IN THE SUPREME COURT
STATE OF MISSOURI

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

INFORMANT'S REPLY BRIEF

OFFICE OF
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STATEMENT OF FACTS

The primary purpose of the "Statement of Facts" is to afford the reviewing court an immediate, accurate, complete, and unbiased understanding of the case. *Kent v. Charlie Chicken, II, Inc*., 972 S.W.2d 513, 514 (Mo. App 1998). Rule 84.04(c) instructs that the "Statement of Facts" shall be a fair and concise statement of the facts relevant to the questions presented for determination and without argument.

Mr. Smith's "Statement of Facts" does not provide an accurate depiction of the case in that it includes numerous references to facts not in evidence, inaccurately summarizes witnesses' testimony and includes numerous arguments. Informant requests that this Court strike Mr. Smith's statements that are unsupported by the record, inaccurate, and/or argumentative. More specifically:

Disciplinary History

Mr. Smith states in his Statement of Facts,

> "The OCDC, which it has been their practice throughout the course of this process, and is still the nature of their conduct with respect to this brief, misstates the evidence and outright lies on some occasions, as the brief misstates the number of admonitions in its Statements of Facts (**Ex. 4, pp. 1-26**). The respondent [sic], according to their recounting has listed fourteen situations where the Respondent was alleged to receive admonitions."

R's Br. 4.

First, this Statement is argumentative and should be struck. Second, Informant's Statement of Facts accurately states the number of admonitions issued to Respondent. The Region IV Disciplinary Committee has issued ten admonitions to Mr. Smith. Inf.'s Br. 8. Informant's Brief then sets out the rule violations, of which there are fourteen. The discrepancy exists because several of the admonitions listed multiple rule violations. (**Ex. 4, pp.1-26**).

Respondent next states that Informant decided not to call John Osgood, the trustee appointed to wind-up Respondent's practices, to testify at the hearing because Mr. Osgood had testified during a deposition that it was the responsibility of Mr. Richard Hicks' former appellate attorney to have requested an extension of time for Mr. Smith to file a petition for certiorari to the United States Supreme Court. R's Br. 5.

There was no evidence presented at the hearing regarding why Informant did not call Mr. Osgood to testify. However, Mr. Osgood did testify at the trial. Respondent called Mr. Osgood to testify. Contrary to Mr. Smith's assertion, Mr. Osgood did not testify that Udashen, Richard Hicks' appellate attorney, should have filed a motion on Mr. Smith's behalf for an extension of time to file a petition for certiorari. (**Tr. 505-50**).[1] Mr. Smith's statements are argumentative, are unsupported by the record, and should be struck.

[1] The transcript of the hearing can be found in the Appendix to Informant's Brief.

Facts Underlying Disciplinary Case

General Information Regarding Mr. Smith's Practice

Mr. Smith states in his Brief that when he joined the Firm all of his personal injury and civil case were transferred to other attorneys in the Firm. R's Br. 6. Mr. Fulcher, the managing partner of the Firm, testified that Mr. Smith's civil and personal injury cases had not been transferred to other members of the firm. (**Tr. 85, 97**). Mr. Fulcher went on to state that when the Firm was formed the partners intended to divide into practice areas but Mr. Smith would not turn over his personal injury files to any of the other attorneys. (**Tr. 85**).

In his Statement of Facts, Mr. Smith states Mr. Fulcher's answers changed between direct examination and cross-examination and he lied to the Panel. R's Br. 7. Mr. Smith failed to support his statement with references to the transcript or specific examples. His statement should be struck.

Mr. Smith states in his brief, "Members of the Firm and staff held secret meetings where the [sic] implemented plans to steal business from the Respondent and create circumstances that would cause clients to express dissatisfaction with the Respondent . . . (**Tr. 660; 676**)" R's Br. 7. Respondent's citations do not support this statement.

Mr. Smith goes on to state,

> "Respondent generated over twenty-six percent of the income generated by the firm for the fiscal year 2004 even though the less than credible testimony from the witnesses for the Informant was that the Respondent spent less than 10 hours

per week at the office and when in the office often spent time watching TV or playing video games."

R's Br. 8. This statement is argumentative and no evidence was presented at hearing regarding the percentage of income Mr. Smith was generating.

Richard Hicks Matter
Count I of the Information

Mr. Smith states, "The Respondent did enter into a written fee agreement with Richard Hicks and his parents." R's Br. 10. Mr. Smith neither presented a written fee agreement at the hearing nor testified that there was a fee agreement, and Ms. Hicks and Mr. Hicks both testified there was no written fee agreement. (**Ex. 6, p.19; Ex. 7, p.16**)[2].

Mr. Smith stated, "On February 3, 2005, Respondent wrote to Mr. Mike Wynn and Gary Udashen, Mr. Hicks' former trial counsel, and requested that Mr. Wynn and Mr. Udashen provide him with any and all documents regarding Mr. Hicks." R's Br. 10. The evidence presented at the hearing was that Mr. Smith wrote to Mr. Wynn. There was no evidence presented that Mr. Udashen ever received a letter from Mr. Smith. In fact, the evidence showed that Mr. Udashen wrote to Mr. Hicks about Mr. Smith's failure to retrieve the file from Mr. Udashen and Mr. Udashen's concern about Mr. Smith filing the petition for certiorari on time. (**Ex. 12, p. 18**).[3]

Mr. Smith states that Mr. Udashen, Mr. Hicks' former appellate attorney, testified that the only thing Mr. Smith should have done differently in relation to representing Mr.

[2] Mr. and Ms. Hicks' depositions can be found in the Appendix to Informant's Brief.

[3] Mr. Udashen's deposition can be found in the Appendix to Informant's Brief.

Hicks was that Mr. Smith should have tried harder to obtain the files from Mr. Udashen. R's Br. 11. Mr. Udashen did not testify to what Mr. Smith purports. Mr. Smith posed several hypothetical questions to Mr. Udashen and Mr. Udashen replied by stating that he did not understand the questions and by testifying that it was the responsibility of the attorney taking over the case to ensure that he obtained the file in sufficient time to prepare the petition for certiorari. (**Ex. 12, pp. 40-44**).

In his Brief, Mr. Smith correctly states that Informant's Brief lacks a citation concerning statements made by Mr. Gary Udashen. R's Br. 11. Informant stated in its Brief,

> "Both John Osgood and Gary Udashen, who are experienced 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**)."

Informant inadvertently failed to include a citation to Mr. Udashen's deposition. The citation for Mr. Udashen's statement can be found at Exhibit 12, pp. 45-46.

In reference to Informant's July 8, 2005, letter to Mr. Smith asking him to provide a response to the Richard Hicks complaint, Mr. Smith states in his Brief, "On July 22, 2005, Mr. Chuck Chionuma, attorney for the Respondent at that time of the lawsuit against his former partners, sent the Informant a letter requesting an extension of time to file a response. (**Ex. 135**)." R's Br. 11. At hearing, Mr. Chionuma testified, "I believe there was an initial request for an extension of time, if my recollection is right. And that,

thereafter, a response was prepared." (**Tr. 563-64**). Mr. Smith goes on in his Brief to reference Exhibit 135, presumably the letter Mr. Chionuma sent to Informant requesting an extension of time to reply. Mr. Smith neither referenced Exhibit 135 at the hearing nor offered Exhibit 135 into evidence at the hearing.

Roderick Criss Matter
Count II of the Information

In footnote 6 of his Brief, Mr. Smith states:

> "Mr. Bradshaw never tried a case while the U.S. Attorney, and after he left the office of the U.S. Attorney, he was hired by Robert Courtney as his original attorney and allowed Mr. Courtney to give a full proffer before having a firm deal in place. Mr. Courtney then hired Wyrsch, Hobbs, Mirakian and Lee as his attorney and fired Mr. Bradshaw. Mr. Courtney received life in prison plus thirty years and is not appealing his sentence."

There was no evidence presented at hearing to support Mr. Smith's footnote and the footnote should be struck.

Mr. Smith states in his Brief,

> "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 Respondent and, based upon his conversation with Respondent Mr. Criss

> cannot provide, nor did he state a reasonable basis as to why he believed that the Respondent would represent him in the Countrywide action. (**Tr. 278-81**). At no point did Mr. Criss present any documentation that would support his unreasonable belief that the Respondent was representing him on the state Court matter, and Mr. Criss did not pay him to represent him in the State Court matter. Mr. Criss stated to the hearing panel that he had documentation to support his claim of being represented by Respondent on the civil matter but to this date has not provided the documentation."

R's Br. 13-14. Respondent's statement is argumentative and untrue. In fact, Mr. Criss testified that he believed Mr. Smith was representing him in the Countrywide civil suit because he gave the Countrywide Petition to Mr. Smith and Mr. Smith said "this is going to cost you more." (**Tr. 300**). Mr. Smith never gave the petition back to Mr. Criss so that he could have other counsel file an answer to the petition. Mr. Osgood, the Trustee appointed to wind-up Mr. Smith's practice, testified that the service copy and an extra copy of the Countrywide petition were in Mr. Smith's files. (**Tr. 539-540**).

Also in relation to his representation of Mr. Criss, Mr. Smith states, "It was in the contract between Mr. Criss and the Respondent's former firm that representation of Mr. Criss was for the criminal cases in Federal Court. (**Tr. 749**)." R's Br. 14. No contract was introduced into evidence and the transcript page that Mr. Smith references does not reference the Roderick Criss matter. Mr. Osgood allowed Mr. Smith to review the files

he took possession of and make copies of anything he needed for his defense in this matter. (**Tr. 540-542**).

Respondent states in his Brief,

> "Respondent met with the agents on the case and the AUSA, Linda Marshall on two separate occasions and talked with them regarding the evidence against Mr. Criss, and after those meetings, informed Mr. Criss of the information conveyed and his possible options for cooperating with the government or whether it would be best for Mr. Criss to proceed to trial." (**Tr. 749**)

R's Br. 14. Informant is unsure where Mr. Smith purports to get support for this statement. Page 749 of the transcript does not reference the Criss matter. AUSA Marshall testified that she only recalled one meeting with Mr. Smith whereby they discussed the evidence against Mr. Criss. (**Ex. 24, p. 46**).

In footnote 8 of his Brief, Mr. Smith states that at trial he was able to present over three-hundred calls from his cell phone to Mr. Criss' phone. R's Br. 14. (**Ex. 128**). At trial, Mr. Smith did introduce into evidence his cell phone records for the period of August 3, 2004, through August 3, 2005. (**Ex. 128**). These records showed 145 calls, not 300 calls, to Mr. Criss' number. Mr. Smith was using this information to support his allegation that he explained to Mr. Criss what his options were and what was the best course of action for Mr. Criss. R's Br. 14-15. Of the 145 calls, 123 calls were for two minutes or less.

Mr. Smith sets forth in his Brief:

> "According to Mr. Criss, Respondent did not advise him of the evidence that the United States Attorney's office had against him, what the likelihood was that he would be convicted if the case went to trial, what type of sentence he could expect to receive if convicted, or any benefits that might exists if he pled guilty early in the proceedings and cooperated with the government (**Tr. 285-87; 296-97**). . . . it defies logic that you would have a conversation with a person on a daily basis, often several times a day, hang out with them, and not ask them to fully explain to you the simple most important issue in your life at the time."

R's Br. 14-15. Mr. Smith's statement about it defying logic that he would speak with Mr. Criss on a daily basis and Mr. Criss would not ask to explain what was going on with his cases is argumentative and should not have been included in Mr. Smith's Statement of Facts.

Shawn Robinson Matter
Count III of the Information

Mr. Smith states, "The parties did enter into a written fee agreement that was from the Respondent's former firm." R's Br. 16. Mr. Smith does not provide a citation for

this statement. In fact, Mr. Robinson testified that he did not enter into a written fee agreement with Mr. Smith. (**Ex. 32, p.** 7).[4] No fee agreement was offered into evidence.

Jorge Herrera Matter
Count IV of the Information

Mr. Smith complains that Informant misstates the evidence by asserting that Mr. Smith only appeared once in court on Mr. Herrera's behalf. R's Br. 18. Informant has reviewed the record and cannot find any evidence that would support that Mr. Smith appeared more than one time on Mr. Herrera's behalf and Mr. Smith referenced no authority for his assertion. There were, however, court appearances where Mr. Smith failed to appear. (**Tr. 225-274; Ex. 38**).

Chris Vidal-Dior McCain Matter
Count V of the Information

In response to Informant's allegation that Respondent did not appear for the June 17, 2005, hearing, Mr. Smith states,

> "Respondent called the Court clerk and indicated that he would like to continue the case and was directed to send the motion in. Respondent 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 Respondent faxed to

[4] Mr. Robinson's deposition can be found in the Appendix to Informant's Brief.

> the prosecuting attorney's office was not filed with the court, in fact, both copies of the continuance request were sent to the Buchanan County Prosecuting Attorney's Office. (**Tr. 486, 488**). Respondent did not appear on June 17, because the clerk indicated that the continuance would go before the Judge and the Court would let the Respondent know of the Judge's decision later in the day . . .
>
> * * *
>
> Judge Robb reset the hearing to occur on July 5, 2005, and Respondent failed to appear for the July 5 hearing, because he was not notified of the hearing until after it occurred." (**Tr. 491-492**).

R's Br. 20-21. Informant has reviewed the record and Mr. Smith's citations and cannot find support in the record for his statements that: (1) he called the court clerk and was directed to send the motion to the court; (2) a second copy of his motion went to the prosecutor's office instead of the court; (3) he failed to appear on June 17 because the clerk indicated that the continuance would go before the Judge and the Court would let the Respondent know of the judge's decision later in the day; and (4) Respondent failed to appear for the July 5 hearing because he was not notified of the hearing until after it occurred. These statements should be struck from the record.

Mr. Smith also states that he appeared timely for his client's hearing on July 19, 2005, and that Informant misrepresented to the court that he arrived late. He cites to

Exhibit 41, p. 8 for support for his statement. R's Br. 22. Exhibit 41, page 8 is the criminal docket sheet for the July 19, 2005, hearing and contains a notation that "defense counsel appears late" which does in fact support Informant's statement that he arrived late for court on July 19, 2005.

Judge O'Malley's Testimony
Count VI of the Information

Mr. Smith states that Judge O'Malley testified that he was a good lawyer and was a rising star. R's Br. 23. Judge O'Malley did testify that Mr. Smith was a good lawyer when he started practice. He also testified that he did not ever recall Mr. Smith making a timely appearance for a criminal "A" docket call and Judge O'Malley ran the docket for many years. Judge O'Malley further testified that he took Mr. Smith aside several years ago and told him, "Come on, you've got to start doing stuff. You have to file pleadings and show up and be on time. Don't be one of these lawyers that does this." (**Tr. 402**). Judge O'Malley went on to testify that Mr. Smith could have avoided the disciplinary hearing if he had only taken Judge O'Malley's advice. (**Tr. 402**).

Ezequiel Flores Matter
Count VIII of the Information

Mr. Smith states that Mr. Fulcher's statement that the Firm encouraged Mr. Smith to return the fees he had received from the Flores family but Mr. Smith did not do so, was not plausible because he was a member of the Firm at the time the Firm refunded money to the Floreses and the Firm could have made a full refund to the Floreses by taking the money out of his payouts from the Firm. R's Br. 25. In fact, Mr. Fulcher did not testify

as to when the Firm made a refund to the Flores family and that such may have occurred after Mr. Smith was no longer a part of the Firm.

Murtaza Gadit Matter
Count XI of the Information

Mr. Smith states that this Court should dismiss this Count because Mr. Gadit did not file a complaint with Informant. R's Br. 28. This statement is argumentative. In any event, Informant has authority to investigate matters even if the client has not complained about the matter. Rule 5.08(a) specifically provides, "The chief disciplinary counsel has the power, with or without complaint, to investigate any matter of professional misconduct."

Homma Shaffee Matter
Count XIII of the Information

Mr. Smith states that Mr. Fulcher, Informant's witness, was not forthright in his statements to the Panel and "outright lied about the sequence of events that occurred" concerning the representation Mr. Smith provided Ms. Shaffee. R's Br. 28. Mr. Smith goes on to state that after he filed her pleadings, he withdrew as her attorney and the case was transferred to the other members of the Firm to handle. R's Br. 29. Mr. Smith's statement is argumentative as to Mr. Flucher's testimony. It is also inaccurate. The docket sheet does not show that Mr. Smith ever filed a motion to withdraw in the matter. (**Ex. 62, pp. 1-3**). Mr. Smith joined the Firm in February 2004. (**Tr. 120**). By that time, the Shaffee case had been outstanding for fourteen months. (**Ex. 62, p. 1**). On January 31, 2004, defense counsel in the Shaffee matter filed a motion to strike Ms. Shaffee's pleadings because both Mr. Smith and Ms. Shaffee failed to attend Ms. Shaffee's

deposition. (**Ex. 62, pp. 11-14**). On January 31, 2004, defense counsel also had a Motion For Summary Judgment outstanding alleging Mr. Smith had named the wrong parties. Mr. Smith had not responded to the Motion For Summary Judgment even though the time for a response had already expired. (**Ex. 62, pp. 1-4, 25-28**). The Court dismissed Ms. Shaffee's action on February 26, 2004, when Mr. Smith failed to appear for the trial on the matter. (**Ex. 62, p. 4**). Thus, within a few weeks of Mr. Smith joining the Firm, the Court had dismissed the case for Mr. Smith's failure to prosecute.

Gerrie Herring Matter
Count XIV of the Information

At the hearing, Mr. Herring that he did certain construction work on a garage Mr. Smith was building as payment for Mr. Smith's legal fees. (**Tr. 139, 141**). Mr. Smith presented testimony from Mr. Emanuel Kind, Jr., a contractor, and Ms. Glenda Smith, Mr. Smith's wife, that Mr. Herring did not do any work on Mr. Smith's garage. (**Tr. 638-40, 677-78**). In its Brief, Informant pointed out that Mr. Smith's response to Mr. Herring's complaint contradicted Mr. Kind's and Ms. Smith's testimony in that Mr. Smith admitted Mr. Herring did do certain work on Mr. Smith's garage but stated he was not happy with the quality of the work. Inf.'s Br. 40. In Mr. Smith's Brief, Mr. Smith states: (1) he discussed the quality of Mr. Herring's work with him; (2) when the work did not improve he hired Mr. Kind; and (3) after Mr. Smith hired Mr. Kind, Mr. Herring came and framed part of the building but the quality of the work was not acceptable. R's Br. 31. None of Mr. Smith's statements were in the record and should be struck from Mr. Smith's Brief.

In his Brief, Mr. Smith states that he "was properly allowed to withdraw from the representation of Mr. Herring after filing the appropriate motion to do so." R's Br. 31. Mr. Smith cites to page 164 of the Transcript in support of his statement. Page 164 of the transcript does not address Mr. Smith withdrawing from the case and Mr. Smith's statement should be struck for lack of support in the record.

Rebecca Shepherd Matter
Count XVIII of the Information

Respondent states that Informant misstates the evidence by alleging "From February 2003 until February 2004, Mr. Smith spoke with Ms. Shepherd only three times." Mr. Smith goes on to point out that he did not represent Mr. Shepherd until after she had her accident in October 2003." R's Br. 32. Informant's Brief has a typographical error in it. Informant's Brief should read, "From February **2004** until October 2004, Mr. Smith spoke with Ms. Shepherd only three times." (**Tr. 579-81**).

Mr. Smith sets forth in his Brief that Informant incorrectly infers that he set up a meeting with the claims adjuster a month after Ms. Shepherd filed a complaint with Informant regarding Mr. Smith's representation. R's Br. 32. He goes on to state that the Firm was in control of the case until he was voted out in April 2005 and he then resumed the case and set up the meeting with the adjuster after that point, almost a full year after Ms. Shepherd filed her complaint. R's Br. 32.

Mr. Smith's statements are unsupported by the record. The fee agreement Ms. Shepherd signed on March 17, 2004, stated she was hiring Mr. Smith as her attorney to prosecute her claim against AMC Theatres and that Mr. Smith was a member of the firm

of Fulcher, LaSalle, Brooks, and Smith, P.C. It does not state that Ms. Shepherd was hiring the Firm to represent her. Similarly, Mr. Smith's July 7, 2004, response to Ms. Shepherd's complaint does not state that after February 2004 some other attorney with the Firm was assigned the case. (**Ex. 73**). Furthermore, the record does support Informant's statement that in response to Ms. Shepherd's complaint Mr. Smith scheduled the meeting with the claims adjuster shortly thereafter. The transcript provides:

> "Q. Now, after you filed that complaint, did Mr. Smith's services improve?
>
> A. He made a valid attempt, and that was the first time we met after that. He came and picked me up and took me to his office for our first meeting with the claims adjuster . . . ."

(**Tr. 586-87**). Informant did not find any evidence in the record which supports Respondent's statement that the meeting with the claims adjuster occurred after April 15, 2005. In fact, the record shows that Ms. Shepherd fired Mr. Smith on April 8, 2005, a few days before he was voted out of the Firm on April 15, 2005. (**Ex. 71**).

Procedural History of Case

Mr. Smith complains that Informant included Exhibit 37 with the record and referenced it in its Brief. 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 on the grounds that the Rules of Civil Procedure only allow the use of depositions at trial and do not address the use of sworn statements at trial. Informant included Exhibit 37 with the record because this Court's review is de novo and

as such this Court has the authority to decide whether or not Exhibit 37 should be admitted into evidence. *In re Wiles*¸107 S.W.2d 228, 229 (Mo. banc 2003).

Mr. Smith also argues in this Statement of Facts that the DHP did not use any independent analysis and only the presiding officer for the DHP signed the Findings of Fact, Conclusions of Law And Recommendation For Discipline. R's Br. 33. Mr. Smith previously raised this issue in a Motion for Hearing Pursuant to Rule 5.24(d) whereby Mr. Smith asked this Court to dissolve the interim suspension. In response to the motion, Informant filed suggestions in opposition where Informant attached and incorporated by reference an affidavit from Mr. Dale Youngs, the Presiding Officer of the DHP attesting:

(1) Immediately after the hearing concluded the Panel Members met and discussed their initial impressions regarding the evidence adduced at the hearing. It was the general view of the Panel that the OCDC had met its burden in showing that Respondent had committed a number of serious violations of the Rules of Professional Conduct and that disbarment might be an appropriate discipline. Before making a final decision about particular violations of the Rules of Professional Conduct and the recommended discipline the Panel wished to review the parties post-hearing submissions;

(2) Upon receipt of the parties' proposed findings, Mr. Youngs forwarded both documents to the other Panel Members;

(3) Mr. Youngs then thoroughly reviewed both sets of proposed findings, carefully reviewed the transcript and his notes from the hearing;

(4) It was Mr. Youngs' opinion that the OCDC's proposed findings more closely reflected the evidence adduced at the hearing. Consequently, Mr. Youngs used the OCDC's proposed findings as a starting point for the Panel's Decision but he made numerous changes to the OCDC's proposed findings so as to better reflect the views of the Panel;

(5) Upon completion of his draft decision, Mr. Youngs sent his draft decision to the other Panel Members for their comments and/or suggested changes. Panel Member James Humphrey signed the signature page and returned it to Mr. Youngs without requesting any revisions. Panel Member Annette Johnson informed Mr. Youngs by e-mail that she agreed with his draft decision. Based upon prior communications between Mr. Youngs and Ms. Johnson, Mr. Youngs signed Ms. Johnson's name to the decision and notated that he was signing on her behalf. Mr. Youngs then forwarded the Panel's Decision to the Chair of the Advisory Committee and the parties.

See Affidavit of Dale Youngs attached to Informant's Suggestions in Opposition to Respondent's Motion for Hearing Pursuant to Rule 5.24(d) filed *In re Smith*, SC87372. This Court denied Mr. Smith's motion. Mr. Youngs' affidavit establishes that the DHP used independent analysis to reach a decision and there was nothing improper with Mr. Youngs signing Ms. Johnson's name to the decision

POINTS RELIED ON

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

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

DeGraaff v. Fusco¸660 A.2d 9, 12 (N.J. Sup. 1995)

In re Forge, 747 S.W2d 141, 145 (Mo. banc)

Rule 4-1.5(c)

Rule 4-8.3(a)

Rule 5.08(a)

Rule 5.225(a)

Rule 84.04(f)

ARGUMENT[5]

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.

Mr. Smith asserts that this Court should not disbar him because there is no proof of his intent to defraud clients. R's Br. 35. Intent is an element of fraud and it can be proven either by direct evidence or by circumstantial evidence by which intent can be inferred. *Bauer v. Adams*, 550 S.W.2d 850, 853 (Mo. App 1977). The circumstantial evidence presented by Informant does show that Mr. Smith engaged in fraud. As

[5] Mr. Smith did not identify which of Informant's Points Relied On he was addressing with his arguments as required by Rule 84.04(f). Informant has responded to Respondent's arguments, under the Point Relied On that it believes he was addressing with his specific argument.

discussed in Informant's brief, at the hearing numerous clients, attorneys and judges testified that Mr. Smith failed to provide adequate representation to his clients and 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. When these failures are coupled with Mr. Smith's refusal to mitigate the harm he caused his clients by returning unearned fees or even turning over his clients' files to their new counsel, the circumstantial evidence clearly supports the conclusion that Mr. Smith engaged in fraud.

Mr. Smith states that Informant cites to *In re Kazanas*¸ 96 S.W.3d 803 (Mo. banc 2003), as a case which supports Mr. Smith's disbarment. Mr. Smith then goes on to argue that *Kazanas* was not factually similar to his case in that the case involved an attorney embezzling money and not paying taxes on it. R's Br. 36-37. Mr. Smith misstates Informant's assertions. Informant cited to *Kazanas* merely for the proposition that when determining the level of discipline to impose, this court should also consider aggravating and mitigating circumstances. Inf.'s Br. 94.

Mr. Smith suggests that *In re Wiles*, 107 S.W.3d 228 (Mo. banc 2003), is instructive as to what discipline this Court should impose against him. R's Br. 40. *In re Wiles* was a reciprocal discipline action in which this Court suspended Mr. Wiles' license indefinitely with leave to apply for reinstatement after six months, stayed the suspension and placed Mr. Wiles' license on probation. The underlying facts of the Wiles matter are very different from that of the instant case. Mr. Wiles was licensed in both Kansas and Missouri. Kansas brought a disciplinary action against Mr. Wiles finding that he violated the Rules of Professional Conduct relating to diligence, communication, fees,

safekeeping of client property and competence. The Kansas Supreme Court publicly censured Mr. Wiles. *See In re Wiles*, 58 P.3d 711 (Kan. 2002). This Court did not believe a public reprimand was harsh enough in that Mr. Wiles had received prior admonitions in Missouri for most of the same rule violations in the past and, accordingly, this Court issued the more severe discipline of a stayed suspension with probation. What Mr. Smith fails to acknowledge is that the Kansas action resulted from Mr. Wiles' handling of one client matter and involved five violations of the of the Rules of Professional Conduct. *Id*. In the instant case the DHP found that Mr. Smith committed 56 violations of the Rules of Professional Conduct and there were many clients involved. It would be illogical to suspend Mr. Smith's license and stay the suspension given the number of clients involved and the severity of the misconduct. Furthermore, Rule 5.225(a) provides that an attorney is eligible for probation only if he is unlikely to harm the public during the probation and can be adequately supervised. Mr. Smith is not eligible for probation in that it is likely that he would harm the public.

In its Brief, Informant cites to *Cincinnati Bar Association v. Weaver*, 809 N.E.2d 1113 (Ohio 2004) for the proposition that taking retainers and failing to carry out the contracts of employment is tantamount to theft of the fee from the client. Mr. Smith asserts the holding of C*incinnati Bar Association* should not be applied to him because in that case the attorney was charging an hourly fee and in Mr. Smith's cases the fees were paid to his firm and were non-refundable. R's Br. 37, ftn. 12. The fact that Mr. Smith's fees were nominally "non-refundable" does not allow Mr. Smith to retain the fee if the fee is not fair and reasonable to the client. While Missouri courts have not ruled that

nonrefundable retainers are unethical *per se,* all fee arrangements must be reasonable and fair to the client. Rule 4-1.5(c). Any unused portion of a nonrefundable retainer must be returned to the client if events make it unconscionable for the attorney to keep the fee. *DeGraaff v. Fusco*¸660 A.2d 9, 12 (N.J. Sup. 1995). As discussed in Point V of Informant's Brief, 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's fees were inherently unreasonable. Also, the fact that the clients paid the fees to the Firm does not absolve Mr. Smith from discipline. The clients in question were represented by Mr. Smith and he retained responsibility for ensuring that his fees were reasonable based upon the service he provided.

Mr. Smith claims that this Court should not disbar him because Ms. Shaffee, the Floreses and Mr. Gadit did not make complaints against him and that the Firm illegally copied these files and sent them to Informant. R's Br. 44. Respondent's claim is without merit. Informant has authority to investigate matters even if the client has not complained about the matter. Rule 5.08(a) specifically provides, "The chief disciplinary counsel has the power, with or without complaint, to investigate any matter of professional misconduct." Pursuant to Rule 4-8.3(a), Mr. Fulcher, managing partner of the Firm, had a duty to report Mr. Smith's activities to Informant. Mr. Fulcher and Ms. Springate only testified to matters in which they had personal knowledge and Informant corroborated their testimony by obtaining the court file in the Shaffee and Flores matters. (**Tr. 68-73; 77-79; 80-85; Exs. 46, 62**). As to the Gadit matter, Mr. Fulcher and Ms.

Springate provided Informant with memos or pleadings they had drafted regarding their dealings with Mr. Smith. (**Tr. 458-61; Ex. 58**).

Mr. Smith also argues that he should not be disbarred because in the majority of the reported Missouri disciplinary cases, this Court has imposed disbarment only for the theft of client funds or when the attorney has been convicted of a felony. Mr. Smith's assertion is unsound. First, as set forth in Informant's initial Brief, Mr. Smith's conduct was tantamount to theft from his clients. Second, while this Court has routinely disbarred attorneys who stole from their clients or were convicted of felonies, this Court has never limited disbarment only to cases in which the attorney stole from the client or where the attorney was convicted of a felony.

Finally, Mr. Smith asserts that he should not be disbarred because John Osgood, the trustee appointed by this Court to windup Mr. Smith's practice, testified that there was no basis for his appointment and that Mr. Osgood testified that the allegations of professional misconduct made against Mr. Smith by Informant were "primarily without merit." R's Br. 40. Mr. Osgood did not testify to what Respondent asserts. Mr. Osgood testified:

(1) he requested trust records from Respondent and the only thing Respondent produced was a bank statement for one month, that Respondent did not have any ledger or accounting records for his trust account and Respondent could not identify to whom the funds in his trust account belonged (**Tr. 531-532**) and

(2) He did not review Respondent's files to assess whether there were any violations of the Rules of Professional Conduct. Rather he reviewed the files to determine who the client was, to what address he should address correspondence to the client regarding the return of the client's files, and what action he should take to assist the client in obtaining new counsel (**Tr. 514, 519-20, 534-35**).

In an attempt to persuade this Court to order discipline other than disbarment, Respondent has provided inaccurate information to this Court regarding Mr. Osgood's testimony. Respondent's assertions in his Brief demonstrate that the public will be at risk if Respondent is allowed to retain his license and establish additional aggravating grounds for disbarring Mr. Smith. *See In re Forge*, 747 S.W2d 141, 145 (Mo. banc) (attempts to mislead the disciplinary committee require imposition of more severe discipline.)

CONCLUSION

For the reasons set forth in Informant's Brief and Reply Brief, this Court should find that Respondent 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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ATTORNEY FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2007, two copies of Informant's Reply Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

Roderick E. Smith
808 W. 99th Street
Kansas City, MO 64114

_____
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 6,715 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