IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
JASON HENRY,	)	**Supreme Court # SC95688**
	)	
Respondent.	)	
	)	

INFORMANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo. 2000.

STATEMENT OF FACTS

Background

Jason Henry ("Respondent") was licensed to practice law on October 1, 2003. **Appendix ("App.") 44 (Transcript of February 9, 2016 Disciplinary Hearing ("Tr.") 15, Lines ("L.") 6-8).** Respondent maintains a solo law practice in West Plains, Howell County, Missouri. **App. 44-45 and 93 (Tr. 15, L. 15-25; Tr. 16, L. 1-8; and Tr. 64, L. 20-23).**

On November 6, 2014, the Office of Chief Disciplinary Counsel ("OCDC"), Informant herein, received a letter from the Honorable Fernando J. Gaitan, Jr., Senior United States District Court Judge for the Western District of Missouri. **App. 174.** Judge Gaitan advised that Respondent represented an inmate by the name of V.C. in connection with a federal petition for a writ of *habeas corpus*, which Judge Gaitan denied on September 2, 2014.[1] **App. 174.** On October 17, 2014, Judge Gaitan received a letter from V.C. complaining of unethical behavior by Respondent. **App. 174.** Attached to V.C.'s letter was an email between Respondent and V.C.'s wife, E.C. **App. 174.** Judge Gaitan wrote that: "In the email, Mr. Henry makes some very disparaging remarks about myself and my office. I consider these remarks to be professional misconduct as defined in Rule 4-8.4 of the Missouri Rules of Professional Conduct." **App. 174.** Judge Gaitan attached

[1] Informant will refer to Respondent's client and his wife by their initials only in this brief to protect their privacy.

copies of both V.C.'s letter and Respondent's email to E.C. to his letter to the OCDC. **App. 174.**

Respondent's email is dated September 12, 2014. **App. 168.** It was sent from Respondent's email account at henrylawoffices.westplains.mo@gmail.com to E.C.'s email account. **App. 168** After some pleasantries, Respondent addressed Judge Gaitan's decision denying V.C.'s *habeas corpus* petition, writing as follows:

> As for the court opinion, it took nearly two years for that puppet nigger Giaten [sic] to write it. I used to be very racial, but I am not so anymore, but know [sic] and again, I must call a spade a spade. This son of a bitch Giatan [sic] had two years and two law clerks to explore [V.C.]'s conditional release claim, which is a claim that plagues many inmates. This issues nerds [sic] resolution and the board of paroles [sic] knows that. Shit, three years ago the board sent out a memo to Missouri judges that basically outlined the exact problem plaguing inmates like [V.C.]. It was written by the board after they read rentschler[2] and realized that the opinion further muddied the waters as to conditional release. Quickly, after Rentschler, the same WD of MO court of appeals that wrote it attempted to cover their ass as they realized

[2] At the hearing, Respondent testified that "rentschler" referred to this Court's opinion in *Rentschler v. Nixon*, 311 S.W.3d 783 (Mo. banc 2010). **App. 55 (Tr. 26, L. 12-24).** *Rentschler* was a unanimous decision regarding conditional release eligibility for certain inmates. It was authored by then Chief Justice William Ray Price, Jr.

> Rentschler was wrong and they came out with the case in the memo that worked to calculate sentences. . . Basically, rentschler was drafted by an idiot and the western district let it slip through the cracks and then tried to fix it with the case I cannot remember the name of just two weeks later . . . Currently, and due to bullshit opinions like [V.C.] got, the parole board does not know what to do so they just rely on rentschler based decisions hoping that a court will finally clarify the issue.
>
> **App. 168.**

Respondent then discusses strategies for appealing V.C.'s case to the Eighth Circuit. **App. 168.** He concludes the letter by writing "[p]lease take care and read this to [V.C]." **App. 168.**

Upon receiving Judge Gaitan's letter, the OCDC opened an investigation and asked Respondent to respond to the letter. Respondent replied as follows:

> In response to your letter dated January 2, 2015, I submit the following. First, I have provided you with a fax letter I have sent to [sic] Honorable Fernando Gaitan. I take full responsibility for the language I used in the email. The language was insulting to Judge Gaitan and I am very sorry for it. I have no excuse and I have expressed my sincere apology to Judge Gaitan for my actions. All I can do is apologize and I have done so to my best ability. Again, I have no excuses for my language and am very sorry for making

them. I believe that I needed to send a direct letter to Judge Gaitan, as I know my words are hurtful and I want him to personally know I am sorry.[3]

App 169.

After discussing his representation of V.C., Respondent concludes his letter by writing: "As for the aforementioned email were [sic] I make horrible remarks about Judge Gaitan, I am guilty and I am very sorry. I have no excuses and make none. I feel that my letter to him has expressed my remorse." **App. 171.**

The matter was then referred to the Region XV Disciplinary Committee, who recommended that an Information be filed. On September 25, 2015, Informant filed a single count Information charging Respondent with Misconduct. **App. 4-6.** Specifically, Informant alleged that Respondent sent an email to V.C's wife on September 12, 2014, expressing his "disappointment with the Judge's ruling and referred to the Judge by a derogatory racial slur."[4] **App. 5 at Paragraph ("Para.") 7.** Informant further stated that

[3] A copy of Respondent's letter to Judge Gaitan was received into evidence at the hearing. **App. 172-173.**

[4] Because of the highly sensitive and offensive language of the terms used by Respondent in his email and the confidential nature of disciplinary investigations under Rule 5, Informant declined to use said terms or to identify Judge Gaitan in the Information. At the DHP hearing, counsel for Informant advised the panel of this decision, and moved for the pleadings conform to the evidence. Said motion was granted. **App. 37-38 (Tr. 8, L. 13 – Tr. 9, L. 11) and App. 127 (Tr. 98, L. 16-24).**

"Respondent also used other crude, profane, or insulting language to describe both the Judge and the judiciary." **App. 5 at Para. 8.** Informant alleged that Respondent's conduct violated Rules 4-8.2(a), 4-8.4(d) and 4-8.4(g). **App. 5-6 at Para. 11-16.** In his Amended Answer, Respondent admitted all of Informant's facts and allegations in full with one exception, wherein Respondent admitted "to violating rule [4-8.4(g)] by making racial slur, but deny that it manifested bias and prejudice in the course of representing a client." **App. 20 (Para. 12).**

DHP Hearing

The matter was set for a hearing on February 9, 2016, before a duly appointed Disciplinary Hearing Panel ("DHP"). Prior to the hearing, Respondent sent emails to the DHP Presiding Officer, Susan Applequist, which the DHP found to be "increasingly agitated and angry." **App. 182.** Additionally, roughly a week before the hearing, counsel for Informant, Kevin Rapp, advised Respondent that Informant's recommendation at the hearing would be for disbarment. Respondent then contacted Alan Pratzel, Chief Disciplinary Counsel, and left two voicemails on February 2, 2016. **App. 64 (Tr. 35, L. 5 to 19).** In said voicemails, Respondent accused Pratzel of "being out to get him" and wanting "to cut my nuts." **App. 177 (CD of Voicemails to Alan Pratzel from Respondent, hand delivered to the Supreme Court) ("CD").** The first voicemail concluded with Respondent telling Pratzel: "I don't know what your deal is, but, um, we need to talk. And when we talk, you are going to listen to me. You are not going to be a smartass, because I've about had it." **CD.** Over Respondent's objection, the voicemails

were admitted into evidence at the hearing. **App. 65-66 (Tr. 36, L. 2 to Tr. 37, L. 12) and App. 67-68 (Tr. 38, L. 23 to Tr. 39, L. 9).**

Following Respondent's voicemails and emails, a prehearing phone conference was held prior to the hearing and was attended by Respondent, Rapp, and Applequist. **App. 34 (Tr. 5, L. 19 – 23).** At the pretrial conference, Rapp again advised Respondent and Applequist that the recommendation from Informant would be disbarment. **App. 34-35 (Tr. 5, L. 25 – Tr. 6, L. 3).** In light of the Informant's recommendation, Rapp informed Respondent that if he needed more time to consider the recommendation, investigate defenses, retain counsel or explore other options, Informant would not oppose a continuance of the disciplinary hearing. **App. 35 (Tr. 6, L. 4-13).** Respondent indicated that he wished to proceed to a hearing. The offer of a continuance was then repeated at the start of the DHP hearing. **App. 35 (Tr. 6, L. 13-15).** Respondent again replied that he wanted to proceed with the hearing. **App. 35 (Tr. 6, L. 18-20).**

During Informant's direct examination, Respondent admitted that he sent the September 12, 2014, email to E.C. **App. 46 (Tr. 17, L. 4-16).** He testified that it was his intention that the email would be passed to V.C., and that the email contained legal strategies for appealing Judge Gaitan's decision to the Eighth Circuit. **App. 47 (Tr. 18, 11-14) and App. 48 (Tr. 19, L. 1 – 17).**

With respect to his use of "nigger" in the email, Henry testified that while he did not know Judge Gaitan's ethnicity, he agreed that the term "nigger" is a contemptuous or disparaging remark that is generally used to refer to black people or people of African-

American descent. **App. 50 (Tr. 21, L. 10-22).** When asked to explain what he meant by "puppet nigger," Henry explained that:

> It was a derogatory remark. Puppet, I think I've explained that, someone who defers to what a lower court has done or what a body does. There was no excuse for me using the word "nigger." And I'm not going to sit here and – I've apologized for that. I guess I used it because I was upset about the opinion.
>
> **App. 53 (Tr. 24, L. 4-13).**

Henry further agreed that his reference to Judge Gaitan as a "son of a bitch" was meant as an insult. **App. 54-55 (Tr. 25, L. 20-25 to Tr. 26, L. 3).** He testified that his use of "idiot" as an indirect reference to Judge Price as author of the *Rentschler* opinion was "inappropriate with regard to something in a public forum." **App. 56 (Tr. 27, L. 1-20).** Respondent defended his use of these terms by explaining:

> On an e-mail the word "son of a bitch," "idiot," when you're trying to express your dissatisfaction with decisions, cases – that's commonly the way a lot of attorneys talk. You know, it's nothing – if an attorney is going to be so thin-skinned as to let that bother them, then I think they need to find another profession. It certainly was nothing personal. If it was something personal, I would have sent that to them.
>
> **App. 56-57 (Tr. 27, L. 22 to Tr. 28, L. 5).**

Following Informant's examination, Respondent testified on his own behalf. He stated that this matter has "caused me a lot of hurt" and that he has tried to apologize to

Judge Gaitan. **App. 77 (Tr. 48, L. 2-5).** He again defended his some of his comments as something that lawyers say in private and that he has heard lawyers call judges much worse things than an "idiot." **App. 77 (Tr. 48, L. 12-18).** As to the email, he stated:

> And I want to say this, I don't want – this is very hard because I don't want to come across as being flippant in the sense that I am trying to make excuses for what I said, because I'm not. But, you know, this was an email that was written to a prisoner's wife. And, you know, I think that's entitled to a degree of protection.

App. 77-78 (App. 48, L. 23 – App. 49, L. 4).

Respondent testified that after he filed the *habeas corpus* petition for V.C., Judge Gaitan did nothing for 15 months, even after he called the judge's law clerks. **App. 78 (Tr. 49, L. 23-25).** With respect to Judge Gaitan's order, he further testified that he thought it "wasn't real strong in analysis . . . it was almost like it was sort of copied off what . . . . Judge Joyce in the Western District Court of Appeals wrote. Again, it was a little disparaging." **App. 79-80 (Tr. 50, L. 22-23 and Tr. 51, L. 7-10).** Respondent defended his right to criticize Judge Gaitan's order stating: "He's a judge, and he can write whatever opinion he wants. I'm an attorney, and I feel like I can give whatever opinion I want to give about the judgment. That's my right." **App. 80 (Tr. 51, L. 11-15).** He later testified that:

> Those of us who've tried those [habeas] cases you know, it's very hard. And sometimes you say things, like call the Court an idiot and call someone a son of a bitch that – I'm not saying

> it's right. A lot of other lawyers do it. I'm not saying it's right. I'm just saying, you know, when you're in that situation and, you know, you've lost five years of litigation, it's hurtful. It's hard.
>
> **App. 84-85 (Tr. 55, L. 23 – Tr. 56, L. 5).**

Respondent also provided testimony about his background, personality, and health issues. He indicated that his parents divorced when he was younger and he received counseling. **App. 87 (Tr. 58, L. 18-19).** He described himself as introverted and stated that they told his mother when he was younger that he had Asperger's syndrome. **App. 87 (Tr. 58, L. 22-24).** He stated he had throat cancer. **App. 95 (Tr. 66, L.23).** He further testified that he is a recovering alcoholic and had received counseling for alcohol addiction. **App. 103 (Tr. 74, L. 15-21).** He also stated that he had recovered from pain pill addiction. **App. 103 (Tr. 74, L. 23).**

On cross examination, counsel for Informant asked if Respondent wanted the panel to consider his health issues as mitigating factors, prompting the following exchange:

> **Mr. Rapp:** All right. Mr. Henry, you talked about some of your health issues today, and I appreciate your candor and some of the counseling for some of the issues that you have. Is it your testimony that the panel should take that into account as mitigating factors?
>
> **Mr. Henry:** About what?

Mr. Rapp: Well, I mean, you've testified here today to – I've written it down that you mentioned throat cancer, Asperger's –

Mr. Henry: No, no. Asperger's. With being Asperger's, yes. Just like I'm dealing with you. You're not a straightforward person, so I tend to try to get you on course. That's the way I deal with people like you. So if you don't like that, then that's my Asperger's.

Mr. Rapp: I was just asking, Mr. Henry, if you want the panel to take into account some of the things you've mentioned today, throat cancer, Asperger's –

Mr. Henry: Throat cancer, no. Asperger's, yes.

Mr. Rapp: --alcohol problem, pain pill addiction, counseling, is that something that you would like the panel to take into account today?

Mr. Henry: No.

App. 111 (Tr. 82, L. 2-25).

This was not the only time during the hearing that Respondent interrupted counsel for the Informant, responded in an aggressive or confrontational manner to questioning by counsel or made off-hand remarks about counsel. Early on, when asked to wait until counsel finished his question before responding, Respondent interrupted counsel and accused him of "nitpicking," "nipping" and making remarks to upset him. **App. 57 (Tr. 28, L. 6 to 20).** He then referred to counsel's questioning as "persnickety" and referred to counsel as

a "smart-ass." **App. 58 (Tr. 29, L 6-12).** When counsel attempted to voir dire Respondent's character witness, Respondent accused counsel of "playing games." **App. 75 (Tr. 46, L. 9-14).** At one point towards the end of counsel's cross examination, the following exchange occurred:

> **Mr. Rapp:** Mr. Henry, you testified earlier today when you were talking about some of the statements you made and what lawyers talk about over happy hour or whatever, but - -
>
> **Mr. Henry:** Objection, I didn't state happy hour.
>
> **Mr. Rapp:** I'll rephrase.
>
> **Mr. Henry:** That's the thing. That's the whole issue here, is the smart-ass remarks you're making.
>
> **Ms. Applequist:** You know, that's not going to look well on the transcript. Please be careful with your language, Mr. Henry.
>
> **Mr. Henry:** Why does he need to make comments like that? He knows I don't drink. You know, all he's trying to do is cut at me.
>
> **Mr. Rapp:** I'll withdraw the question.
>
> **Ms. Applequist:** Please do. Please rephrase it.
>
> **App. 113-114 (Tr. 84, L. 20 – Tr. 85, L. 13).**

At the conclusion of his testimony, Respondent called a character witness, Philip Meyer, to testify on his behalf. ***See, e.g.,*** **App. 116-122.** The parties then proceeded to make closing arguments. During his closing, Respondent stated that:

> I really have a fundamental problem with this case, and I have a fundamental problem with people who get a kick out of taking other people's information and using it as a way to explore their whole life and everything about it and to put it right here on the table.
>
> My mistake was stated in that letter. I have apologized for that mistake. This has turned into a bunch of extracurricular things as to what, you know, I said to Mr. Pratzel or what I said to Mr. Phillips or what I said to Mr. Rapp. You know, I didn't come here for that. I came here to answer the questions on what you're disciplining me for – I guess you're disciplining me for, and that's an e-mail that I made.
>
> **App. 124-25 (Tr. 95, L. 23 – Tr. 96, L. 12).**

During its closing, Informant requested that Respondent be disbarred. **App. 129 (Tr. 100, L. 17-23).** Specifically, Informant argued that Respondent had violated Rules 4-8.2(a) and 4-8.4(g), which Respondent had admitted to in his Amended Answer to the Information. **App. 131-133 (Tr. 102, L. 13 – Tr. 104, L. 4).** Informant further argued that it had serious concerns about Respondent's fitness to practice law based on the derogatory email as well as perceived anger issues as evidenced by his voicemails to Alan Pratzel and

his conduct during the hearing. **App. 133 (Tr. 104, L. 14 – 23) and App. 152-153 (Tr. 123, L. 15 – Tr. 124, L. 6).** Respondent responded to Informant's concerns about his anger by stating that it was not anger, but rather, fear of disbarment or losing his license that was driving his conduct. **App. 159-60 (Tr. 130, L. 12 – Tr. 131, L. 7).**

Alternatively, Informant requested that if Respondent was not disbarred that he be suspended with conditions to undergo psychological counseling and receive help with anger management issues prior to reinstatement. **App. 157 (Tr. 128, L. 4 -13).** However, the DHP presiding officer expressed hesitation that the DHP (as opposed to the Missouri Supreme Court) had the authority to impose those conditions. **App. 157-158 (Tr. 128, L. 14 – Tr. 129, L. 15).**

DHP Decision

On March 9, 2016, the DHP entered its decision. **App. 179-190.** The DHP concluded that Respondent violated Rules 4-8.4(g) and 4-8.2(a). **App. 182.** The DHP recommended that the alleged violations of Rule 4-8.4(d) be dismissed. **App. 182-183.** A two person majority of the DHP recommended that Respondent's license be suspended indefinitely with no leave to reapply for reinstatement for one year. **App. 188.** One panel member believed Respondent's misconduct warranted disbarment. **App. 188.**

On April 7, 2016, Respondent provided his notice rejecting the panel's decision. **App. 191.** On April 8, 2016, Informant also rejected the panel's decision. **App. 192.**

POINTS RELIED ON

I.

RESPONDENT VIOLATED RULE 4-8.4(g) BY MANIFESTING RACIAL BIAS OR PREJUDICE IN THE REPRESENTATION OF A CLIENT; VIOLATED RULE 4-8.2(a) BY MAKING FALSE OR RECKLESS STATEMENTS CONCERNING THE QUALIFICATIONS OR INTEGRITY OF JUDGES AND THE JUDICIARY; AND VIOLATED RULE 4-8.4(d) BY ENGAGING IN CONDUCT THAT IS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

In re Madison, 282 S.W.3d 350 (Mo. banc 2009)

Matter of Westfall, 808 S.W.2d 829 (Mo. banc 1991)

Missouri Supreme Court Rule 4-8.2

Missouri Supreme Court Rule 4-8.4

POINTS RELIED ON

II.

UPON APPLICATION OF THE ABA SANCTION STANDARDS, INCLUDING AGGRAVATING AND MITIGATING FACTORS, AND PRIOR DECISIONS OF THIS COURT, THE COURT SHOULD DISBAR RESPONDENT FROM THE PRACTICE OF LAW.

In re Disciplinary Proceedings Against Isaacson, 860 N.W.2d 490 (Wis. 2015)

In re Madison, 282 S.W.3d 350 (Mo. banc 2009)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

RESPONDENT VIOLATED RULE 4-8.4(g) BY MANIFESTING RACIAL BIAS OR PREJUDICE IN THE REPRESENTATION OF A CLIENT; VIOLATED RULE 4-8.2(a) BY MAKING FALSE OR RECKLESS STATEMENTS CONCERNING THE QUALIFICATIONS OR INTEGRITY OF JUDGES AND THE JUDICIARY; AND VIOLATED RULE 4-8-4(d) BY ENGAGING IN CONDUCT THAT IS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

Violation of Rule 4-8.4(g)

Rule 4-8.4(g) provides that: "[i]t is professional misconduct for a lawyer to: manifest by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation." Informant has been unable to locate any published cases where this Court has considered what racially based or racially charged conduct rises to the level of a Rule 4-8.4(g) violation. Review of other jurisdictions, however, reveals several discipline decisions where courts have found racially charged or racially insensitive comments to constitute violations of Rule 4-8.4(g).

In *In re Thomsen*, 837 N.E.2d 1011 (Ind. 2005), the Indiana Supreme Court found, as a matter of first impression, that a divorce lawyer's comments and descriptions about an

African-American male who was an acquaintance of the opposing party to be a violation of Indiana Professional Conduct Rule 8.4(g). *Id.* at 1012. The Court noted that "[i]terjecting race into proceedings where it is not relevant is offensive, unprofessional and tarnishes the image of the profession as a whole . . . Respondent's comments only serve to fester wounds caused by past discrimination and encourage future intolerance." *Id.* Thomsen was reprimanded. *Id.* In *In re Swarts*, 30 P.3d 1011 (Kan. 2001), the Kansas Supreme Court held that a county attorney's slavery comments to an African-American teenage girl constituted a violation of Kansas Rule of Professional Conduct 8.4(g). *Id.* at 1029. Swarts was suspended from the practice of law and placed on supervised probation. *Id.* at 1032.

Still other Courts have found racially charged or racially insensitive comments or conduct to be serious violations of related rules of professional conduct. *In re Charges of Unprofessional Conduct Contained in Panel File 98-26*, 597 N.W.2d 563 (Minn. 1999), the Minnesota Supreme Court considered attorney discipline arising from an underlying criminal case involving an African-American defendant. Therein, the prosecuting attorney filed a motion in limine asking the trial court to "prohibit[] counsel for the defendant to have a person of color as co-counsel for the sole purpose of playing upon the emotions of the jury." *Id.* at 566. Noting that race based conduct is "an inherently serious matter" the Court rejected a panel's finding that such misconduct was "not serious" under Minnesota Rule of Professional Conduct 8.4(d). The attorney received a private admonition in light of substantial mitigating conduct. *See id.* at 569. *See also In re Williams*, 414 N.W.2d 394, 397-99 (Minn. 1987) (lawyer's use of "sheeny Hebrew" in reference to opposing counsel

found to be a racial slur in violation of the former Code of Professional Responsibility resulting in a reprimand).

In this case, Respondent's direct reference to Judge Gaitan as a "puppet nigger" constitutes a violation of Rule 4-8.4(g). Dictionary.com states that "[t]he term nigger is now probably the most offensive word in English." Dictionary.com, *available at* http://dictionary.reference.com/browse/nigger (last visited February 8, 2016). Dictionary.com further describes "nigger" as "extremely disparaging and offensive" slang and defines the word as a "contemptuous term used to refer to a black person" or "a member of any dark-skinned people." *Id.* At the hearing, Respondent conceded that the term is a contemptuous, disparaging remark that is generally used to refer to black people or people of African-American descent. **App. 50.** He further admitted that the term was derogatory and that there was no excuse for him using the word. **App. 53.**

However, Respondent attempted to mitigate his use of the slur at the hearing by claiming that he did not know Judge Gaitan's ethnicity. **App. 49-50.** However, such testimony is belied by his email to V.C. in which he states that he "used to be very racial, but I am not so anymore . . . ," establishing that he knew Judge Gaitan was a different race from Respondent, who is white. **App. 168.** The DHP correctly found Respondent's testimony on this point not credible. **App. 187.**

Of particular relevance are opinions from other jurisdictions where Courts have found the use of the word "nigger" to be violations of Rule 4-8.4(g) or related rules of professional conduct. *In re McCarthy*, 938 N.E.2d 698 (Ind. 2010), the Indiana Supreme Court found a Rule 8.4(g) violation where an attorney wrote an email to another party

stating: "I know you must do your bosses [sic] bidding at his direction, but I am here to tell you that I am neither you [sic] or his nigger." *Id.* at 698. The attorney was suspended from the practice of law for 30 days. *Id.* at 699. *See also In re Mann*, 578 S.E.2d 722, 723 (S.C. 2003) (attorney's comment to staff member that if he tried to second guess a judge he would be perceived as though he were "an uppity nigger on an old south plantation" found to be violations of several provisions of South Carolina Rule of Professional Conduct 8.4 resulting in a public reprimand). The Court will note that the use of "nigger" in these cases was not in direct reference to a person of color, but rather, an interpretation by the attorney making the statement that they would be considered to be a "nigger" or an "uppity nigger" if they took a particular course of action. Respectfully, in this case, Respondent's use of the word in direct reference to a judge of color is even more offensive, and represents a blatant violation of Rule 4-8.4(g).

In his answer, Respondent admitted "to violating rule [4-8.4(g)] by making racial slur, but deny that it manifested bias and prejudice in the course of representing a client." **App. 20 (Para. 12).** The evidence at the hearing, however, establishes that Respondent's use of the racial slur was made in the course of representing a client. The email containing the slur was emailed to Respondent's client's wife, with instructions for her to "read this to [V.C.]." **App 168**. Respondent further admitted at the hearing that he still represented V.C. when the email was sent and that the email contained legal strategies for appealing Judge Gaitan's denial of habeas corpus relief to the Eighth Circuit Court of Appeals. **App. 47 and 48.**

Violation of Rule 4-8.2(a)

Rule 4-8.2(a) provides in relevant part that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . ." This Court first considered the parameters of what constitutes a Rule 4-8.2(a) violation in *Matter of Westfall*, 808 S.W.2d 829 (Mo. banc 1991). In *Westfall*, this Court was asked to determine the appropriate level of discipline to impose on a prosecutor who strongly and personally attacked a sitting court of appeals judge in an interview with a local television station after the judge authored an opinion that the prosecutor disagreed with. *See id.* at 831. This Court found that "[s]tatements by a lawyer impugning the integrity and qualifications of a judge, made with knowledge of the statement's falsity or in reckless disregard of the truth or falsity, can undermine public confidence in the administration and integrity of the judiciary, thus in the fair and impartial administration of justice." *Id.* at 836.

In re Madison, 282 S.W.3d 350 (Mo. banc 2009) this Court was asked to consider disciplining an attorney who made statements about two Jackson County judges, including, but not limited to, accusations that the judges were ill-qualified to be judges; that one judge was part of an "evil network" of judges and lawyers; that one judge acted with a ruthless abuse of power and contempt for the law; that one judge was unethical; and that one judge unjustly filed a bar complaint against an African-American attorney. *Id.* at 352 and 355. This Court held that the attorney's conduct violated several rules of professional conduct, including Rule 4-8.2(a). *Id.* at 360. Specifically, the *Madison* court noted that the attorney's "allegations against both judges were completely without factual basis and were made in

the heat of anger and pique" and that "the allegations were made either with knowledge of their falsity or with reckless disregard as to their truth." *Id.* at 359. Madison was suspended from the practice of law indefinitely, with no leave to apply for reinstatement for six months. *Id.* at 362.

Here, in his email to client V.C., Respondent made several comments that impugned the integrity of Judge Gaitan, Judge Price and the judiciary in general. Informant has already discussed the use of the racial slur as directed to Judge Gaitan. Further, when asked to explain what he meant by puppet in the context of his "puppet nigger" comment, Henry explained that is a puppet is "someone who defers to what a lower court has done or what a body does," implying that he thought Judge Gaitan was incapable of reaching an independent decision on his own. **App. 53.** He further referred to Judge Gaitan as a "son of a bitch" which he testified was meant as an insult.[5] **App. 54-55.** He later referred to Judge Gaitan's Order as a "bullshit opinion." **App. 168.** He further expressed frustration with this Court's opinion in *Rentschler,* stating that it "was drafted by an idiot." **App. 168.** He wrote that after *Rentschler* was handed down, the Missouri Court of Appeals for the Western District "realized [*Rentschler*] was wrong" and wrote another opinion in attempt to "cover their ass." **App. 168.** As in *Madison,* Respondent's comments were made in the "heat of anger and pique" and with full knowledge of the statements' falsity or reckless

[5] Dictionary.com defines "son of a bitch" as vulgar slang for "a contemptible or thoroughly disagreeable person." Dictionary.com *available at* http://dictionary.reference.com/browse/son-of-a-bitch (last visited February 8, 2016).

disregard as to their truth. Further, Respondent's statements, made as they were in an email to a client's wife with instructions to deliver to an incarcerated client, run the risk of undermining public confidence in the administration and integrity of the judiciary and the fair and impartial administration of justice. Respondent himself, in his email, makes reference to correspondence with "jailhouse lawyers" about V.C.'s case. **App. 168.** Accordingly, it was possible, if not probable, that Respondent's email would be shared with other inmates, thereby further undermining public confidence in the integrity of the judiciary and the fair and impartial administration of justice.

Violation of Rule 4-8.4(d)

Rule 4-8.4(d) provides that "[i]t is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice."

In this case, Informant alleged in the Information that Respondent's conduct violated Rule 4-8.4(d), which Respondent admitted. **App. 21 at Para. 15.** At the time the Information was prepared, Informant knew only of Respondent's comments about Judge Gaitan and the judiciary as set forth in his email to client V.C., which are discussed at length above. This Court has held that scurrilous allegations made about judges are prejudicial to the administration of justice and constitute a Rule 4-8.4(d) violation. *In re Madison,* 282 S.W.3d at 359-60.

ARGUMENT

II.

UPON APPLICATION OF THE ABA SANCTION STANDARDS, INCLUDING AGGRAVATING AND MITIGATING FACTORS, AND PRIOR DECISIONS OF THIS COURT THE COURT SHOULD DISBAR RESPONDENT FROM THE PRACTICE OF LAW.

As discussed herein, the evidence introduced at the November 19, 2015 hearing indisputably establishes a violation of Rule 4-8.2(a) and misconduct under Rule 4-8.2(d) and (g). Considering the seriousness of the racial slur used by Respondent; the fact that the slur was directed at a sitting federal judge in an email intended for an incarcerated client; Respondent's other comments about judges and the judiciary; and Respondent's continuing displays of anger - as evidenced in the email to V.C. and his conduct both prior to and during the hearing, Respondent lacks the character and fitness to practice law. Informant seeks disbarment.

Sanction Standards

Sanction analysis commonly derives from several sources: hearing panel recommendations; applicable Rules of Professional Conduct; application of the ABA Standards for Imposing Lawyer Sanctions (1991 ed.) ("ABA Standards"), including aggravating and mitigating circumstances; consideration of previous Missouri Supreme Court decisions - for consistency; and, relevant case law from other jurisdictions. In determining the appropriate sanction, the Court routinely considers all of these sources.

In this case, Respondent's conduct violated a duty all lawyers owe to the legal system and to the profession.

Respondent's conduct does not fit easily within the framework of existing ABA sanction standards, a situation contemplated by the drafters of the ABA Standards. *See, e.g.*, ABA Standards, Section II "Theoretical Framework" ("While there may be particular cases of lawyer misconduct that are not easily categorized, the standards are not designed to propose a specific sanction for each of the myriad of fact patterns in cases of lawyer misconduct. Rather, the standards provide a theoretical framework to guide the courts in imposing sanctions.") Nevertheless, Informant believes that Respondent's breaches of these respective duties are sufficient to warrant the most stringent sanctions under any theoretical framework.

Lawyers owe duties to the legal system. Lawyers are officers of the court, and must abide by the rules of substance and procedure which shape the administration of justice. ABA Standards, Section II "Theoretical Framework." Lawyers must always operate with the bounds of the law, and cannot engage in any other illegal or improper conduct. *Id.* The ABA Standards specifically identify Rules 8.2 and 8.4 as rules related to duties owed to the legal system. *Id.* *See also* ABA Standard 6.1 ("[a]bsent aggravating or mitigating circumstances . . . the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice . . . .") Similarly, lawyers owe duties to the legal profession, including a duty to maintain the integrity of the legal profession. ABA Standards, Section II "Theoretical Framework."

In this case, Respondent's breached both of these duties by his conduct. He intentionally and knowingly used a racial slur to describe Judge Gaitan in an email intended for his client V.C., thereby manifesting bias in the course of representing said client. Such conduct damages the legal system and the profession of lawyering and reflects directly on Respondent's character and fitness as a lawyer. *See, e.g.*, Comment [4] to Rule 4-8.4 ("Rule 4-8.4(g) identifies the special importance of a lawyer's words or conduct, in representing a client, that manifest bias or prejudice against others based upon race . . . A lawyer acts as an officer of the court and is licensed to practice law by the state. The manifestation of bias or prejudice by a lawyer, in representing a client, fosters discrimination in the provision of services in the state judicial system, creates a substantial likelihood of material prejudice by impairing the integrity and fairness of the judicial system, and undermines public confidence in the fair and impartial administration of justice.") As noted by the Minnesota Supreme Court:

> Racism, whether it takes the form of an individual's overt bigotry or an institution's subtle apathy, is, by its very nature, serious . . . When any individual engages in race-based misconduct it undermines the ideals of a society founded on the belief that all people are created equal. When the person who engages in this misconduct is an officer of the court, the misconduct is especially troubling. Left unchecked, such racially-biased actions as we have here not only undermine

> confidence in our system of justice, but also erode the very foundation upon which justice is based.
>
> *In re Charges of Unprofessional Conduct Contained in Panel File 98-26*, 597 N.W.2d at 567-68.

In addition to the racial slur, Respondent referred to the judge as a "puppet." **App. 168.** He further described the judge's opinion as "bullshit." **App. 168.** He also stated that a Missouri Supreme Court opinion with which he disagreed was drafted by an "idiot." **App. 168.** All of these statements were made in an email intended for his client V.C., and had a significant adverse effect not just on V.C.'s legal proceeding, but on the legal system and legal profession as a whole.

Generally, as discussed in several of the cases cited above, the use of an isolated racial comment or racially charged conduct--standing alone—often results in a reprimand or lesser discipline. None of those cases, however, involved a scenario where an attorney used a racial slur in direct reference to the trial judge overseeing a client's case in an email intended for the client.

In that regard, the closest case providing guidance to this Court in determining an appropriate sanction would be the recent decision from the Wisconsin Supreme Court *In re Disciplinary Proceedings Against Isaacson*, 860 N.W.2d 490 (Wis. 2015). Therein, the Court considered what level of discipline was appropriate to impose against an attorney who made a number of "verbose and grandiose" allegations against "the courts generally, specific judges, other counsel, appointed officers, and third parties." *Id.* at 493. These included comments referring to various judges as "a black-robed bigot," a "Jesuit judge,"

and a "Catholic Knight Witch Hunter." *Id.* at 494-95. Said attorney also stated that certain court systems "are composed of a bunch of ignoramus, bigoted Catholic beasts that carry the sword of the church." *Id.* at 495. As a result of said conduct, Respondent's license to practice law in Wisconsin was suspended for one year. *Id.* at 498. *See also In re Madison*, 282 S.W.3d at 362-63 (improper conduct and comments made toward judges overseeing the lawyer's case justified suspension from the practice of law) and *Lawyer Disciplinary Bd. v. Hall*, 765 S.E.2d 187 (W.Va. 2014) (allegations that African-American judge was biased and predisposed towards African-American plaintiffs justified three month suspension from the practice of law).

In this case, there are several additional factors that justify Respondent's disbarment. First, the conduct described in the aforementioned cases was confined primarily to court pleadings (*Issacson* and *Hall*) or in letters to judges (*Madison*), thereby limiting their exposure to the public. Here, the racial slur, other insults and criticism directed to judges and the judicial system were included in an email intended for the client, who is an incarcerated prisoner. As noted by the DHP panel:

> That communication [e-mail to V.C.] was made to the wife of the client and she was commissioned to forward it on to her husband. Accordingly, Respondent essentially was giving permission to publish this diatribe at large. The enormity of his choice of words is harshened by the fact that his client was actually in a penitentiary. He described his client as having used that kind of language himself and he also described in the email his knowledge that inmates talked to each other about their cases that are pending

> and relate information about their pending cases to one another. The effect that this language would have on the people in the prison environment can only be imagined.
>
> **App. 185.**

Additionally, although such language was apparently not intended by Respondent to be seen by Judge Gaitan, Respondent's client did in fact forward the email to Judge Gaitan, who read it and notified the OCDC, correctly believing it to be a violation of Rule 4-8.4. Furthermore, Respondent's email did not further any interest of his client, who had just been denied *habeas corpus* relief. Rather, Respondent "simply satisfied his own need to vent his feelings . . . ." *In re Madison*, 282 S.W.3d at 361.

Finally, the anger and frustration evidenced in Respondent's email was also on display throughout the disciplinary process in his interactions with disciplinary officers, including, but not limited to, the Chief Disciplinary Counsel, casting serious doubt on Respondent's judgment and his fitness to practice law. Accordingly, when all the factors constituting violations of the Rules of Professional Conduct and misconduct are considered together, disbarment is the appropriate sanction, with or without consideration of any aggravating or mitigating factors. Nevertheless, consideration of applicable aggravating and mitigating circumstances is necessary.

Aggravating Circumstances

ABA Standard 9.22(a)-(k) sets forth eleven factors which may be considered aggravating circumstances. Some key mitigating and aggravating factors relate to remorse,

acknowledgement of the wrongful nature of conduct, and submission of false statements during the disciplinary process.

Informant respectfully submits that Respondent's conduct prior to and during the disciplinary proceedings should be considered as additional factors in aggravation. *See, e.g., In re Madison*, 282 S.W.3d at 362 (holding that an attorney's "inappropriate and uncooperative conduct toward the panel, his lack of respect for the tribunal shown through his shouting at the presiding officer and his failure to attend a deposition he had scheduled are properly considered as additional matters in aggravation.") Leading up to the hearing, Respondent sent several emails to the presiding officer that the hearing panel considered "increasingly agitated and angry." **App. 182.** After learning that Informant would be seeking disbarment, Respondent left two voice mails for Alan Pratzel, which were angry, improper and aggressive. **CD.** As evidenced by the transcript and found by the DHP, Respondent was angry and used vulgar language at the hearing. **App. 182**. He repeatedly interrupted counsel for Informant and referred to him as persnickety, dishonest and a "smart ass." **App. 58, 112-113.** Such conduct had no purpose other than to disrupt or impede an attorney disciplinary matter and to attempt to intimidate disciplinary officers and should be considered aggravating conduct.

Mitigating Circumstances

ABA Standard 9.32(a)-(m) sets forth 13 factors which may be considered mitigating circumstances. Respondent has several factors that could be considered mitigating:

(a) Absence of a prior disciplinary record

Respondent has no previous discipline.

(c) Personal or Emotional Problems and (i) Mental disability of chemical dependency including alcoholism.

Respondent testified that he is a recovering alcoholic and that he suffers from Asperger's. **App. 87, 103.** He has received counseling in the past. **App. 87, 103.** However, there was no evidence that these conditions were in any way causally connected to the misconduct in this case. In addition, when asked by counsel for Informant if these matters should be considered as mitigating factors, Respondent answered in a flippant manner, making it unclear whether he considered these issues to be mitigating factors. **App 111.** Respondent also presented no medical evidence that he was affected by a chemical or mental dependency as required by ABA Standard 9.32(i)(1). Finally, to obtain consideration of mental health issues in mitigation, Missouri Rule 5.285 establishes several thresholds. He has not met any of those requirements. To the extent that Respondent wants to seek mitigation for his Asperger's, he should not be allowed. He has not complied with Rule 5.285's requirement of an independent medical evaluation; he has offered no evidence that Aspergers's or any condition caused his misconduct; and, he has offered no proof that his condition has improved or that recurrence is unlikely. In fact, his continued displays of disrespect toward the discipline system tend to prove the opposite.

(l) Remorse

Respondent wrote Judge Gaitan an apology letter. **App. 172-173.** He repeatedly testified during the disciplinary hearing that he was sorry about what he had said. **App. 84-85.** He admitted Rule violations in his answer. **App. 20-21.** Respectfully, however, Respondent's conduct and testimony prior to and during the DHP hearing, cast doubt on the veracity of Respondent's remorse.

Specifically, Respondent defended his comments as the way lawyers express dissatisfaction with court decisions in private and stating during closing argument that "I really have a fundamental problem with this case" and that it is his right to "give whatever opinion I want to give about the judgment." **App. 56, 77 and 80.** Further, his behavior prior to and at the hearing shows that Respondent—rather than expressing remorse for his conduct—instead establishes that he was aggressive, angry and annoyed with disciplinary officers and the disciplinary process.

CONCLUSION

For the foregoing reasons, Informant believes that Respondent lacks the basic character and fitness to practice law and respectfully recommends that Respondent be disbarred.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2016, a true and correct copy of the foregoing was served via the electronic filing system pursuant to Rule 103.08 to:

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Respondent

Kevin J. Rapp

RULE 84.06(c) CERTIFICATION

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 7,658 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Kevin J. Rapp