IN THE SUPREME COURT
STATE OF MISSOURI

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

INFORMANT'S REPLY BRIEF

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A. Respondent Failed to Mitigate Many of the Issues Raised in his Brief by Declining Two Offers from Informant to Continue the Disciplinary Hearing.

At the outset, Informant offered Respondent two chances to continue the Disciplinary Hearing Panel (DHP) hearing in this matter to allow him additional time to obtain counsel and prepare his defense. **Record (R.) 31-32 (Transcript (Tr.) 5, L. 19 to Tr. 6, L. 22).** Both of these offers were made after Informant notified Respondent that he would be recommending Respondent's disbarment. The first of these was at a prehearing phone conference among Informant, Respondent and DHP Presiding Officer Susan Applequist on February 4, 2016. Respondent declined the offer. At the start of the DHP hearing on February 9, 2016, before any evidence was heard, Informant again offered Respondent the opportunity to continue the matter. Respondent again declined Informant's offer and elected to proceed. Accordingly, Respondent should not now be heard to complain of these issues on appeal.

Respondent takes issue with the fact that the recordings of the voicemails left for Alan Pratzel, Chief Disciplinary Counsel, were not provided to Respondent prior to the hearing. **Respondent's Brief at 16-17.** In this case, Respondent was specifically advised in the notice accompanying the Information that "Pursuant to Rule 5.11, all statements and documents obtained in the investigation of this matter are available for inspection or copying at [the OCDC] by appointment. The materials are voluminous, therefore a copy does not accompany this notice." **Record at 7.** At no point did Respondent make any

request for any records maintained by OCDC, a fact noted by the DHP presiding officer during the hearing:

> **Mr. Henry**: I'm only raising it because, you know, I came here today not realizing that Mr. Rapp was going to throw a voice recording on me for some unknown reason.
>
> **Ms. Applequist**: Well, there are discovery proceedings under the rules. And that's why, you know, I would have hoped that you would have taken advantage of reviewing those discovery proceedings.
>
> **R. 123 (Tr. 97, L. 3 to 10)**

B. <u>Respondent's Brief and Appendix Contain Medical Information Not in the Record and Not in Compliance with Rule 5.285 and Should not be Considered by this Court.</u>

At the disciplinary hearing, Respondent stated that he suffered from Asperger's. For the first time, at the Supreme Court, Respondent states that he also suffers from hemochromatosis. In his brief at pages 15-16 and his Appendix at pages 11-36 are a series of discussions or medical articles about Asperger's syndrome and hemochromatosis, including the effects of such ailments. Informant respectfully submits that this information is not in the record, improperly included in Respondent's brief and appendix, and should not be considered by this Court.

As previously discussed in Informant's Brief, Respondent presented no evidence at the hearing that these conditions contributed to his misconduct in this case. **Informant's**

Brief at 33. None of the medical articles was provided to the DHP. No foundation or expert testimony has been laid for the articles. Further, introduction of said authorities at this stage of the disciplinary proceeding is directly counter to the requirements of Rule 5.285 which provides that an attorney claiming a mental disorder as a mitigating factor shall identify the mitigating factor and how it relates to the alleged misconduct no later than in the answer or amended answer. **Rule 5.285(b)**. The rule further provides that the attorney shall produce evidence from an independent mental health provider that the mental disorder caused or was directly and substantially related to the misconduct. **Rule 5.285(c)**. No such evidence was adduced at the DHP hearing.

C. Respondent's Conduct was Prejudicial to the Administration of Justice under Rule 4-8.4(d)

In his response to Informant's first point relied on, Respondent admits that his email containing the racial slur violated Rule 4-8.4(g) by manifesting racial prejudice in the representation of a client. **Respondent's Brief at 8.** He further admits that he violated Rule 4-8.2(a). ***Id.*** Respondent now denies, however, that he violated Rule 4-8.4(d) concerning conduct that is prejudicial to the administration of justice. As noted by Respondent in his brief, he admitted in his answer that he violated Rule 4-8.4(d). **Respondent's Brief at 9.** He now attempts to withdraw this admission because he says the DHP did not find a violation of Rule 4-8.4(d). **R. 197-98 (DHP 4-5).** Respondent violated Rule 4-8.4(d) for the reasons set forth in Informant's main brief at page 25.

D. A Reprimand with Requirements is not Sufficient Discipline in this Case.

Respondent submits that a reprimand with requirements, namely, that Respondent be required to complete anger management, is sufficient discipline in this matter. **Respondent's Brief at 25-26.** Informant disagrees, and again submits that disbarment is the appropriate discipline to be imposed in this case for the reasons set forth in its opening brief at pages 26-34.

Respondent's conduct is further exacerbated by Respondent's anger management issues, which existed long before he was informed that the OCDC would be seeking disbarment and do not arise solely out of Respondent's fear of losing his license. On its face, the email containing the racial slur exhibits anger and frustration. In his letter to Judge Gaitan, Respondent's client, V.C., used the word "rage" three times to describe the email. **R. 190.** Respondent's conduct leading up to the disciplinary hearing and at the hearing itself further exhibit that Respondent has great difficulty managing his emotions during periods of stress. Lawyers, however, are quite often called upon to work in extremely stressful environments. Respondent's inability to deal with his anger during such stressful time periods raises serious questions about his fitness to continue to practice law. Even assuming, *arguendo*, that this Court takes into account Respondent's Asperger's and hemochromatosis as an explanation for his conduct, at no point does Respondent offer any explanation or evidence that said conditions can be controlled or regulated to prevent further incidents of anger.

In seeking a reprimand with conditions, Respondent stresses that he has apologized to Judge Gaitan and is remorseful for his actions. Respondent offered his apology to Judge

Gaitan before the disciplinary hearing and again apologized at said hearing, but said apology still occurred only after Judge Gaitan reported Respondent to the OCDC, begging the age old question of whether Respondent is truly sorry for what he did or merely sorry that he got caught. Further, as discussed in Informant's opening brief, Respondent's conduct and testimony during the disciplinary process cast doubt on whether or not he is truly remorseful. **Informant's Brief at 34.**

E. Respondent did Not Properly Raise or Preserve any First Amendment Challenges.

Finally, Respondent suggests that "had he not admitted this violation in his answer that a case could be made that there was no violation and that the comment was protected by the First Amendment." **Respondent's Brief at 20.** Said suggestion, or any implied First Amendment Challenge, should not be considered.

At no point prior to this court's review of the record under Rule 5.19 has Respondent set forth or raised a First Amendment challenge to disciplinary charges, nor does he set forth one with sufficient detail here. This Court has consistently held that a constitutional question must be raised at the first available opportunity or it is waived. *St. Louis County v. Prestige Travel*, 344 S.W.3d 708, 712 (Mo. banc 2011). Here, the first opportunity to raise said challenge would have been in Respondent's Answer to the Information. Having failed to raise the issue in both his Answer and before the Hearing Panel, any constitutional challenges have been waived.

Further, this Court has generally rebuffed First Amendment challenges in the context of attorney discipline cases involving judicial criticism and disruption of judicial

proceedings. *See, e.g. Coe,* 903 S.W.2d at 917 and *In re Madison,* 282 S.W.3d 350, 353-354 and 363 (Mo. banc 2009).

CONCLUSION

For all the reasons set forth herein, and set forth in Informant's opening brief, Informant respectfully recommends that Respondent be disbarred from the practice of law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 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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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 1615 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Kevin J. Rapp