so, and failed to assess whether it would be in the best interest for Mr. Criss to plead guilty and cooperate with the government. He then failed to provide Mr. Criss with the information he needed to make an informed decision about pleading guilty or going to trial. As a result, Mr. Criss did not agree to cooperate with the government until Mr. Criss fired Mr. Smith and his new attorney, Mr. Bradshaw, explained to him that if he proceeded to trial he had little, if any chance, of avoiding conviction. (**Tr. 327-34**). By the time Mr. Criss agreed to plead guilty, all but one defendant in the case had already cooperated with the government and the government was unwilling to assist Mr. Criss in obtaining a "downward departure" from the federal sentencing guidelines. (**Tr. 327-34**).

Mr. Smith was also representing Mr. Criss in a civil action for mortgage fraud brought by Ameriquest Mortgage Company prior to Mr. Criss' criminal indictments. During Mr. Criss' deposition in the civil case, Mr. Smith allowed Mr. Criss to make his own determination as to whether he should take the Fifth Amendment. As a result, Mr. Criss answered questions regarding his knowledge of the transactions which the United States Attorney's office could have used to show intent in the criminal prosecution if Mr. Criss had proceeded to trial on the criminal case. (**Tr. 340-42**). Mr. Bradshaw testified that a knowledgeable criminal defense attorney would have instructed his client during

the deposition to assert the Fifth Amendment to any question other than the client's name. (**Tr. 340-42**).

When representing Mr. Robinson (Count III) on federal drug conspiracy charges, Mr. Smith was unable, or unwilling, to answer questions Mr. Robinson posed to him about the evidence the government had against him and was unable to answer Mr. Robinson's questions about the length of sentence he could expect to receive under the federal sentencing guidelines if convicted. (**Ex. 32, pp. 12-14; 19; 26**). This is basic information that a federal criminal defense attorney must know in order to provide competent representation. Mr. Smith's failure to answer Mr. Robinson's questions about the government's evidence is particularly troubling in light of the fact that Mr. Robinson was advising Mr. Smith that he was not involved in the drug conspiracy to the degree that the government was asserting. In order to work out a favorable plea agreement for Mr. Robinson, Mr. Smith needed to be able to point out the government's weaknesses in the case, including the fact that the government was escalating Mr. Robinson's level of involvement in the conspiracy. (**Ex. 32, pp. 13-14**).

Mr. Smith also forced Mr. Robinson to navigate his own way through a proffer when he slept through the proffer. It was critical for Mr. Smith to stay awake during the proffer. Although Mr. Robinson had agreed to cooperate with the government, it is up to the discretion of the United States Attorney's Office to file the motion for "downward departure". If the United States Attorney's Office had refused to file the motion, Mr. Smith might have had to file a motion showing that the United States Attorney's Office refusal to make the motion was unwarranted and based on bad faith. 9A Federal

Procedure, Lawyer's Edition, *Requirement That Government Move for Departure* § 22:1617 (2006). To do so, he would have needed to be able to recite what useful information Mr. Robinson had provided during the proffer.

When representing Mr. Herrera (Count IV) on federal drug conspiracy charges, Mr. Smith never approached the government regarding a plea agreement or negotiated with the government about obtaining a more favorable plea agreement than what the government initially offered. (**Tr. 240-44; 251-53; 308-12**). Instead, he scheduled a change of plea agreement based upon the unfavorable plea agreement and then failed to appear. As discussed above, competent federal criminal defense counsel always at least discusses the possibility of a plea agreement with the government and would then attempt to obtain the best possible plea agreement possible for his client.

Mr. Herrera was a good candidate for "downward departure" because he played a minor role in the conspiracy but Mr. Smith never inquired about Mr. Herrera receiving a "downward departure" for cooperating. The government did send a plea agreement to Mr. Smith whereby Mr. Herrera would serve 33-41 months in prison. After the court dismissed Mr. Smith from the representation and appointed new counsel for Mr. Herrera, new counsel negotiated a much more favorable 12 month sentence for Mr. Herrera by pointing out to the government that Mr. Herrera had a very minor role in the drug conspiracy. Mr. Smith had never done that and Mr. Herrera would have spent at least another 19 months in prison if Mr. Smith had continued with the representation.

C. IN CIVIL ACTIONS HE FAILED TO KNOW BASIC TENANTS OF THE SUBSTANTIVE LAW, FAILED TO CONDUCT NECESSARY RESEARCH BEFORE FILING ACTIONS AND DID NOT ADEQUATELY PREPARE FOR OR REPRESENT CLIENTS DURING THE LITIGATION.

As stated above, under sub-point A of this Argument, Rule 4-1.1 requires an attorney to be knowledgeable about the well-settled principles of law applicable to his client's needs. Mr. Smith routinely represented clients in domestic law matters. He, however, has demonstrated a substantial lack of knowledge concerning domestic law matters. During the hearing, Judge Mesle, who handled a domestic docket in Jackson County for two years, testified that is a matter of long and well-settled law, that Missouri courts will not grant a divorce to a pregnant woman. (**Tr. 381**). Yet, Mr. Smith did not advise client Toninicole Smith (Count IX) that it was virtually impossible for her to obtain a divorce while pregnant even though at the outset of the representation she explained to him that it was imperative that she obtain a divorce before the birth of her child. (**Tr. 357-61**). Instead, he collected his attorney fees and filing fees and then had someone from his staff advise Ms. Smith that the clerk's office would not accept her petition for filing because the petition stated she was pregnant. (**Tr. 357-61**).

After Jeffery Gaumer's teenage daughter, Lindsey, began living with Mr. Gaumer, Jeffery Gaumer hired Mr. Smith to assist him in redirecting child support payments he was making to his ex-wife to his child support arrearage, rather than to ongoing child support (Count IX). (**Tr. 403-07**). The petition Mr. Smith filed on Mr. Gaumer's behalf sought, among other things, a determination of Mr. Gaumer's paternity over Lindsey.

(**Ex. 74**). Mr. Gaumer never questioned that he was the father of Lindsey and he had been married to Lindsey's mother at the time of Lindsey's birth. (**Tr. 407**). Pursuant to Section 210.822.1(1) RSMo,[14] Mr. Gaumer was the presumed father and there was no need to ask the court to determine such. As a family law practitioner, Mr. Smith should have been aware of this basic family law tenant.

Rule 4-1.1 specifically states that competent representation requires the preparation reasonably necessary for the representation. Judge Mesle and Judge O'Malley (Count VI) both testified that Mr. Smith often had cases before them and he repeatedly failed to adequately prepare for hearings. (**Tr. 371-402**). Judge Mesle specifically remembered a child custody dispute whereby the child had been taken out of state by the father. She, as the judge, had to research the issues of the case extensively because Mr. Smith had failed to recognize and address the jurisdictional aspects of the case. (**Tr. 378-79**).

Competent handling of a matter also includes inquiry into and analysis of the factual elements of a case. Rule 4-1.1, cmt. Mr. Smith failed to make the necessary factual analysis when representing Ms. Homma Shaffee and Ms. Rebecca Shepherd. When representing Ms. Shaffee in a slip and fall action, Mr. Smith named as the defendants a non-existent corporation and a person who did not own the premises in

[14] Section 210.822.1(1) provides that a man shall be presumed to be the natural father of a child if he and the child's mother are or have been married to each other and the child is born during the marriage.

question at the time of the fall. Obviously, Mr. Smith did not make the necessary factual inquiry before filing suit. If Mr. Smith had reviewed the Missouri Secretary of State's corporate records and the Recorder of Deeds records for the property in questions, he would have realized that he had sued the wrong parties. Ultimately, the court dismissed the matter and Ms. Shaffee lost the right to refile her suit because the statute of limitations had run.

Likewise, when representing Ms. Rebecca Shepherd (Count XVIII) in a slip and fall action he did not even take the most basic step of interviewing witnesses to the accident and thus did not analyze the facts of the case. (**Tr. 581-82**). In addition, Mr. Smith did not prepare Ms. Shepherd for her interview with insurance adjuster and then slept through her interview. Ms. Shepherd spent a great deal of time worrying about whether she had made admissions during the interview that were damaging to her case. Common sense dictates that a competent attorney should be awake when his client is being interviewed or deposed by the opposing party.

II.

THE SUPREME COURT SHOULD DISCIPLINE MR. SMITH'S LICENSE BECAUSE HE FAILED TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS IN REPRESENTING HIS CLIENTS IN VIOLATION OF RULE 4-1.3 IN THAT:

A. HE DID NOT PREPARE A PETITION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT IN A TIMELY MANNER;

Rule 4-1.3 provides that a lawyer shall act with reasonable diligence and promptness in representing a client. At the core of the duty of diligence is a lawyer's obligation to perform the work for which he or she was hired in a timely manner. ABA/BNA Lawyer's Manual on Professional Conduct, *Diligence* § 31:402 (2005). The failure to attend to a client's case is a very serious ethical violation. *Committee on Professional Ethics and Conduct v. Freed*, 341 N.W.2d 757, 759 (Iowa 1983). Lack of diligence in criminal matters is particularly reprehensible because the client is often languishing in prison waiting for the attorney to do something. Debra T. Landis, Annotation, *Negligence, Inattention or Professional Incompetency of Attorney In Handling Client Affairs In Criminal Matters as Grounds for Disciplinary Action*, 69 A.L.R. 4th 410 (1989). The Iowa Supreme Court has equated an attorney's failure to attend to a client's case to "a surgeon who, without transferring responsibility, drops his scalpel and abandons his patient in the course of an operation." *Freed* at 759.

Clearly, reasonable diligence means that a lawyer must meet all deadlines imposed by a court. ABA/BNA Lawyers Manual on Professional Conduct, *Diligence* at § 31:403

(2005). As more thoroughly discussed under Point I of this Argument, the Hicks family hired Mr. Smith to prepare a petition for certiorari to the United States Supreme Court on Richard Hicks' behalf (Count I). The petition was Mr. Hicks' last chance to obtain a new trial or resentencing. The petition was due on March 7, 2005. Mr. Smith did not file Mr. Hicks' petition on March 7, 2005. Rather he filed a motion for extension of time on March 7, 2005, even though United States Supreme Court Rules provide that applications for extensions of time are not favored and also provides that, unless there are extenuating circumstances, any application for extension of time to file a petition for certiorari must be filed ten days in advance of the due date for the petition for certiorari. Mr. Smith did not act diligently in the representation of Mr. Hicks.

B. WHEN REPRESENTING DEFENDANTS IN FEDERAL CRIMINAL PROSECUTIONS HE FAILED TO ENTER INTO PLEA NEGOTIATIONS IN A TIMELY MANNER SO HIS CLIENTS COULD BENEFIT FROM REDUCED SENTENCES BY PROVIDING "SUBSTANTIAL ASSISTANCE" TO THE PROSECUTION;

The comments to Rule 4-1.3 acknowledge that a client's interest can often be adversely affected by the passage of time or change in conditions. In criminal matters, a lawyer's lack of diligence can even amount to the ineffective assistance of counsel. ABA/BNA Lawyer's Manual on Professional Conduct, *Diligence* at § 31:405. Also as more thoroughly discussed under Point I of this Argument, when representing clients in federal criminal prosecutions (Roderick Criss, Count II; Jorge Herrera, Count IV), Mr. Smith failed to enter into plea negotiations early in the representation and as a result his

clients lost the opportunity to receive a downward departure or reduced sentence when being sentenced for providing "substantial assistance" to the prosecution.

C. HE ROUTINELY FAILED TO APPEAR FOR ALL TYPES OF HEARINGS AND TRIALS; AND

The duty to act with reasonable diligence includes the tracking of dates upon which hearings, trials and deposition are to occur. *See Tiller v. Semonis*, 635 N.E.2d 572, 574 (Ill. Ct. App. 1994). The failure of an attorney to be notified of the hearing does not constitute an excuse for failing to appear at the hearing. *Id.* Mr. Smith routinely failed to appear in court. For example, at the disciplinary hearing the evidence showed that Mr. Smith failed to appear for:

(1) a hearing when representing Mr. Criss (Count II) (**Ex. 24, pp. 20-21; Ex. 26**);

(2) a show cause hearing concerning his failure to turn over Mr. Robinson's file to new counsel (Count III) (**Ex. 29, pp. 10-16, 20-23**);

(3) a pretrial conference and a change of plea hearing for Mr. Herrera (Count IV) (**Tr. 245-47, 308**);

(4) three hearings in *State v. McCain* (Count V) (**Tr. 486, 490-92**);

(5) Kelly Kirkland's criminal trial (Count VII) (**Ex. 45**);

(6) two deportation hearings in the Ezequiel Flores matter (Count VIII) (**Ex. 46, pp. 47-50, 95-103**);

(7) multiple court appearances concerning Murtaza Gadit's traffic ticket (Count XI) (**Tr. 430; Ex. 58, p. 10**); and

(8) a court appearance and the trial when representing Gerrie Herring in a dissolution (Count XIV) (**Tr. 148; Ex. 64, pp. 3-4**).

Each time Mr. Smith missed a court appearance, he caused his clients great distress and the judicial system was disrupted. Judge Mesle testified that Mr. Smith has had 20 to 30 cases before her and that, in her experience, Mr. Smith was either late for or failed to appear in more than fifty percent of these cases (Count VI). (**Tr. 383**). Judge O'Malley testified that during his long tenure running the criminal "A" docket in Jackson County, he could not recall Mr. Smith ever making a timely appearance. (**Tr. 396**). Darren Fulcher, the managing partner at the firm where Mr. Smith practiced from February 2004 until April 15, 2005, testified that the Firm received many complaints from both court personnel and clients that Mr. Smith routinely failed to appear in court when scheduled. (**Tr. 31-32**). Mr. Smith's behavior was totally inexcusable and amounted to abandonment of his clients.

D. IN CIVIL CASES HE ROUTINELY FAILED TO FILE PLEADINGS IN A TIMELY MANNER AND TO MOVE CASES ALONG.

Mr. Smith showed a complete lack of diligence throughout his representation of Ms. Homma Shaffee (Count XIII). First, he waited until the statute of limitations was about to run before filing suit even though she had hired him two years earlier. He then failed to: (a) appear for a default hearing he had requested, (b) file a reply to defendant's motion for summary judgment, (c) show up for his client's deposition, and (d) show up for the trial. The trial court ultimately dismissed the action because of Mr. Smith's failure to prosecute. (**Ex. 62**).

Mr. Smith also showed a complete lack of diligence when representing Mr. Gerrie Herring (Count XIV). Mr. Herring had been served with a dissolution petition on April 8, 2003. Mr. Smith did not file an Answer to the petition until June 12, 2003, and did not request leave from the Court to file out of time. (**Ex. 64**). By June 12, 2003, Mr. Herring's wife had already filed an amended petition which Mr. Smith never answered. (**Ex. 64**). Mr. Smith then failed to appear in court on September 10, 2003, and again on September 25, 2003. (**Ex. 64**). As a result, Mr. Herring, who has no legal training and no prior experience with the judicial system, had to defend himself at the dissolution hearing. This was disastrous for Mr. Herring in that the family home was awarded to his wife and he was ordered to pay child support, including back child support, even though his children were living with him and continued to live with him after the divorce. (**Tr. 148-151**). Mr. Herring then had to hire another attorney to get the judgment set aside and incurred an additional $5,000 in attorney's fees.

Similarly, Mr. Smith failed to file an answer on Mr. Criss' behalf in the Countrywide civil suit and a default judgment was entered against Mr. Criss.

III.

THE SUPREME COURT SHOULD DISCIPLINE MR. SMITH'S LICENSE BECAUSE HE FAILED TO ADEQUATELY COMMUNICATE WITH HIS CLIENTS IN VIOLATION OF RULE 4-1.4 IN THAT MR. SMITH ROUTINELY REFUSED TO TAKE OR RETURN PHONE CALLS FROM CLIENTS AND WHEN HE DID SPEAK WITH CLIENTS HE DID NOT PROVIDE THEM WITH ADEQUATE INFORMATION TO MAKE INFORMED DECISIONS ABOUT THEIR LEGAL MATTERS.

Rule 4-1.4(a) provides that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. A lawyer's duty to communicate with the client is one of the most fundamental of the attorney's obligations to the client. The duty to communicate is particularly important in criminal cases involving a threat of incarceration. ABA/BNA Lawyer's Manual on Professional Conduct, *Communication* § 31:515 (2005). In fact, the United States Supreme Court has stated that a lawyer representing a criminal defendant has a Sixth Amendment duty to "consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

Mr. Smith routinely failed to consult with criminal defendants and keep them informed on important developments in their case. Mr. Smith was hired to file a petition for certiorari to the United States Supreme Court on Mr. Hicks' behalf (Count I). Mr. Hicks testified that Mr. Smith never spoke with him or sent any kind of written

communication to him, even after the Supreme Court denied Mr. Smith's motion for extension of time to prepare the petition for certiorari. (**Ex. 7, pp. 6-7**). Shawn Robinson, who was being prosecuting on federal drug conspiracy charges, complained that Mr. Smith would not return phone calls from Mr. Robinson and Mr. Smith would not provide Mr. Robinson with information about what he was doing on his behalf (Count III). (**Ex. 32, pp. 17-18**). Mr. Herrera, who was also being prosecuted on federal drug conspiracy charges, and his wife complained to Judge Maughmer that Mr. Smith would not take Mr. Herrera's phone calls and after Mr. Smith failed to appear in court on several occasions, the court dismissed Mr. Smith from the case (Count IV). (**Ex. 38, pp. 26-27**).

Mr. Smith's communication with clients who had civil matters pending was not any better than his communication with clients who had criminal matters pending. The Flores family made repeated phone calls to Mr. Smith about his failure to appear at Ezequiel Flores' deportation hearings which Mr. Smith did not return (Count VIII). (**Tr. 454-55**). Mr. Smith would not take Ms. Toninicole Smith's calls about obtaining a refund of the fees she had paid him or respond to the letter she sent to him. (**Tr. 363-65**). Mr. Smith did not inform Homma Shaffee that the court had dismissed her personal injury action, even though she called his office repeatedly asking about what Mr. Smith was doing on her case. (**Tr. 80, 84, 462**).

Ms. Shepherd testified that she called Mr. Smith's office weekly from February 2004 until October 2004 and left messages for him to call her regarding the progress he was making on her personal injury case (Count VIII). (**Tr. 578-80**). Ms. Shepherd had previously informed Mr. Smith that it was imperative that he move quickly on her legal

matter because she was on a fixed income from disability and was caring for a critically ill grandchild and she needed the settlement from the theater's insurance company as quickly as possible. Mr. Smith only spoke with Ms. Shepherd three times during that time period and during one of the calls he merely stated he was in court and would call her back. (**Tr. 579-81**).

Mr. Fulcher, the managing partner at the Firm, and Elizabeth Springate, the paralegal who assisted Mr. Smith while he was at the Firm, received numerous complaints from Mr. Smith's clients that Mr. Smith failed to communicate with them and that he did nothing on their behalf. (**Tr. 35-37, 432**).

Rule 4-1.4 also requires an attorney to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. While Mr. Smith did have frequent contact with Mr. Criss, as discussed in Point I of the Argument, he did not provide Mr. Criss with the necessary information about whether he should plead guilty and cooperate with the prosecutor or instead go to trial (Count II). More specifically, he did not explain to Mr. Criss that if he went to trial if was highly unlikely he would prevail and that Mr. Criss could receive a reduced sentence if he agree to plead guilty and cooperate with the government before the other defendants offered their cooperation to the government. Mr. Smith's failure was very detrimental to Mr. Criss because by the time Mr. Criss fired Mr. Smith and obtained new counsel, all but one of the other defendants were cooperating with the prosecution and, consequently, the prosecutor was unwilling to recommend a reduced sentence for Mr. Criss.

Similarly, Mr. Smith did not explain to Mr. Robinson what length of sentence he could expect to receive if convicted. Without this critical information, it is almost impossible for a criminal defendant to make an informed decision about how to proceed.

IV.

THE SUPREME COURT SHOULD DISCIPLINE MR. SMITH'S LICENSE BECAUSE MR. SMITH VIOLATED RULE 4-1.16 WHICH REQUIRES AN ATTORNEY, AT A MINIMUM, TO PROVIDE REASONABLE NOTICE OF HIS INTENT TO WITHDRAW FROM A CASE, AND TO TAKE REASONABLE STEPS TO PROTECT THE CLIENT'S INTEREST AT THE END OF THE REPRESENTATION, IN THAT:

A. HE WITHDREW FROM MR. HERRING'S CASE WITHOUT PROVIDING MR. HERRING WITH REASONABLE NOTICE OF HIS INTENTION TO DO SO; AND

When representing Gerrie Herring in a dissolution action brought by Mr. Herring's wife, Mr. Smith failed to show up for Mr. Herring's dissolution hearing (Count XIV). Mr. Smith, in effect, abandoned his client on the day of the trial even though Mr. Smith had called Mr. Herring the day of trial and ensured him he would appear. (**Tr. 148-50**). The results were disastrous for Mr. Herring. The trial court required Mr. Herring to proceed pro se at the dissolution hearing. After the hearing, the court entered a decree of dissolution which awarded the family home to Ms. Herring, gave primary physical custody of the children to Ms. Herring and ordered Mr. Herring to pay child support, including retroactive child support, even though the children had been living with Mr. Herring during the dissolution proceeding and continued to live with him after the court entered its order. (**Ex. 64, p. 4**).

At the disciplinary hearing Mr. Smith alleged that his actions were justified because Mr. Herring owed him attorney's fees. (**Tr. 764-65**). Even assuming, arguendo, that Mr. Herring had not paid his fees as agreed, Mr. Smith was not justified in abandoning Mr. Herring on the day of trial. Mr. Smith did not give reasonable warning to Mr. Herring and did not allow time for Mr. Herring to find new counsel. In fact, Mr. Smith called Mr. Herring on the day of the trail and then failed to appear.

Rule 4-1.16(b) permits a lawyer to withdraw from representing a client if the client fails to pay the attorney only if the client has been given reasonable notice that the lawyer will withdraw unless the client pays the attorney. Furthermore, if the client is engaged in a legitimate dispute with the attorney over the amount and nature of the fees, that dispute should not be viewed as a failure to pay. *In re Benjamin*, 514 N.Y.S.2d 526 (NY Sup. Ct. App. Div. 1987). In the instant case, a dispute existed between Mr. Herring and Mr. Smith regarding the value of services Mr. Herring provided to Mr. Smith when assisting in the construction of Mr. Smith's garage.[15] Because of such dispute, Mr. Smith did not have the right to withdraw because of Mr. Herring's alleged failure to pay. Moreover, when an attorney fails to notify a client, until the day of trial, of his intent to withdraw from the case for the client's failure to pay the fees, this is insufficient notice to the client and in violation of Rule 4-1.16(b). *In re Thomson*, 499 P.2d 815 (Or. Sup. Ct. 1972).

[15] Mr. Smith and Mr. Herring agreed that Mr. Herring could pay Mr. Smith's legal fees, in part, by assisting Mr. Smith in the building of a garage. In addition, Mr. Herring paid Mr. Smith $400 for his services.

B. WHEN CLIENTS TERMINATED MR. SMITH'S SERVICES, MR. SMITH WOULD NOT TURN OVER THEIR FILES TO THE CLIENT OR THE CLIENT'S NEW COUNSEL.

Rule 4-1.16(d) requires an attorney whose services have been terminated to take reasonable steps to protect a client's interest including surrendering papers and property which belong to the client. This Court has previously held that a client's file belongs to the client, not to the attorney representing the client. *In re Cupples,* 952 S.W.2d 226, 234 (Mo. banc 1997). *See also* Advisory Committee Formal Opinion #115 (adopted March 4, 1988) (file belongs to the client cover to cover, except for those items contained within the file for which the attorney has borne out-of-pocket expenses, such as transcripts).

Mr. Smith routinely failed to protect his former client's interest by returning their files to the client or the client's new attorney. Mr. Hicks' appellate counsel wrote to Mr. Smith and asked him to return the Hicks file, as appellate counsel had not made copies of all of the documents he had provided to Mr. Smith (Count I). (**Ex. 12, pp. 24-26; Ex. 18**). Mr. Smith failed to return the files. What is particularly disturbing about Mr. Smith's lack of action is the fact that appellate counsel was trying to rectify the harm Mr. Smith had done by failing to file a petition for certiorari and Mr. Smith completely disregarded Mr. Hicks' interest.

After Ms. Shepherd terminated Mr. Smith's services in her slip and fall action, Ms. Shepherd's new counsel requested her files (Count XVIII). Mr. Smith failed to produce them. (**Tr. 542**).

Mr. Smith's failure to comply with Rule 4-1.16(d) was even more egregious when Mr. Robinson terminated Mr. Smith's services (Count III). Mr. Robinson's new counsel both spoke to and wrote to Mr. Smith about obtaining Mr. Robinson's files and Mr. Smith ignored the requests. (**Ex. 29, pp. 10-16, 20-23; Exs 30, 31**). It was imperative that Mr. Robinson's attorney receive the file. New counsel needed Mr. Smith's notes from the proffer to see whether Mr. Robinson should receive a reduced sentence for providing "substantial assistance" to the government. After Mr. Robinson's counsel complained to the federal court about Mr. Smith's failure to provide the file, the federal court ordered Mr. Smith to produce the files and, unbelievably, Mr. Smith ignored the order. Finally, the federal court issued a show cause order for Mr. Smith to appear and explain why he had failed to produce the file. Again, unbelievably, Mr. Smith ignored the order. Mr. Smith has shown that he has absolutely no interest in protecting his clients' interests or trying to mitigate any harm he caused them and is in violation of Rule 4-1.16(d).

V.

THE SUPREME COURT SHOULD DISCIPLINE MR. SMITH'S LICENSE FOR CHARGING A NUMBER OF HIS CLIENTS UNREASONABLE FEES IN VIOLATION OF RULE 4-1.5 IN THAT MR. SMITH DID NOT PERFORM OR COMPLETE THE PROFESSIONAL REPRESENTATION FOR WHICH THE FEES WERE PAID AND ANY TIME HE SPENT ON THE REPRESENTATION WAS NOT BENEFICIAL TO THE CLIENT.

Rule 4-1.5 provides that a lawyer's fees shall be reasonable. The factors to be considered in determining the reasonableness of a fee include, among other things, the time and labor required for the matter and the results obtained. *Id.* An attorney violates 4-1.5 when he collects a nonrefundable fee, does not perform or complete the professional representation for which the fee was paid but fails to remit the unearned portion of the fee. *In re Gastineau*, 857 P.2d 136, 140 (Or. 1993). Stated somewhat differently, "a fee charged for which little or no work performed is an unreasonable fee," *Attorney Grievance Comm. v. McLaughlin*, 813 A.2d 1145, 1166 (Md. 2002). As the Supreme Court of Ohio declared in *Cincinnati Bar Assoc. v. Weaver*, 809 N.E.2d 1113, 1116 (Ohio 2004), "taking retainers and failing to carry out the contracts of employment is tantamount to theft of the fee from the client."

Mr. Smith routinely charged excessive fees in comparison to the services he provided many clients. The Hicks family paid Mr. Smith $10,000 in attorney's fees for Mr. Smith to prepare a petition for certiorari to the United Sates Supreme Court on Richard Hicks' behalf (Count I). (**Ex. 5; Ex. 6, p. 8**). Mr. Smith did not prepare the

petition as he had agreed to do. Instead the only thing Mr. Smith did on Mr. Hicks' behalf was to prepare a two page motion for extension of time to file the petition. The Court denied the motion. The motion could not have taken any more than one hour for Mr. Smith to prepare and Mr. Hicks gained no benefit whatsoever from the motion. When the Hicks family complained about Mr. Smith's representation, the Firm returned the portion of the fees the Firm had retained but Mr. Smith refused to return the $6,000 in fees he had retained.[16] Mr. Smith's fees were clearly excessive in that Mr. Smith did virtually no work on the matter and Mr. Hicks received no benefit from Mr. Smith's representation.

Similarly, Mr. Smith charged Ms. Hicks $1,000 to travel to Dallas to obtain Mr. Hicks' legal files from both his trial and appellate counsel. (**Ex. 6, p. 10**). Mr. Smith never even went to the trial attorney's office and the appellate attorney had previously offered to ship the files to Mr. Smith but Mr. Smith refused to allow him to do so. (**Ex. 8; Ex. 12, p. 19**). Mr. Hicks received no benefit from the trip and there was no real reason for the trip except that Mr. Smith wanted to enjoy a weekend in Dallas.

Ms. Herrera had paid Mr. Smith $10,000 to defend her husband against federal criminal drug charges (Count IV). It was extremely hard for Ms. Herrera to come up with this money and she in fact sold the family's vehicles and all of their furniture. (**Tr. 227-28**). After Mr. Smith missed two court appearances, including the change of plea

[16] Under the partnership agreement, the originating attorney received 60 percent of a client's fees and the Firm received the remaining 40 percent of the fees. (**Tr. 30-31; 120**).

hearing, Mr. Herrera complained to Judge Maughmer about Mr. Smith's representation. Judge Maughmer dismissed Mr. Smith from the case and strongly suggested in a written order that Mr. Smith "review his fee arrangement with defendant Herrera and voluntarily return any portion of the retainer he had not earned." (**Ex. 38, pp. 26-27**). Despite the scathing order from Judge Maughmer, Mr. Smith never returned any of his fees to the Herreras. (**Tr. 230-31**). What is even more troubling is that while representing Mr. Herrera he did not do anything to benefit Mr. Herrera. The only thing he did on Mr. Herrera's behalf was attend one short court appearance. Mr. Smith's fees were clearly unreasonable.

The Ezequiel Flores family paid Mr. Smith $2,500 to represent their son in a deportation hearing (Count VIII). Mr. Smith failed to show up for the hearing and when the court rescheduled the hearing he also failed to attend. (**Tr. 72; Ex. 46, pp. 47-50, 95-103**). When the Firm learned what had occurred the Firm refunded the portion of the fees it had received from the Floreses but Mr. Smith did not do so. (**Tr. 73-74**).

By taking money from the Hicks family, the Herrera family, and the Ezequiel Flores family, and then performing little or no work for his client, Mr. Smith has, in effect, stolen from his clients.

VI.

THE SUPREME COURT SHOULD DISCIPLINE MR. SMITH'S LICENSE BECAUSE MR. SMITH VIOLATED RULE 4-8.1(b) IN THAT MR. SMITH FAILED TO COOPERATE WITH INFORMANT'S LAWFUL REQUEST FOR RESPONSES TO COMPLAINTS MADE AGAINST HIM BY CLIENTS AND JUDGES.

Rule 4-8.1(b) provides that a lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information. "The requirement to cooperate in disciplinary investigations is rooted in the self-governing nature of the legal profession." *Lake County Bar Assoc. v. Vala*, 693 N.E.2d 1083, 1084 (Ohio 1998). Each lawyer has a duty to participate in the regulation of the profession, even if the investigation is focused on the attorney, himself. *Id.* A lawyer's failure to cooperate in a disciplinary investigation can greatly hamper the efforts of disciplinary authorities and evidences the lawyer's lack of regard for the seriousness of the proceeding. *In re Cutting*, 671 N.W.2d 173, 175 (Minn. 2003) (quoting *In re Engel*, 538 N.W.2d 906, 907 (Minn. 1995)). This Court has stated that "[w]e depend on our bar committees to investigate allegations of unethical conduct. . [.] and "[w]e expect members of the bar to cooperate promptly and candidly with bar committees." *In re Donaho*, 98 S.W.3d 871, 874 (Mo. banc 2003). This Court has further stated that repetitive non-cooperation with Informant justifies the conclusion that an attorney does not fully understand the profound duty imposed by his profession. *In re Staab*, 719 S.W.2d 780, 784 (Mo. banc 1986).

Mr. Smith failed to respond to the Informant's request for information concerning the Shawn Robinson complaint (Count III), the Jorge Herrera complaint (Count IV), and the Judge Patrick Robb complaint (Count V). Mr. Smith did not respond to the Richard Hicks complaint in at timely manner (Count I). (**Tr. 16-19**). In failing to respond to OCDC's request or responding in a delinquent manner, Mr. Smith hampered Informant's investigation into the complaints and violated the Rules of Professional Conduct. He also demonstrated his total disregard for the legal system and should be disciplined for his actions.

VII.

THIS COURT SHOULD DISBAR MR. SMITH BECAUSE:

A. DISBARMENT IS APPROPRIATE WHEN A LAWYER DOES NOT UNDERSTAND FUNDAMENTAL LEGAL DOCTRINES OR PROCEDURES;

B. DISBARMENT IS APPROPRIATE WHEN A LAWYER ENGAGES IN A PATTERN OF NEGLECT WITH RESPECT TO CLIENTS' MATTERS;

When determining an appropriate penalty for the violations 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 consistently turned to the ABA Standards for Imposing Lawyer Sanctions (1991) ("ABA Standards") for guidance in deciding what discipline to impose. The notes to the ABA Standards provide that when an attorney violates multiple Rules of Professional Conduct the ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct and often should be greater than the sanctions for the most serious misconduct. See Section II-Theoretical Framework.

The Panel recommended that this Court disbar Mr. Smith and Informant concurs in the Panel's recommendation. Various ABA Standards dictate disbarment is an appropriate discipline for Mr. Smith. ABA Standard 4.51 provides disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's

conduct causes injury or potential injury to a client. The comments to Standard 4.51 further state that disbarment is reserved for lawyers who are found to have engaged in multiple instances of incompetent behavior as opposed to a single instance of incompetent behavior. ABA Standard 4.41 recommends disbarment when a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

This Court has stated that the public should be able to rely on an attorney's devotion to his client's interest. *In re Donaho*, 98 S.W.2d 871, 874 (Mo. banc 2003). Mr. Smith's conduct exhibits a total lack of devotion to his clients. The evidence presented at the hearing demonstrates that Mr. Smith did not understand, or at least, utilize the most basic legal doctrines and that, at a minimum, he engaged in a pattern of neglect with respect to client matters. Various witnesses testified that it is essential in a multiple defendant, federal criminal prosecution that the defense attorney: (1) thoroughly review the evidence against the client, (2) assess the likelihood of a defendant being successful if the matter proceeded to trial, (3) determine whether it would be in the best interest of the client to plead guilty and assist the government in the prosecution of the other defendants, and (4) then advise the client of the attorney's recommended action. Mr. Smith did none of these things for Roderick Criss or Jorge Herrera. At the hearing, OCDC presented evidence from experienced federal criminal appellate attorneys that when preparing a petition for certiorari to the United States Supreme Court for a client, it is essential to

review the procedural rules for such and abide by those rules. Mr. Smith did not do these things when representing Mr. Hicks.

Common sense dictates that it is essential when representing clients that an attorney meet court imposed deadlines and make court appearances. When attending court, an attorney also must be prepared to represent the client. Informant presented testimony from several judges who testified that Mr. Smith routinely failed to do basic things on behalf of his client such as filing pleadings when due, appearing in court and, preparing for trial.

Mr. Smith's clients were harmed by his incompetence and/or neglect. For example, Mr. Hicks lost the opportunity to file a petition for certiorari with the United States Supreme Court and his family lost the fees they paid to Mr. Smith. Roderick Criss lost the opportunity to receive a reduced sentence for cooperating with the government and received no benefit for the $10,000 he paid Mr. Smith. Mr. Herring had to represent himself at trial because Mr. Smith failed to appear at the hearing and the court entered a divorce decree which was detrimental to Mr. Herring. He then had to have new counsel set aside the judgment. Mr. Robinson lost $8,000 in fees and his new counsel had to proceed with plea bargaining without having the benefit of knowing what Mr. Robinson said at the proffer. Mr. Smith failed to appear at Mr. Flores' deportation hearing and Mr. Flores was deported. Mr. Gadit had warrants issued for his arrest because of Mr. Smith's failure to pay Mr. Gadit's traffic ticket. Ms. Shaffee lost the right to recover for her personal injuries because Mr. Smith sued the wrong party and then failed to prosecute the

case. These are just a few of the clients who have suffered harm as a result of Mr. Smith's incompetence.

C. DISBARMENT IS APPROPRIATE WHEN A LAWYER KNOWINGLY DECEIVES A CLIENT WITH THE INTENT TO BENEFIT THE LAWYER; AND

ABA Standard 4.61 provides disbarment is appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential injury to the client. ABA Standards define "knowledge" as the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious object or purpose to accomplish a particular result. Given the number of clients, attorneys and judges who testified against Mr. Smith at the hearing that Mr. Smith failed to provide adequate representation to his clients and the fact that Mr. Smith did nothing to improve his practices and procedures after being admonished by Informant, the other attorneys in his Firm and even judges, OCDC asserts Mr. Smith knowingly deceived his client. The fact that Mr. Smith refused to mitigate any harm he had caused the clients by doing things such as returning unearned fees, or even turning over the clients' files to their new counsel also points to Mr. Smith's actions as being intentional.

Missouri case law also supports disbarment. This Court has stated that disbarment is reserved for clear cases of severe misconduct where an attorney is "demonstrably unfit

to practice law." *In re Frank*, 885 S.W.2d 328, 334 (Mo. banc 1994).[17] The Court has also recognized that multiple offenses tend to reveal a pattern of misconduct and have imposed disbarment where an attorney has committed numerous violations of the Rules of Professional Conduct. *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997). In *In re Stewart*, 782 S.W.2d 390 (Mo. banc 1990), this Court disbarred an attorney who: (a) acted incompetently in that he failed to adequately prepare for cases, thereby prejudicing the clients' rights, and (b) failed to accurately explain to his clients what had occurred, depriving the clients of the right to make informed decisions about the representation. These are some of the same ethical violations this Panel found Mr. Smith guilty of violating in this case. *See also* DHP Decision, Briefs and this Court's Order in *In re Leon Sutton*, Supreme Court Case No. SC87525 as an example of a case where this Court disbarred an attorney for incompetence, lack of diligence, and the failure to communicate with clients.

In re Crews, 159 S.W.3d (Mo. banc 2005) is also instructive as to the appropriate discipline for Mr. Smith, even though it is not a disbarment case. In *Crews*, the attorney in question failed to act competently and diligently in the representation of one client. Mr. Crews only had one instance of prior discipline. This Court suspended Mr. Crews from the practice of law and imposed numerous conditions for Mr. Crews to meet before he could apply for reinstatement. In the instant case, Mr. Smith failed to competently and

[17] This Court suspended Mr. Frank. *In re Frank* is distinguishable from the instant case in that Mr. Smith's clients suffered greater harm than Mr. Frank's clients did.

diligently represent numerous clients. Surely, given the number of clients Mr. Smith harmed and the fact that he has been disciplined on ten prior occasions, his behavior warrants a much more severe discipline than that which Mr. Crews received.

Finally, case law from other jurisdictions supports disbarment. The Supreme Court of Ohio declared in *Cincinnati Bar Assoc. v. Weaver*, 809 N.E.2d 1113, 1116 (Ohio 2004), "taking retainers and failing to carry out the contracts of employment is tantamount to theft of the fee from the client" and disbarment is the only appropriate discipline.

D. THERE ARE MANY AGGRAVATING FACTORS WHICH SUGGEST MR. SMITH SHOULD RECEIVE THE MOST SEVERE DISCIPLINE.

In determining the level of discipline to be imposed, this Court also considers aggravating and mitigating circumstances. *In re Kazanas*, 96 S.W.3d 803, 808 (Mo. banc 2003). In this case the aggravating factors also support Mr. Smith's disbarment. Mr. Smith has an extensive disciplinary history. He has received ten prior admonitions, many for the same issues present in this case and should have been on notice that his practices and procedures needed to improve. ABA Standards 9.22(a).

Mr. Smith demonstrated a dishonest and/or selfish motive. ABA Standard 9.22(b). Mr. Smith took money from the Richard Hicks family, Roderick Criss, Shawn Robinson, Clarita Herrera, and the Ezequiel Flores family. In each of these cases he provided inadequate representation and then refused to refund any of his fees even in instances whereby a court or the Firm encouraged him to do so. There is also substantial

and convincing evidence that Mr. Smith did not cooperate when clients hired new counsel and new counsel requested his assistance in rectifying the harm he had caused the clients. He did not forward the files to new counsel in the Hicks matter, the Robinson matter, or the Shepherd matter even though their attorneys had requested such. Mr. Smith's disregard for his clients' well being demonstrates his dishonest and selfish motives.

The evidence presented at the hearing shows that Mr. Smith had a pattern and practice of: (a) failing to adequately communicate with clients, (b) failing to perform any substantive work for a client, (c) missing court imposed deadlines, (d) failing to appear in court, and (e) failing to take action to address the problems with his law practices and procedures even after being put on notice of the problems via client complaints, prior discipline and recommendations from the managing partner of his Firm. ABA Standards 9.22(c). As set forth above Mr. Smith violated the Rules of Professional Conduct in multiple client representations. ABA Standard 9.22(d).

Mr. Smith did not take responsibility for his wrongful conduct. Mr. Smith's entire defense was based upon the premise that "it was somebody else's fault" and in the Proposed Findings that he submitted to the Panel, he asked the Panel to dismiss the charges against him because OCDC had not proven any violation of the Rules of Professional Conduct. Mr. Smith has not taken any responsibility for his actions. ABA Standards 9.22(g).

Many of Mr. Smith's clients were very vulnerable. ABA Standard 9.22(h). Clarita Herrera sold everything she owned, including her children's bed and her

household appliances, to pay for Mr. Smith's services. The Hicks family had to forgo fertilizing their crops to pay Mr. Smith's fees. Mr. Flores was subject to deportation. Many of Mr. Smith's clients were facing serious criminal charges and they had a Sixth Amendment right to effective assistance of counsel. Ms. Shepherd was caring for an ill grandchild and was living on a disability pension and was in dire need of being reimbursed for her injuries.

Mr. Smith has been licensed since 1995 and practiced continually from 1995 until his suspension in January 2006. ABA Standard 9.22(i). Consequently, he is not new to the practice of law.

Mr. Smith was indifferent to making restitution to his clients. Except for reportedly returning filing fees to Ms. Smith after she testified, Mr. Smith has not made restitution to any of his clients even when the Firm or the courts encouraged him to do so. ABA Standard 9.22(j).

Consequently, the following aggravating factors are present in this case: (a) prior disciplinary offenses, (b) dishonest or selfish motive, (c) pattern of misconduct, (d) multiple offenses, (e) refusal to acknowledge wrongful nature of conduct, (f) vulnerability of victims, (g) substantial experience in the practice of the law; and (h) indifference to making restitution.

Although Mr. Smith asserted at the hearing that there were several mitigating factors present, this Court should not give them any weight. At the hearing, Mr. Smith introduced an unauthenticated March 1993, letter from a physician stating Mr. Smith had been diagnosed with narcolepsy. (**Ex. 126**). The letter further stated Mr. Smith's poor

performance in law school could be attributed, at least in part, to the narcolepsy but that the disease was treatable with neuro stimulants. The letter does not excuse or mitigate Mr. Smith's behavior.

First, while the narcolepsy diagnosis may explain testimony from various witnesses that Mr. Smith fell asleep during various meetings, it does not explain why he failed to attend court, why he failed to adequately communicate with his clients, why he failed to accomplish any substantive work on client matters or why he refused to refund money to clients when he did not complete their representation for them.

Second, ABA Standards provide that in order for a mental disability to be considered a mitigating factor, the attorney must prove that: (a) the mental disability caused the misconduct, (b) the attorney has demonstrated a meaningful and sustained period of successful rehabilitation and the recovery arrested the misconduct and the recurrence of the misconduct is unlikely. ABA Standard 9.3. The comments to the rule further state that direct causation between the disability and the offense must be established and unless the disorder significantly contributed to the conduct the Court should give little, if any, weight to the disability when deciding what discipline to impose.

Mr. Smith did not offer any evidence that: (1) the narcolepsy caused the misconduct, (2) he has recovered from the narcolepsy, or (3) his recovery arrested the misconduct and a reoccurrence of the conduct is unlikely. In fact, the evidence presented during the hearing shows that thirteen years after diagnosis Mr. Smith continues to fall asleep while representing clients even though the doctor providing the diagnosis stated

the illness is treatable. This behavior seems to indicate that Mr. Smith has little concern for his clients and continues to present a risk to his clients.

Mr. Smith did present testimony from various individuals that he had provided adequate representation to them. Mr. Smith also presented testimony from his minister that, as part of the Church's outreach programs, Mr. Smith helped people who had outstanding warrants resolve their legal matters. (**Tr. 687-88**). The fact that Mr. Smith provided satisfactory representation to some clients does not mitigate the fact that there were a substantial number of clients who received incompetent and inadequate representation from Mr. Smith and Mr. Smith appears indifferent to these clients.

At hearing Mr. Smith attributed complaints from clients, judges and other attorneys to the action or inaction of the staff and members of the Firm, i.e. Mr. Smith asserted the other members of the Firm and Ms. Springate sabotaged his practice and caused him to violate the Rules of Professional Conduct.

While it is evident that Mr. Smith did not have a good working relationship with Mr. Fulcher or Ms. Springate, Mr. Smith's assertions about the other members of the Firm and Ms. Springate sabotaging his practice are not credible. First, there was an incentive for the members of the Firm and the staff to assist Mr. Smith's clients in that Mr. Smith's clients brought fees into the Firm and the Firm was struggling financially. Second, several witnesses testified that they spoke with Mr. Smith about his lack of communication and diligence (Rebecca Shepherd, Geraldine Hicks, Shawn Robinson, Richard Sindel). Thus, Mr. Smith had notice of client complaints and Mr. Smith continued to practice with the Firm. Third, as far as missed court dates, testimony was

presented by Judges Mesle and O'Malley that Mr. Smith routinely failed to appear in court long before he joined the Firm. Fourth, there was extensive evidence presented at hearing that Mr. Smith was not diligent in client representations, failed to adequately communicate with clients and routinely missed court appearances before he joined the Firm.[18] Finally, Mr. Smith's extensive prior disciplinary history, which dates back to 1999, shows that Mr. Smith had not performed clients' services in a timely manner, had charged unreasonable fees and had failed to maintain adequate communications with clients prior to joining the Firm. These are the same issues that clients, members of the Firm, and staff complained about while Mr. Smith was with the Firm.

Moreover, even if Mr. Smith's assertions about the other members of the Firm and Ms. Springate sabotaging his practice were credible, this does not excuse Mr. Smith. Rule 4-5.1 provides that a lawyer is responsible for the another lawyer's violation of the Rules of Professional conduct if the lawyer is a partner in the law firm in which the other lawyer practices and knows of the conduct at a time when the consequences can be avoided or mitigated but fails to take reasonable remedial action. Similarly Rule 4-5.3 provides a lawyer shall be responsible for the conduct of a nonlawyer if the lawyer is a partner in the firm where the assistant works and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[18] The Gerrie Herring, Kelly Kirkland, Toninicole Smith, and Jeffrey Gaumer Counts all related to Mr. Smith's actions prior to joining the Firm.

As discussed above, numerous clients, judges, and other attorneys had complained to Mr. Smith about his representation. If the problems with his representation stemmed from the other attorneys and staff in the office, Mr. Smith had a duty pursuant to Rules 4-5.1 and 4-5.3 to take whatever action was necessary to ensure that his clients were protected even if such required him to leave the Firm. Mr. Smith put on no evidence that he took any action to protect his clients. Thus, this Court should not reduce the discipline it imposes because of any mitigating factors. Mr. Smith has engaged in severe misconduct whereby his clients have been greatly harmed. This Court should disbar Mr. Smith in order to protect the public.

CONCLUSION

For the reasons set forth above, this Court should find that Mr. Smith violated Rules 4-1.1, 4-1.3, 4-1.5(a), 4-3.2, 4-3.3(a), 4-1.15(a), 4-1.16, 4-8.1(b), disbar Mr. Smith and tax all costs in this matter against Respondent.

Respectfully submitted,

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ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2007, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

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_____
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 24,125 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

_____
Nancy L. Ripperger

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