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

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| **IN RE:** | ) | |
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| **RODERICK E SMITH,** | ) | **SUPREME COURT #88244** |
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# RESPONDENT'S BRIEF

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**PROCEEDING PRO SE**

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## STATEMENT OF JURISDICTION

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. Facts Underlying Disciplinary Case

## STATEMENT OF FACTS

### Respondent History

Respondent was admitted to Missouri's Bar on December 20, 1995. The Respondent handled approximately over 5500 cases during the period between February 1996 and January 23, 2006 when this Court entered an order of Interim Suspension. Of those over 5500 cases the Respondent has had fifty complaints filed against him that resulted in the Region IV Disciplinary Committee issuing ten admonitions to the Respondent. 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, according to their recounting has listed fourteen situations where the Respondent was alleged to receive admonitions. The Respondent received his first admonition in 1999 and he received his most recent admonition in 2002.

On January 3, 2006, Informant filed an Information for Interim Suspension of

Respondent's license and Motion For Appointment of Trustee. On January 23, 2006, this honorable Court interim suspended Respondent's license. (Ex. 1, par. 4; Ex. 2, par. 4). The Court appointed attorney John Osgood as a trustee to wind-up Respondent's practice. Mr. Osgood testified on behalf of the Respondent in this matter as the Informant decided not to call the Trustee who was appointed by this Court to receive the files of the Respondent and dissolve his practice. The Informant made its decision not to call the Trustee, Mr. Osgood, after the Informant took the deposition of the Trustee, who testified in the deposition and in the hearing held before the panel that the Respondent, especially with respect to the Hicks matter, did all that he could have done, and in fact stated that he was of the opinion that Mr. Udashen, the very experienced and decorated attorney who held the file and had sent the Respondent a letter and whom the Respondent directed correspondence be sent, requesting the file be sent before he traveled to Texas to pick it up personally, should have sent in the request for an extension of time since he was acutely aware of the rules and the impending deadline for filing an extension or the motion. (Tr. 519-549). Respondent's license is currently interim suspended pursuant to this Court's order of January 23, 2006.

General Information Regarding Respondent's Practice

From February 1996 until January 2004, Respondent was a solo practitioner. Respondent focused his practice predominately on criminal law and family law matters. (Tr. 428). Respondent also handled some personal injury matters. (Tr. 665). In February 2004, Respondent, along with several other attorneys, formed the firm of Fulcher, LaSalle, Brooks, Smith & Daniels, L.L.C ("the Firm"). . The Firm struggled

financially after its inception because three of the five partners consistently failed to earn the minimum amount to pay the bills or the amount of money that they stated they were making when the potential partners discussed the formation of the firm and the amounts provided in their financial statements.(Tr. 743). Further, the Respondent and the other partners created the firm for the purpose specializing in a particular legal discipline. As a result of the formation of the firm, the Respondent was to concentrate on Criminal and Family Law, and therefore reassigned all of his Civil and Personal Injury cases to the firm at its inception. (Tr. 741)

While Respondent 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, the paralegal assigned to work with Respondent, because Mr. Fulcher consistently misrepresented the truth and engaged in sabotage of the law practice of the Respondent. During the time that the Respondent was a member of the firm, approximately fourteen(14) months, he received the complaints that the Informant presented to be the most serious. The Respondent asserts that the reason that there were more complaints during this time frame, and the nature of the complaints supports the position of the Respondent that the firm sabotaged his practice and failed to provide him with the support that was extended to other partners and necessary to service the clients of the firm. Throughout this procedure, the Informant has presented their case as if the Respondent was acting independently. The Respondent presented testimony from former clients that setforth evidence of the sabotage that the firm engaged in.(Tr. 433) Testimony from Mrs. Thomas-Spears, and Ms. Sullivan established the actions towards

the clients of the Respondent that he serviced through the firm and that he had established prior to joining the firm. The actions of the Informant's witness, Ms. Springate were discussed by those two witnesses in particular, and by the testimony of the Respondent's brother, his wife, and his mother. (Tr.) Informant's witness, Darren Fulcher also helped to create in particular, the Hicks situation by failing to provide the funds to travel to get the files from Texas in the Hicks case. (Tr. 103, 618; 655). In fact, his answers between direct examination and cross-examination changed as he lied to the panel. Ms. Springate consistently failed to perform the duties assigned to her by Respondent, was rude to his family and clients that were calling to speak with him, and did not maintain the files of the Respondent or the calendar of the Respondent.(Tr.645-680)

While Respondent was a member of the Firm:

(1) Members of the Firm and staff held secret meetings where the implemented plans to steal business from the Respondent and create circumstances that would cause clients to express dissatisfaction with the Respondent; and remove and hide information from files that had previously been in the file (Tr. 660;676)

(2) He turned over all of his personal injury cases to the firm and referred all other personal injury cases that came to him into the firm (Tr.643-701 )

(3) His files, along with all the other partners' files were merged into a centralized filing system and all filings and documents should have been placed in each file by the staff, just as every other partner's was. (Tr. 29-107)

(4) That Respondent generated over twenty-six percent of the income generated by the firm for the fiscal year of 2004[1] 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; (Tr. 34; 423;670-770).

(5) The informant's witness testified that because of the client complaints he received, he took over or asked other members of the Firm to take over approximately fifty of the Respondent's cases; however he could only name one case, even when asked for specific names (Tr. 37-106) and

(6) Although the Informant's witness Darren Fulcher's testimony alleged many instances where he talked to the Respondent about various issues and he acknowledged that he believed the issues he claimed to talk to the Respondent about to be essential, he could only provide written notification to the Respondent that he was allegedly violating the terms of the partnership agreement on one occasion, though he claimed to be building a case to remove the Respondent from the partnership (Tr. 37-106) (Ex. 96).

(7) On April 15, 2005, the Respondent was voted from the Firm by unanimous vote of the partners. (Tr. 46, 86). The Respondent did not move from the office because he had a contractual right to be in the office space. He signed a lease that obligated him to a five year term and the Respondent

[1] The Respondent was responsible for twenty six percent of the income in 2004, even with funds that were returned to clients, like the Flores family.

relinquished the office space after the leasing company released him from his contractual obligation in March of 2006(Tr. 740-775)(Respondent exhibit 134)Respondent filed suit against his former partners and Elizabeth Springate.in July 2005, after they refused to return his phone number to him so he could move, or in the alternative to compensate him for the phone number, and for other issues. (Tr. 86- 90; 560-61). (Respondent exhibit 133)

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). The Respondent talked to Mr. Hicks after Mr. Hicks received a recommendation from another inmate regarding the Respondent. Prior to taking the case, Respondent informed Mr. Hicks that he did not practice in front of the Supreme Court of the United States but that he could get licensed before the Court. After the conversation with the Respondent, Mr. Hicks requested that his mother, Ms. Geraldine Hicks, contact Mr. Smith about reviewing the case and preparing a petition for certiorari to the United States Supreme Court on his behalf. (Ex. 6, p. 2; Ex. 7, pp. 4-6).

In early January, 2005, Mrs. Hicks contacted Respondent about reviewing her son's case and preparing the petition for certiorari on her son's behalf. Respondent stated: (a) he would take the case, (b) his fees would be $25,000 and (c) he would require $10,000 be paid up front and the remainder could be paid after the motion was

filed and accepted for argument. The Respondent did enter into a written fee agreement with Richard Hicks and his parents. On or about January 25, 2005, Respondent received a $10,000 check from Mr. Hicks' parents.

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. 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. Further, Richard Hicks wrote Mr. Udashen a letter prior to the letter written to the Respondent and directed him to send the files in his possession to the Respondent.(Ex. 8)[2].

On or February 26, 2005, Respondent met with Mrs. Hicks in Dallas at the hotel that he was staying because he was feeling ill and informed Mrs. Hicks of this fact while they were meeting and also informed Ms. Hicks that he would be seeking an extension of time because he had just received the file, and had Ms. Hicks bring documents in her possession, which she did, and gave to the Respondent for his review.[3]. Mrs. Hicks reimbursed the Respondent money he had paid to cover his travel expenses.[4] (Ex. 6, pp. **9-10; Ex.** 5). He also went to Mr. Udashen's office and picked up Mr. Hicks' files.

[2] The Respondent directed Ms. Springate to send out letters to both Mr. Wynn and Mr. Udashen, and after he didn't receive a response, went to Texas to obtain the files himself. He initially was scheduled to visit both attorneys while in Texas but became sick with bronchitis while on the way to Texas and Mr. Wynn's office was located about 90 miles away from Dallas.

[3] The information provided by Ms. Hicks was primarily transcripts and material from the trial Mr. Wynn presided over.

[4] Respondent was forced to pay the money from his own funds to travel to Texas to obtain the file after he was not provided the file by Mr. Udashen, and after discovering from Mr. Wynn's office that there was over 50 boxes of materials in their possession, and the firm refused to provide the expense money and the client could not send it initially.(Tr.37-106)

(Ex. 12, p. 12). Mr. Udashen testified in a deposition for the Informant that he was concerned that the file had not been obtained by Respondent and that he knew that Mr. Hicks would be prejudiced if the brief was not filed but he neither sent the file as he had been directed to by Mr. Hicks in a letter sent to Mr. Udashen, nor did he file an extension. Further, in questioning posed to him by the Respondent, Mr. Udashen indicated that the only thing he would have done differently would have been to try harder to obtain the file from him.(ex.12 pp. 40-50) Mr. Udashen also made the extraordinary claim that he could have reviewed all the transcripts and pleadings and prepared the Writ of Certiorari in one (1) day!(Ex. 12 p.45) Informant as has been their practice continues to misstate the testimony that was elicited at the hearing. There is no testimony from Mr. Udashen on the cited pages of the transcript that relates to the time frame to submit a Writ of Certiorari.[5]

> "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).**"

On June 27, 2005, Mr. Hicks made a compliant to Informant. (Ex. 4) 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). On July 22, 2005 Mr. Chuck Chionuma, attorney for the Respondent at that time on the lawsuit against his former partners, sent the Informant a letter requesting an extension of time to file a response. (Ex 135) In his response sent on or about August 24, 2005, in the cover letter accompanying the

[5] In fact, Mr. Osgood indicates that he would not have felt comfortable filing a motion to the Supreme Court of the United States with only seven days to do it.(Tr. 518)

response, Mr. Smith's attorney apologized for the delay in making the response past the time initially requested.(Tr. 16-17; Ex. 4, p. 101-119; Ex. 4a; Ex.136) .

Roderick Criss Matter
Count II of the Information

Respondent 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 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, Respondent was initially only hired by Mr. Criss to attend Mr. Criss' deposition on February 18, 2004.(Tr. **281; Ex.** 27). Jean Paul Bradshaw, the former United States Attorney for the Western District of Missouri[6], 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

[6] 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 now appealing his sentence.

matter that is related to pending or possible criminal prosecution. Respondent would indicate to Mr. Criss during the questioning whether he should respond to the question or invoke his 5th Amendment rights.(Tr. 341-42).

Respondent received various items of correspondence from Ameriquest's attorney concerning the Ameriquest civil litigation.(Tr. 542-46).

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 Respondent and, based upon his conversations with Respondent, can not 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.[7] 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.

Mr. Criss paid Respondent $10,000 in fees over several months. **(Tr.** 277). 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).

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). Mr. Criss was informed of his possible options and did not determine that he wanted to move forward with a plea agreement until he was informed by the Respondent that Mr. Calvert was going to plead guilty. (Tr. 277-300)

As is admitted by the Informant[8], the respondent spoke frequently with Mr. Criss, and the Respondent testified that he provided Mr. Criss with analysis regarding his circumstances and possible outcomes if he entered a plea or if he took the matter to trial. (Tr. 285-87; 296-97). 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 sentence he could expect to receive if convicted, or any benefits that might exist if

[7] It should be noted that the Judgment in the matter came approximately nine months after Mr. Criss stated he fired Mr. Smith and hired Mr. Bradshaw

[8] At the hearing before the panel, Respondent was able to present over three-hundred calls from his cell phone to that of Mr. Criss, but the billing did not allow for the recording of the number of times that Mr. Criss called the Respondent.

he pled guilty early in the proceedings and cooperated with the government.(Tr. 285-87; 296-97). Respondent testified to the contrary on this matter, 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 single most important issue in your life at the time. The conversations between the Respondent and Mr. Criss usually centered on what he should do and what his chances were to prevail at trial. (Tr. 761-62). While it is true Mr. Criss had limited experience with either civil or criminal litigation and did not know what should occur when he had an attorney to represent him, he asked the Respondent about issues for himself and others consistently. (Tr. 730-760).

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 had his girlfriend pay Respondent $7,500 for representation (Ex. 32, pp. 7-9; Ex. 33). Respondent's total fee was to be $15,000 (Ex. 32, pp. 7-9). Respondent requested that $7,500 be paid as a non-refundable initial retainer with 60 days to pay the remaining fees. The parties did enter into a written fee agreement that was from the

Respondent's former firm.

Respondent, on the same day that he provided Mr. Robinson a copy of all the other discovery presented to him in the case, 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 did not have the correct version of media player. (Ex. 32, pp.1-59). Respondent testified that at a later date he did listen to the information on the CD. (Tr. 757). Later, Mr. Robinson asked Respondent about what was on the CD, and Respondent shared with him the content of the wire taps.(Tr. 757) Informant points to testimony by Mr. Robinson and states that he did not deny he was involved in the drug conspiracy, he did dispute his level of involvement in the conspiracy. The problem with that approach is that he was giving a proffer, where his sole purpose was to provide the government with truthful and exhaustive testimony of everything he did related to the charges. It would provide him no additional benefit to misrepresent anything in a proffer and it would serve no purpose for the Respondent to persuade Mr. Robinson to lie as he alleged in his deposition.(Ex. 32, pp.1-59). Mr. Robinson's belief that the wiretaps would provide the Respondent with valuable information about Mr. Robinson's actual level of involvement in the conspiracy was moot at the point he decided to do the proffer , unless he further determined later to not accept the proffer and proceed to trial.(Ex. 32, pp.1-59).

When Mr. Robinson asked Respondent about the federal sentencing guidelines and where he would fall within the guidelines if convicted, Respondent informed Mr.

Robinson what the potential outcomes would be based upon the information provided by Mr. Robinson, and the government.(Ex. 32, p. 26). In it's brief, the Informant uses the old fallback and virtually difficult to prove, except in the previous Count, that Respondent failed to make phone calls to Mr. Robinson. The glaring and obvious omission in their argument is that Mr. Robinson was at the county jail and there was very little opportunity to call him, however, the Respondent did speak to Mr. Robinson and Patricia, his girlfriend on every occasion that they called.

On June 8, 2004, Mr. Robinson fired Respondent because he was not satisfied with the representation being provided by Respondent.(Ex. 32, pp. 20-23). Mr. Robinson requested a refund of Respondent's unearned fees and Respondent agreed to make such refund if Mr. Robinson had any refund coming, which he did not. (Ex. 32, pp. 20-23). Mr. Robinson wrote to the respondent and indicated that he believed that the Respondent was only entitled to $2,000 of the $7,500 paid, even though he was aware that the Respondent had driven between Kansas City and St. Louis on at least five occasions and that he had visited Mr. Robinson and appeared with him on two proffer de-briefings and at least one Court appearance to that point. For the travel time between Kansas City and St. Louis for the four trips we are talking about thirty-two hours at $200 per hour and at least another twenty-five hours between the proffers, visits with Mr. Robinson and meeting with his appointed counsel to obtain the file.(Ex. 35).

Mr. Robinson's new counsel, Richard Sindel, spoke with Respondent on July 3, 2004, and wrote to Respondent on July 9, 2004, and July 27, 2004, requesting that

Respondent provide Mr. Sindel with Mr. Robinson's file. (Ex. 32, pp. 10-16; Exs. 30, 31). Respondent directed Elizabeth Springate to send the file at Mr. Sindel's request. Respondent 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).

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 Respondent $10,000 of the $15,000 to defend her husband against the charges. (Tr. 227).

As has been the case throughout the entire process, the Informant takes an opportunity to misstate the evidence, the Respondent appeared in Court with Mr. Herrera on at least four occasions, the Informant blatantly misrepresents the evidence by stating "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." The true part of the statement is that the strategy was to go to trial, the rest of the statement is a total and absolute lie.(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).The Informant indicates that Mr. Herrera was a good candidate for downward departure because he played a minor role in the conspiracy. Mr. Herrera's situation was also a good situation for trial because of the lack of evidence against him, the fact that he would be deported if he entered a plea or was convicted, and the factual basis related to the case. (Tr. 224). Ms. Connelly did not offer downward departure to Mr. Herrera because his lawyer, Respondent, never approached her about it or initiated any negotiation with her on Mr. Herrera's behalf. The reason no plea was ever negotiated on the behalf of Mr. Herrera was because the strategy was to go to trial from the very beginning, and as Mr. Osgood stated , who by the way has more federal criminal and trial experience than both Elena Franco and Catherine Connelly, stated that it is not always a good strategy to talk a plea offer with the prosecutor because it is likely to be construed as a sign of weakness.(Tr. 544). After Ms. Connelly asked the Respondent if he wanted a plea offer for his client, because he did not seek one since the strategy was to go to trial, she did offer a plea agreement to Mr. Herrera, through Respondent, under the terms of which Mr. Herrera would serve 33-41 months in federal prison. (Tr. 258-259, 311).

Respondent failed to appear at a pretrial conference scheduled in Mr. Herrera's case because the original one was changed and the date for the new one was not sent to his then current office address, but to his former office address, even though he had submitted a change of address letter to the Court.(Tr. 730) Then, the Court again sent the notice to the Respondent's former address, causing the

Respondent to fail to appear at a subsequent setting for a change of plea, set for April 15, 2004, which was not requested by the Respondent, since the strategy was to take the matter to trial, and Mr. Herrera was willing to go to trial at the time he was represented by Respondent. (Tr. 245-247, 308). Respondent never received the order that the Informant alleges was entered by Judge Maughmer, because it was not sent to the correct address. Mrs. Herrera testified at the hearing that the Respondent never returned any of the fee and that she had never requested a return of any of the fee.(Tr. 230-235)

Chris Vidal-Dior McCain Matter
Count V of the Information

On April 26, 2005, Respondent 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 Respondent 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, Respondent 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). Respondent did not voice an objection to that date because the public defender was supposed to send the information prior to June 10, 2005. (Tr. 485).

Respondent did not appear for the June 17, 2005, hearing. (Tr. 486).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 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 Respondent faxed to 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 matter for June 27, 2005. (Tr. **488-489).** On June 27, 2005, Respondent did not appear for the hearing scheduled to begin at 8:45 a.m. **(Tr. 490).** Respondent had faxed a continuance motion to the court at 7:58 that morning. Later on that same day, Judge Robb was made aware of that **(Tr. 490).** While it is true that the motion was not the filed according to the local rules, that is because the Respondent was not aware of the need to file the motion at least five working days prior to the date for which the continuance is requested, but instead found out on the date the hearing was set to occur, because the Respondent had a client arrested on a matter in Kansas City and was notified that he needed to be present for that matter because it had been pending for several years while the client was in Federal Prison. **(Tr. 488, 491).**

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).**

On July 19, 2005, contrary to the statement by the Informant, the respondent appeared timely for his client's hearing. **(Tr. 496; Ex.** 41, p. 8). At the July 19 hearing, Respondent apologized to the Court and offered Judge Robb an explanation for not appearing for the June 27 hearing. Respondent 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).

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

With respect to this count of the Information by the Informant, the Informant introduces testimony from Cathryn Mesle, a circuit court judge in Jackson County, Missouri. (Tr. 371). Respondent agrees that he appeared on her docket numerous times when she presided over a domestic docket, approximately from 2000 to 2002. (Tr. 372-373).However, Respondent disagrees with Judge Mesle's opinion that Respondent was either late or failed to appear at all in more than 50% of his scheduled appearances in her court. (Tr. 388-389). Further, Respondent disagrees that 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" While Respondent does not contend that he was present on time or appeared for every Court appearance, he just contends that his Court appearances were not out of line with the rest of the attorneys practicing

before Judge Mesle. (Tr. 384).

In the case involving interstate custody issues, that Judge Mesle alluded to that she claimed she was compelled to do considerable legal research to resolve jurisdictional questions because she felt the Respondent failed to identify and research the issues on his client's behalf. In fact the issues were defined and presented, but the Judge desired an alternative outcome than the one suggested in the pleadings **(Tr.** 378-379).

John O'Malley has been a circuit court judge in Jackson County since 1989. **(Tr.** 329). He is acquainted with Respondent through his practice in Judge O'Malley's court and indicated that he was a good lawyer and was a rising star. (Tr. 393). Informant had Judge O'Malley testify about a September 13, 2005, a paternity case in which Respondent represented the putative father, who appeared and testified before the hearing panel, testified to the contrary.(Tr.520) Jeffrey Atkins, whose case Judge O'Malley was discussing before the panel, testified that the Respondent had another Court appearance at the same time as his Court case and had notified him that he would be there to represent him after he appeared at the Court that began at 9:00.(Tr.524) Further, Mr. Atkins testified that the Respondent in his case was not present because she had been arrested and placed in jail for property damage, and that her mother had appeared on her behalf and requested a continuance. Mr. Atkins also testified that the Respondent in this matter was present in Court and objected to the continuance when the case was called by the Judge.(Tr. 524) Further, Mr. Atkins refuted the testimony elicited by Informant that indicated that. "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).**

Kelly Kirkland Matter
Count VII of the
Information

Respondent in the hearing held before the panel and the Findings of Facts and Conclusions of law objected to this count of the Informant's information because the only evidence presented by the Informant was a transcript that was not even testified to by the Court Reporter, let alone the Judge or Mr. Kirkland. Further, the information in the transcript does not meet the minimum standard of proof.(Tr. 499)

Ezequiel Flores Matter
CountVIII of the Information

The Ezequiel Flores family hired the firm and specifically Respondent to represent Mr. Flores in removal proceedings started by the Bureau of Citizenship and Immigrations Services and signed a contract with the former firm of the Respondent. 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).

The Respondent objected to this particular count in the Informant's information because there was no complaint made by the Flores family, but is based upon information sent by the Informant's witness and the managing partner of the firm that the Respondent was previously a partner in. The animus between the Respondent and his former partners is well established. In the hearsay and completely fabricated testimony of the Informant's witness, Mr. Fulcher, who

indicated that he instructed the Respondent to appeal the matter(Tr. 68-69), and that on June 11, 2004, Respondent filed a Notice of Appeal before the Board of Immigration Appeals but failed to brief the matter. The Informant or the witness was unable to produce corroborating documentation . (Tr. 68-69).

The Informant had their witness testify that Firm refunded the portion of the fees it had received ($1,000) from the Flores family, and that "The Firm encouraged Mr. Smith to refund the fees he had received from the Flores family but Mr. Smith did not do so." While this fabrication was plausible for the Hicks matter since the Respondent was no longer a member of the firm, and the pay agreement was a forty-sixty payout agreement, this statement is not supported by logic or reason because the firm controlled the money that came into the firm, the partners were on a salary and the managing partner calculated the payouts of the partners and controlled the disbursement of the checks, so if the firm had indicated that additional monies should be paid out, then that would have been accomplished with little option for recourse by the Respondent.(Tr. 37-74).

Toninicole Smith Matter
Count IX of the Information

In September of 2003, while Respondent was a solo practitioner, Toninicole Smith hired Respondent to represent her in obtaining a dissolution of marriage. (Tr. 355). Ms. Smith met with Respondent in his office located at 1125 Grand, suite 1301. (Tr. 355-358). Respondent was not aware that she was pregnant when they initially met (Tr. 736-37). As a matter of long and well-settled law, it is almost impossible for a dissolution to be obtained in Missouri while a woman is pregnant. (Tr. 736-37)

However, this does not prevent the pleadings from being filed and the spouse from being served. Further, the Respondent only informed Ms. Smith that they needed to get the dissolution filed immediately to improve their chances of getting her spouse served before he was released from jail and deported. (Tr. 736-37) Ms. Smith paid Respondent an attorney fee of $500.00, and $155.00 for court costs, so that he could get the case filed right away. (Tr. 359).

Ms. Smith was told that Respondent's office, specifically to come in and sign the paperwork and the dissolution petition would be filed for her, but the dissolution would not be granted until after the baby was born. (Tr. 361). Ms. Smith was very upset, after she was informed that the dissolution could not be acquired while she was pregnant. One of the questions on the paperwork she filled out and returned was a question about whether because either party was now pregnant. Mr. Smith had not warned her or said anything about the fact that her pregnancy might be an issue, because he was unaware that she was pregnant. (Tr. 361). Ms. Smith told the office person who called her to tell her that the pleadings were prepared to be signed that she did not want Respondent to pursue the dissolution for her after the baby was born. (Tr. 361-363).

Respondent had attempted to refund the filing costs as of the date he wrote disciplinary counsel a letter in April of 2005 saying that he would refund the filing fee, and in fact mailed the filing fee to her address at the time. In fact, when the Respondent questioned her about the address she was residing at the time the first

check was mailed to her in April of 2005, Ms. Smith replied that she was a gypsy and had probably moved by then. (Tr. 363-365; Ex. 50). At the hearing, Respondent introduced testimony through his office staff, that the refund check had been sent out by her on both occasions and that she and the Respondent were unaware that the first check mailed out had not been received until the Respondent received the information on January 4, 2006, and produced an enveloped post-marked January 4, 2006, addressed to Ms. Smith that was registered mail, return receipt, returned to Respondent and marked "unclaimed' by the post office. (Ex. 129). Respondent presented a check to Ms. Smith for the filing fee immediately after Ms. Smith testified at the hearing. (Tr. 739).

Murtaza Gadit Matter
Count XI of the
Information

In October 2003, before Respondent joined the Firm, client Murtaza Gadit paid him 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).**

Respondent prepared and had the staff 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, because he was out of town. **(Tr. 430, 460-61).**

The Court refused to reset the matter. The matter was covered by a partner of the firm Respondent was in at the time, who was appearing on a matter for another firm client.( Tr. 37-77) Further, the Respondent moves that this Count of the Informant's complaint be dismissed because there was no complaint generated by the client.[9] This is a manifestation of the acrimony between the Respondent and his former partners and part of the plan initiated by them to sabotage the Respondent .

Homma Shaffee Matter
Count [10]XIII of the
Information

Respondent represented Hornma Shaffee in a slip and fall action which occurred on December 26, 1997. Respondent filed a petition for damages on Ms. Shaffee's behalf on December 26, 2002, whereby he sued Wise Car Rental, Inc. and Stephen Lyle, who was listed as owner of the property and the company. The petition was filed on the last day before the statute of limitations ran, to preserve the claim. (Ex. 62, pp. 22, 53-56). At the hearing and in his findings of facts and conclusion of law submitted to the panel, the Respondent moved to dismiss this Count of the Informant's complaint because no complaint was generated by the client.

The witness for the Informant was not forthright in his statements to the panel and outright lied about the sequence of events that occurred. The Respondent did represent Ms. Shaffee and filed the pleadings for her to preserve the action, but then withdrew as her attorney. The case remained in the Respondent's caseload and was transferred to the firm when the Respondent joined the firm, along with the rest of his

[9] Mr. Gadit never issued a complaint and was ultimately satisfied with the resolution of the matter because Phillip Brooks, a partner of the Respondent appearing at the Court on the same day for another client, amended the ticket on Mr. Gadit's behalf.
[10]

personal injury cases. The matter was dismissed without prejudice and was never re-filed.

Gerrie Herring Matter Count
XIV of the Information

The Informant had Mr. Herring testify that in January or February 2003, Respondent 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). Further, the Informant stated in their brief that "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)." The purpose of this specific information is to allege that the testimony of Mr. Kind and the Respondent's wife is not accurate. However, the fact is that the information in the response, the testimony of Mr. Kind and of Glenda Smith is all accurate. The construction work Mr. Herring did on Respondent's home was shoddy and had to be totally redone, causing Respondent to spend additional money to repair the work Mr. Herring performed. Respondent initially discussed with Mr. Herring the performance of the work on his garage and he actually came out on one day and attempted to clear the area for the Garage and used the equipment rented by the Respondent. Because of his inability to clear the area and his sporadic appearances and the cost of renting equipment that was not being used, the Respondent hired Mr. Kind to perform the work. After the garage pad was properly dug caged and poured, Mr. Herring started to re-surface. By the time he re-surfaced, the first floor of the garage had been framed. The Respondent, in an attempt to expedite the building process because of building frustration about the process, allowed Mr. Herring to come out and do additional work, because he knew Mr. Herring to possess framing skills, and was willing to give him an opportunity to work because he owed the Respondent for representation in the Order of Protection, hearing in Platte City. The work performed by Mr. Herring was done on a day that the crew of Mr. Kind was off. The work done was not level or accurate and had to be removed and redone, costing the Respondent additional money and time. The plans introduced by the Informant that Mr. Herring helped to originate, though approved by the city planning department, they in no way were used to

construct the garage. Mr. Herring had no active role in the proper pouring of the footing or garage pad, the framing of the garage or the application of the exterior building material. Respondent answered the pleadings from Mr. Herring's wife and other duties during the course of the representation. Respondent also filed the appropriate motions to set the matter over or called and set the matter over with the Court. Respondent was properly allowed to withdraw from the representation of Mr. Herring after filing the appropriate motion to do so. (Tr. **164).**

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 the firm that the Respondent was a member of to represent her in a personal injury action against the theatre. (Tr. 576-580). When Ms. Shepherd hired Respondent she had already completed medical treatment for the fall and was still having trouble ambulating. (Tr. 578-80). At some point early in the course of representation, Ms. Shepherd filed a complaint with Informant regarding Respondent's lack of communication in May 2004. After Ms. Shepherd made her complaint to Informant, Respondent contacted Ms. Shepherd and gave Ms. Shepard an opportunity to hire other counsel, and promised to move forward with her action in a prompt manner. (Tr. 586).Ms. Shepard filed a complaint against the Respondent because she did not believe that he was processing the case fast enough for her[11]

[11] At the time that Ms. Shepherd originally contacted the Respondent, he was in process of merging his practice with the firm. Ms. Shepherd originally signed a contract with the Respondent but later re-signed a contract of the firms. Ms. Shepherd determined that she would continue to be represented by the firm.

The Informant misstates the evidence again by alleging "From February 2003 until October 2004, Mr. Smith spoke with Ms. Shepherd only three times." (Tr. 579-81). Respondent did not represent Ms. Shepherd until after she had the accident in October of 2003, and did not become a client until February of 2004, when she signed a contract with the firm. During the course of the representation, Ms. Shepherd was in contact with Respondent's paralegal(Ms. Springate) or the Respondent himself. Ms. Shepherd had provided releases for Respondent to obtain medical records, Ms. Springate had ordered the medical records of Ms. Shepherd and the firm was awaiting the records before the case could be moved forward. In their brief, the Informant infers that the complaint happened and the next month, Respondent and Ms. Shepherd met with the claims adjuster. Informant wrote "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.". (Tr. 587) The truth of the circumstances are that the firm was in control of the case until the Respondent was voted out in April of 2005, and the Respondent resumed the case and set up the meeting with the adjuster after that point, almost a full year after Ms. Shepherd filed her complaint.(Tr. 580-87)

After the meeting with the claims adjuster, Ms. Shepherd decided to fire Mr. Smith and find other counsel. Respondent 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, however, the only request for Ms. Shepard's file came from Ms. Shepard.

Jeffrey Gaumer Matter Count

XIX of the Information

Jeffrey Gaumer and his wife Cathleen wanted legal assistance to gain custody of his daughter, Lindsey. Lindsey had moved in with the Gaumers, and needed to live with them for ninety days before a petition could be filed for a change of custody. Informant's explanation of the situation misstates the legal process that the Gaumers were seeking. By the time the pleadings were legally filed after ninety days and the Respondent in that matter was served, Mr. Gaumer's daughter, Lindsey had moved back with her mother on her own, and for good, thereby making the action moot.(Tr.411)

Procedural History of Case

On March 31, 2006, Informant filed a twenty-one count Information alleging that Respondent violated various Rules of Professional Conduct. On April 21, 2006, Respondent 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 Weedlin. Mr. Smith appeared pro se. Informant offered 65 exhibits into evidence and the Panel admitted 63 of the exhibits into evidence.[5]

More specifically and rightfully so, the Panel rejected Exhibits 37 and 84. Further, the Informant, though they acknowledge that the exhibits weren't entered into evidence, they still use the exhibits, and illegally include them with the exhibits that were accepted by the panel into evidence. Despite the diatribe included in the Informant's Procedural

History of the Case, the panel rejected the exhibits, but they flexed their muscle and included the exhibits and included the information contained in the exhibits in their brief to this honorable Court.(Tr. 225, **Ex.** 37).

At the close of Informant's case, the Respondent moved for dismissal of counts VII, VIII, X, XI, XII, XV, XVI, XVII, and XX of the Informant's pleadings to conform to the evidence, which the panel denied. Informant dismissed Counts X, XII, XV, XVI, XVII, and XX of the Information without prejudice, over the objection of the Respondent, who sought that the Counts be dismissed with prejudice. (Tr. **501-502; 599-600).**

Respondent offered thirteen exhibits, all of which were admitted into evidence, and put on testimony from twelve live witnesses. In addition, Respondent 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 filed the Findings of Fact and Conclusions of Law and Recommendations submitted by the Informant, without the application of any independent analysis, or anyone but the hearing chair signing the findings . In its Decision, the Panel found fifty-six violations of the Rules of Professional Conduct and recommended that this Court disbar Respondent. Respondent did not concur in the discipline recommended by the Panel. Therefore, Informant filed

the record with this Court.

## ARGUMENT

The case law in Missouri regarding the discipline of members of its bar is well settled and distinguished by the paucity of cases in relationship to the number of attorneys on the rolls and the number of complaints that are generated by the representation by attorneys of the general public. It is an accepted and well established position that is reinforced by this honorable Court that the public must be directly protected and that the reputation of the entire legal profession should be held out and preserved as inviolable. In accordance with this position, the rulings of the Court regarding attorney discipline seem to follow a certain trend and legal finding with respect to the decisions of this honorable Court. Taking an analysis of the Court's positions from an inverse perspective, the Court appears to position itself squarely on the issues that it deems necessitate an attorney be disbarred, as opposed to the other manners and forms of punishment at the disposal of the Court. In the instant case, the Informant is trying to create the impression that the acts of the Respondent are intended to defraud the individuals who made complaints to the Informant or some committee associated with the Informant, however, there is no proof of the intent of the Respondent to defraud the individuals who made complaints or the thousands of happy clients that the Respondent effectively serviced during the course of his solo practice and time

with the firm. Never was it the intent of the Respondent to engage in fraud, the circumstances presented by the Informant are over-blown and an attempt to take minor issues and over dramatize them.

As a general rule, the forms of behavior that the Court determines that the sanction of disbarment is appropriate involve circumstances where the attorney in question commingles the client's funds with their own. As far back as IN RE OLIVER, *365 Mo. 656* (Mo.banc 1956) *285 S.W.2d 648*

This Court has used the sanction of disbarment for commingling or depriving clients of funds due them or misuse of client funds in possession of an attorney. In comparing the instant situation of the Respondent in this matter to all the circumstances that the Court has determined the attorney should be disbarred, this situation is clearly not a comparable situation to any where the Court has determined that disbarment is appropriate.

As stated infra, the overwhelming reason stated for disbarment has been regarding the misuse of client funds, the other basis that has drawn the ultimate sanction has been conviction of a felony or a misdemeanor crime involving moral turpitude, see IN RE KAZANAS, *96 S.W.3d 803* (Mo.banc 2003). The Informant cites this case as one that it would find as support to its position that the Respondent should be disbarred. The Kazanas case was factually based on an attorney embezzling almost $170,000 dollars and no paying taxes on it. He was found guilty of tax evasion and received a conviction; none of this remotely fits

the circumstances of the Respondent. The Informant also continually cites an Ohio case, CINCINNATI BAR ASSN. v. WEAVER, *102 Ohio St.3d 264* (2004)*2004-Ohio-2683*, *809 N.E.2d 1113, in which they take a quote from another Ohio case that indicated that Disbarment is appropriate when a lawyer engages in a pattern of neglect with respect to a client's matters*[12]. *With respect to the Weaver case, the Respondent failed to respond and the Court entered a default judgment against Mr. Weaver*[13] *The case that the Weaver case cites, and the Informant pulls the one phrase from in a case that has no resemblance to the instant matter was the case of Stigall,)*[14] *In other cases where the Court entered the ultimate sanction against the Respondent was a situation like*, lying to a tribunal, as was the outcome decided by In Re CARANCHINI, 956 S.W. 2D 910(Mo.banc 1997), where the Court determined that the actions of the Respondent Caranchini, which included using forged documents to continue prosecution of a matter, even after being informed that the documents were forged.

There has been no case cited in Missouri case law that an attorney has been disbarred for allegedly failing to file an appeal, or for allegedly failing to

[12] In the Weaver case, the Respondent was charging an hourly fee, in all the cases that the Informant asserts the Respondent in the instant matter committed some fraudulent action, the fees were paid to his former firm and the fees were non-refundable retainers, as was testified to by the managing partner(Tr. 37-107)

[13] The hearing committee entered an order seeking indefinite suspension, on 5 of the 7 counts however, the Court determined that since it was a default judgment it entered an order of disbarment on all seven counts.

[14] In Stigall, the Respondent was suspended for 1 year.

inform a client that he should take a plea, or for any of the other allegations that the Informant has charged the Respondent with.

In their argument to this Court, the Informant continuously cites law from outside the Court's jurisdiction and miss-cites the majority of the cases that they cite. The informant does not properly cite the Kazanas case, in that case has no applicability to the instant matter, the Informant does not properly cite In Re Wiles, which is the case that is most factually aligned to the instant matter.

In fact, the relevant case law regarding matters of this nature, would suggest that an opposite result should transpire, see In Re Synder. It should be noted that there appear to be no previous cases before this Court that are the result of a filing pursuant to Rule 5.24, and that the matters about to be listed are matters that the attorneys were allowed to continue practicing until an ultimate determination was reached, unlike the instant circumstance, where the Respondent has had an Order of Interim Suspension entered against him and his practice assumed by a trustee, John R. Osgood. With respect to Mr. Osgood, the trustee, he assumed the practice of the Respondent and found no issues related to his trust account and has testified that he assumed files that were properly maintained and all contained sufficient work for the fees charged. Further, Mr. Osgood has testified under oath that the Respondent did all he could have done in the matter that the Informant has concluded was the most egregious allegation against the Respondent in its multiple count Information filed before this honorable Court.

Additionally, the trustee has indicated that the Respondent was fit to conclude his own practice from the files that he obtained after the Court appointed him.

With respect to the effort that the trustee expended, it should be noted that before Mr. Osgood, even before he met with the Respondent, obtained a list of the Respondent's cases that were in litigation within the 16th Judicial Circuit and attempted to put together a list of all the Municipal Court cases the Respondent was then representing clients on and finally all the Federal Cases that the Respondent was involved in. After that, on the same day he received the Order appointing him as trustee for the Respondent's practice, came to the office of the Respondent and obtained a copy of all the files on both of the Respondent's computers, as well as a copy of the files from the former partners of the Respondent. Mr. Osgood, who is very well versed in computers, obtained all the information from the computer system of the Respondent. Mr. Osgood got a copy of the Respondent's file and client lists, as well as the information regarding his trust account. Mr. Osgood created a website for the former clients of the Respondent to call and directed the former firm of the Respondent to provide the information to all clients who called in search of the Respondent. Mr. Osgood also sent out over six hundred (600) letters to present and recently former clients at that time to determine if there were any additional issues or claims against the Respondent. After meticulously going through the files and information regarding the Respondent's practice, Mr. Osgood determined that there was no basis for his

appointment and that the issues related to the information were primarily without merit. There were no issues discovered, even with the meticulous attention to the details of the Respondent's practice, where there was a commingling of funds or failure to provide all funds due and payable to his clients.

In review of the cases before this Court related to attorney discipline, there are several that the Respondent has discovered that are more compelling than those listed by the Informant infra that concluded the appropriate sanction was disbarment. For example, IN RE WILES, *107 S.W.3d 228* (Mo.banc 2003), the Court suspended the license of Mr. Wiles for six (6) months and then placed him on a one (1) year probation, even in the face of the his two Kansas bar discipline proceedings and eleven admonitions in Missouri within a three year period. The violations in Missouri consisted of four (4) diligence violations, five (5) communication violations, one (1) safeguarding client property rule violation, and one (1) violation of the rule against engaging in conduct prejudicial to the administration of justice. This matter is closely aligned to the instant matter with respect to the number of previous disciplinary issues and the nature of the issues.

In other matters before this Court, suspension for periods of one year or less have been the sanction imposed for behavior that was related to conduct deem violate of the rules of professional conduct. For example, In the case of IN RE DONAHO, 98 S.W. 3d 871 the court stated: "Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement,

submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes significant or potentially significant adverse effect on the legal proceeding." In Donaho, even though the attorney told the disciplinary committee that he had returned the money, sending copies of the money orders and then taking them back and cashing them, twice, he was only suspended for 12 months, or IN RE LITTLETON, *719 S.W.2d 772* (Mo.banc 1986), where the attorney in question was suspended for a period of six (6) months for substantiated allegations that included, failing to return money identified as bond money after the money was not used to make bond and , visiting a client late at night and making sexual advances towards her, and allegedly sexually assaulting her and obtaining files from a client for review, failing to review them and failing to turn them over to the new counsel hired by the client.

In the Informant's argument, they point to the Criss case as an example of Respondent failing to act on behalf of the client. The factual basis of the Criss case is that there were three parties with about the same status and one party, Brent Barber who the Government felt was most culpable. The Respondent, who proved that he was in constant contact with Mr. Criss testified and stated to the panel that he discussed the options with Mr. Criss on several occasions, and the testimony of Mr. Criss established that Respondent discussed with him when other people decided to make deals with the government. As Respondent testified in the

hearing, he did discuss the sentencing guidelines with Mr. Criss, and that he called him over 300 times over the course of the months of September 2004 to May 2005, when the Respondent was no longer able to reach Mr. Criss.(Tr. 730-760)

In the Robinson matter, the Respondent created the opportunity for the client, Mr. Robinson to get a deal and offer a proffer for a more favorable outcome in that matter, and this was based on the agreement of the client after the Respondent went over the facts of the case in the discover with him.(Ex. 12 pp1-30) Based upon the determination of the client, the Respondent communicated with the AUSA, and worked out a proffer. (Ex. 12 pp. 1-30) The Proffer went off as it should have and the Informant's assertion that the Respondent told Mr. Robinson to lie or that the Respondent fell asleep and somehow affected the truth that Mr. Robinson was going to tell, is inconsistent with purpose or basis of a proffer, and the ranting of a lifelong criminal seeking any opportunity to change his circumstances. The Informant never presented testimony by someone credible like the two officers who conducted the proffer, and the Respondent denied the statements of Mr. Robinson.(Tr. 730-760) The Informant argues that the Respondent performed no service for Mr. Robinson, even though it is undisputed that Respondent traveled from Kansas City to St. Louis on behalf of Mr. Robinson on at least five occasions, that he set him up to receive the benefit of entering into a deal earlier than his co-Defendants in his multi Defendant, multi count indictment.(Ex. 12 pp. 1-30)

In the Informant's argument, it appears that their intention is to construe every act of the Respondent's as fraudulent. With respect to the Herring case, the Informant makes the action of the Respondent withdrawing by filing a motion with the Court seeking leave to withdraw from his case because he failed to pay for the representation an attempt to defraud him. The testimony from the Respondent, his legal assistant who worked for him at the time that he represented Mr. Herring, who testified that Mr. Herring did not pay for the representation. There was testimony from Mr. Herring himself that substantiated that the Respondent represented him on his Order of Protection case in Platte City, for which he never paid the Respondent for, and began representation of Mr. Herring on his domestic case, a contested divorce case, for which the minimum retainer would be $1500. The Respondent presented the person who performed the work on his house, work that Mr. Herring was supposed to do, Mr. Kind, who credibly testified, and the testimony was substantiated by the Respondent's wife, who had known Mr. Herring most of her life, and who visually saw the people who performed the work at the house, that he was the person who built the garage, even specifying what materials were used, and the processes used to perform some of the work and problems experienced, something Mr. Herring was unable to do.(Tr. 540)

The Informant also argues several issues that were not presented by the clients, but were from cases the Respondent had with the firm, that were returned

to the Respondent when he was voted out of the partnership, but copies of the files were sent to the Informant by the former firm of the Respondent, Fulcher, LaSalle, Brooks & Daniels, even though the firm illegally copied the files of the Respondent and sent them to the Informant, and the files were sent to the informant without the approval of the client or a release of the privilege from the client.[15] Specifically, the Informant used privileged information from the Schaffee case, the Flores case, and the Gadit case[16]

None of the actions that the Informant alleges the Respondent engaged in, when compared to the history of Missouri case law regarding the use of the ultimate sanction of disbarment as discussed hereinabove, would merit that the Respondent be disbarred. Further, since the Respondent did not intentionally engage in any fraudulent acts, but attempted to serve every client in each situation, as was discussed in the hearing and reinforced by the testimony of the witnesses offered by the Respondent, and was not supported by the testimony of the witnesses of the Informant. Like the testimony of Mrs. Herrera in the hearing where she testified that the Respondent informed her that the strategy was to go to trial from the outset, and that she never requested that the Respondent provide a refund, an answer in response to a question asked by counsel for the Informant.(Tr. 270-300)

[15] The firm, by not getting a release from the client of each file that they sent a copy of to the Informant, violated the attorney client privilege, specifically Rule 4-1.6(b) (2). Further, since the firm acknowledges that the files were returned to the Respondent, they had no possible exception for violating the privilege.

[16] Informant presented these cases that the client did not make a complaint in, nor did the firm or the Informant secure a release from the client whose matter they divulged in violation of attorney client privilege.

In the hearing before the panel, the Respondent testified and discussed each matter in detail that was before the panel. After the testimony of the Respondent, the Informant asked the Respondent fewer than six questions regarding the matters that were before the panel. Clearly the Informant had an opportunity to question the Respondent about all the matters before the panel, but did not. (Tr.720-775)

## CONCLUSION

For the reasons set forth hereinabove, the Respondent prays for an Order from this Court that reinstates the Respondent's law license and for such other and further relief as the Court deems necessary

RESPECTFULLY SUBMITTED,

BY_____

Roderick E. Smith
808 W. 99th st.
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**RESPONDENT PROCEEDING PRO SE**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was sent via first class Mail this 4th day of March, 2007 to:

Office of Chief Disciplinary Counsel
Nancy L. Ripperger, Staff Counsel
3335 American Ave
Jefferson City, MO 65109

And
Missouri Supreme Court
207 West High Street
Jefferson City, MO 65109

_____
Roderick Smith

## 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 12,391 words according to Microsoft Word, which is the processing system used to create this brief; and

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

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Roderick Smith