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## Picking Winners and Losers: The Subjectivity of Missouri Disciplinary Decisions

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## NOTE

# Picking Winners and Losers: The Subjectivity of Missouri Disciplinary Decisions

*In re Krigel*, 480 S.W.3d 294 (Mo. 2016) (en banc)

*Bradley Craigmyle*\*

### I. INTRODUCTION

Imagine someone close to you unexpectedly impregnates his girlfriend. He wants to raise the child and does not want to put the baby up for adoption, but the mother feels adoption is best. To facilitate the adoption process, the mother hires a lawyer. This lawyer intentionally keeps the father and the father's attorney in the dark regarding the adoption proceedings. The mother then, under her lawyer's guidance, gives false testimony at a court hearing so the child can be adopted. The father – who had been misled about the baby's due date and deprived of custody for over one year – eventually learns of the child's birth and intervenes in the adoption proceedings. Imagine further that the lawyer who orchestrated the plan to deceive the father and separate him from his child never loses his law license. Would you feel satisfied with this outcome? Would this strike you as the appropriate discipline? Or would you expect justice to take another form? While this might seem like a far-fetched hypothetical, it was a harsh reality for at least one Missourian not long ago.

The American Bar Association (“ABA”) provides a guide for state-level ethics laws known as the Model Rules of Professional Conduct (“Model Rules”). The Supreme Court of Missouri adopts ethics laws (“Missouri Rules”) and disciplines lawyers who violate these laws.<sup>1</sup> One of a lawyer's

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\* B.A., Truman State University, 2014; J.D. Candidate, University of Missouri School of Law, 2017; Editor in Chief, *Missouri Law Review*, 2016–2017. I owe many thanks to the *Missouri Law Review* editing and footnote folks for their hard work and thoughtful feedback. All remaining errors are mine alone.

1. The Missouri Rules are the substantive equivalent of the Model Rules. See MO. SUP. CT. R. 4-8.5(a) (“A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and other jurisdictions for the same conduct.”).

most fundamental duties is exercising honesty toward the tribunal, and the Missouri Rules prohibit a lawyer from engaging in dishonest behavior before tribunals.<sup>2</sup>

This Note traces the facts and holding of the case *In re Krigel*, before delving into the ABA's influential role in legal ethics. Next, it outlines Missouri's attorney discipline procedures and analyzes pertinent Missouri case law. Lastly, this Note critiques the majority opinion and argues that Krigel should have been disbarred.

## II. FACTS AND HOLDING

In response to several alleged violations of the Missouri Rules, the Office of the Chief Disciplinary Counsel ("OCDC") adopted the Disciplinary Hearing Panel's ("DHP") recommendation and sought suspension of Sanford P. Krigel's law license.<sup>3</sup> Krigel objected to the DHP's recommendation and asked the Supreme Court of Missouri to dismiss the OCDC's Information (Missouri's charging document).<sup>4</sup>

Krigel became a member of The Missouri Bar in 1976.<sup>5</sup> In 1978, he began practicing law with his wife, and their firm employs eleven attorneys.<sup>6</sup> He specializes in adoption law and, before this incident, had no record of disciplinary action.<sup>7</sup> The conduct at issue stemmed from Krigel's representation of an "unmarried, pregnant, eighteen year old woman" ("Birth Mother") in 2009.<sup>8</sup> Initially, Birth Mother and Birth Father agreed to hide the unexpected pregnancy from their parents until Birth Mother was eight months pregnant.<sup>9</sup> During their meeting with both parents to discuss the pregnancy, Birth Father asserted that he wanted to raise the child and did not want to give it up for adoption.<sup>10</sup> The birth parents' relationship deteriorated because of this meeting, and Birth Mother's parents tried to prevent Birth Father from contacting Birth Mother.<sup>11</sup>

Birth Father hired attorney Jeff Zimmerman to assist him with Birth Mother's pregnancy.<sup>12</sup> Concurrently, Birth Mother asked Hillary Merryfield,

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2. *Id.* R. 4-3.3(a) (prohibiting lawyers from knowingly presenting "a false statement of fact or law to a tribunal").

3. *In re Krigel*, 480 S.W.3d 294, 298–99 (Mo. 2016) (en banc).

4. *Id.* at 299.

5. *Id.* at 296.

6. *Sanford P. Krigel*, KRIGEL & KRIGEL L. OFFS., <https://www.krigelandkrigel.com/people/sanford-p-krigel/> (last visited Jan. 29, 2017); *Our People: Attorneys*, KRIGEL & KRIGEL L. OFFS., <https://www.krigelandkrigel.com/section/attorney/> (last visited Jan. 29, 2017).

7. *Krigel*, 480 S.W.3d at 296–97.

8. *Id.* at 297.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

who runs a child placement agency, for an attorney referral.<sup>13</sup> Merryfield and Krigel had worked together on adoptions for around twenty years, and she recommended Krigel to Birth Mother.<sup>14</sup> Krigel met with Birth Mother on March 11, 2010, and Birth Mother explained that she felt it would be best to give the child up for adoption.<sup>15</sup> She also informed Krigel that Birth Father would not consent to an adoption.<sup>16</sup> Birth Mother retained Krigel to counsel her in terminating her parental rights in preparation for an adoption.<sup>17</sup> Krigel implemented a “passive strategy,” whereby they “would actively do nothing to communicate with Birth Father or his counsel; they would not advise Birth Father or his counsel of the adoption plans, the birth of the child, and the instigation of any legal proceedings.”<sup>18</sup>

On March 19, 2010, Zimmerman called Krigel and suggested that the birth parents receive counseling outside their parents’ presence.<sup>19</sup> Already knowing Birth Mother was working with Merryfield seeking an adoption, Krigel proposed the birth parents meet with Merryfield.<sup>20</sup> During this call, Krigel told Zimmerman the child would not be adopted without the Birth Father’s consent.<sup>21</sup> After meeting with the birth parents, Merryfield reported to Krigel that Birth Father did not want to consent to an adoption, but she believed that Birth Father would not contest the adoption because she felt he was “quiet, sad, and passive.”<sup>22</sup>

Birth Mother contacted Birth Father in late March – intending to deceive him – and falsely claimed that her due date had changed from early April to early May.<sup>23</sup> The child was born, and neither Birth Father nor Zimmerman was informed.<sup>24</sup> Next, Birth Mother attended a hearing in Jackson County, Missouri, to terminate her parental rights and move forward with the adoption on April 6, 2010.<sup>25</sup> Both Birth Father and Zimmerman failed to attend because neither was aware of the hearing.<sup>26</sup> Responding to Krigel’s question at the hearing, Birth Mother agreed that “Birth Father had been consulted at length about the matter.”<sup>27</sup> Krigel also asked Birth Mother: “[E]ven though you’ve talked to him and his family at some length, he has not stepped forward since

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13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 297–98 (internal quotations omitted).

19. *Id.* at 298.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* (internal quotations omitted).

the birth of the child claiming any rights to the child"; and she agreed.<sup>28</sup> The court terminated Birth Mother's parental rights and transferred custody to the prospective adoptive parents.<sup>29</sup> Birth Father intervened in the adoption proceedings after learning of the child's birth, and the trial court awarded legal and physical custody to Birth Father on May 6, 2011.<sup>30</sup>

The OCDC filed an Information against Krigel in 2014, and the DHP (discussed below) conducted an evidentiary hearing – it recommended suspending Krigel indefinitely, without leave to apply for reinstatement, for six months.<sup>31</sup> The OCDC (Missouri's investigative disciplinary body) accepted the recommendation, but Krigel did not – believing no sanctions should be imposed – and appealed to the Supreme Court of Missouri.<sup>32</sup> The Supreme Court of Missouri found that Krigel violated the Missouri Rules, specifically Rules 4-3.3(a)(3) (knowingly offering false evidence), 4-4.1(a) (making a false statement of material fact), 4-4.4(a) (improperly burdening or delaying a third person), and 4-8.4(d) (engaging in conduct prejudicial to the administration of justice).<sup>33</sup> The court stayed Krigel's suspension, subject to his completion of two years' probation, according to court-imposed conditions.<sup>34</sup>

### III. LEGAL BACKGROUND

Lawyers, as professionals, must exercise a high degree of skill and care, and ethical behavior is part of that skill and care.<sup>35</sup> This Part looks at the ABA's function in articulating and enforcing legal ethics. Next, it analyzes Missouri's legal ethics laws and synthesizes Missouri case law that deals with Rule 4-3.3(a) violations, which involve lawyers who knowingly present false evidence. The court cited all of the cases discussed below in deciding Krigel's fate.

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28. *Id.* (internal quotations omitted).

29. *Id.*

30. *Id.*

31. *Id.* at 298–99.

32. *Id.* at 299.

33. *Id.* at 296.

34. *Id.*

35. LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 5 (4th ed. 2016).

### A. *The ABA's Role in Legal Ethics*

One of the ABA's goals is to improve the legal profession.<sup>36</sup> A related objective is to "[p]romote competence, ethical conduct[,] and professionalism."<sup>37</sup> Against this backdrop, the ABA has helped develop the ethical framework governing lawyer behavior for over a century.<sup>38</sup> In an effort to proactively encourage lawyers to act ethically, the ABA, in 1908, promulgated the *Canons of Professional Ethics* ("Canons").<sup>39</sup> In 1969, the ABA replaced the Canons with suggested disciplinary rules when it adopted the *Model Code of Professional Responsibility* ("Model Code").<sup>40</sup> The ABA approved the *Model Rules of Professional Conduct* ("Model Rules") in 1983 to address some important problems lawyers were facing that the Model Code did not adequately address.<sup>41</sup> The ABA continues to revise and publish the Model Rules, and while they are not law, the Model Rules have been very influential in most states.<sup>42</sup>

Lawyer discipline is meant to serve three main functions. It aims to protect the public, ensure the administration of justice, and maintain the integrity of the profession.<sup>43</sup> The ABA promulgated the *Standards for Imposing Lawyer Sanctions* ("Standards") to increase disciplinary consistency in 1986.<sup>44</sup> The Standards instruct courts to consider the following when disciplining a lawyer: (1) the duty violated, (2) the lawyer's mental state, (3) the actual or potential injury the lawyer's misconduct caused, and (4) any aggravating or mitigating factors.<sup>45</sup> Aggravating factors relevant to Krigel's case include: (1) multiple offenses, (2) a refusal to acknowledge the conduct's wrongful nature, and (3) substantial experience practicing law.<sup>46</sup> The only mitigating factor mentioned in Krigel's case was the absence of a prior disciplinary record.<sup>47</sup>

Model Rule 3.3(a) seeks to ensure candor toward the tribunal; it instructs that a "lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false."<sup>48</sup> Further, a lawyer shall take reasonable remedial measures if he, his client, or his witness offers material evidence and the lawyer later learns

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36. *ABA Mission and Goals*, ABA, [http://www.americanbar.org/about\\_the\\_aba/aba-mission-goals.html](http://www.americanbar.org/about_the_aba/aba-mission-goals.html) (last visited Jan. 29, 2017).

37. *Id.*

38. LERMAN & SCHRAG, *supra* note 35, at 36.

39. *Id.*

40. *Id.* at 37.

41. *Id.*

42. *Id.* at 21.

43. STANDARDS FOR IMPOSING LAWYER SANCTIONS Preface (AM. BAR ASS'N 1986).

44. *Id.*

45. *Id.* at 3.0.

46. *Id.* at 9.22.

47. *Id.* at 9.32.

48. MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 1983).

the evidence is false.<sup>49</sup> If necessary, a lawyer shall inform the tribunal about the false evidence.<sup>50</sup> Under the Standards, generally, a lawyer should be disbarred if he *intends* to deceive the court in making a false statement or withholding material information and injures a party or adversely affects the legal proceeding.<sup>51</sup> For less serious violations, a lawyer should generally be suspended if he *knows* false statements are being submitted to the court, fails to take remedial action, and a party is injured or the legal proceeding is adversely affected.<sup>52</sup>

Model Rule 4.1 concerns truthfulness in statements to others, and it forbids a lawyer from knowingly making “a false statement of material fact or law to a third person” in the course of representing a client.<sup>53</sup> To comply with Model Rule 4.4(a), a lawyer must not engage in behavior that has no substantial purpose “other than to embarrass, delay, or burden” another person.<sup>54</sup> Lastly, a lawyer violates Model Rule 8.4(d) – and commits professional misconduct – if he engages in conduct prejudicial to the administration of justice.<sup>55</sup>

### B. Missouri Ethics Laws and Disciplinary Procedures

The Supreme Court of Missouri oversees the state’s lawyer disciplinary system.<sup>56</sup> The Missouri Rules govern The Missouri Bar, and Rules 4-3.3(a)(3), 4-4.1(a), 4-4.4(a), and 4-8.4(d) are functionally identical to the Model Rules discussed above.<sup>57</sup>

49. *Id.*

50. *Id.*

51. STANDARDS FOR IMPOSING LAWYER SANCTIONS 6.11 (AM. BAR ASS’N 1986) (emphasis added).

52. *Id.* at 6.12. Further,

Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

*Id.* at 6.13.

53. MODEL RULES OF PROF’L CONDUCT r. 4.1(a).

54. *Id.* r. 4.4(a).

55. *Id.* r. 8.4(d). This rule has been described as “a kind of catch-all that exhorts people to act honorable, without defining the behavior that could cause a lawyer to be disciplined or even disbarred”; it applies to a “wide range of conduct.” LERMAN & SCHRAG, *supra* note 35, at 739.

56. *Disciplinary Information*, MO. BAR, <http://www.mobar.org/ethics/> (last visited Jan. 28, 2017).

57. *Comparison of Newly Adopted Missouri Rules of Professional Conduct with ABA Model Rules*, ABA (Feb. 17, 2010), <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/miss.authcheckdam.pdf>. The Missouri Rules numbering scheme follows closely the Model Rules, but because the Missouri Rules are part

When a person believes a lawyer has acted unethically, she may file a complaint with the OCDC, an office the Supreme Court of Missouri created to investigate ethical complaints filed against lawyers.<sup>58</sup> First, the OCDC screens the complaint to ensure it deals with professional misconduct.<sup>59</sup> Next, if the complaint does involve professional misconduct, the OCDC may either refer the complainant to the Complaint Resolution Program<sup>60</sup> or “open” the complaint file.<sup>61</sup> The OCDC or a Regional Disciplinary Committee (“RDC”) (local committees comprised of lawyers and non-lawyers) investigates the opened complaint.<sup>62</sup> The investigation may include written investigation, telephone calls, and personal interviews.<sup>63</sup> Based on the investigation, the Chief Disciplinary Counsel (“CDC”) or RDC: (1) closes the file, (2) issues a written admonition, or (3) files an Information.<sup>64</sup> The investigative body closes the file if it finds no violation.<sup>65</sup> If the investigative body believes the lawyer has committed a minor violation, it can issue a written admonition that becomes part of the lawyer’s record.<sup>66</sup> The investigative body will file an Information if it decides the lawyer committed a serious violation.<sup>67</sup> The lawyer may request a hearing on the Information within thirty days; otherwise, the Supreme Court of Missouri imposes discipline by default.<sup>68</sup>

If the offending lawyer requests a hearing, the Advisory Committee (composed of lawyers and non-lawyers appointed by the Supreme Court of Missouri) assigns the case to a DHP (which includes two lawyers and one non-lawyer chosen from a larger panel appointed by the Supreme Court of Missouri).<sup>69</sup> The DHP hears evidence and recommends one of the following: (1) dismissal, (2) written admonition, (3) reprimand, or (4) suspension or disbarment.<sup>70</sup> Either party may appeal the DHP’s recommendation to the Supreme

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of Missouri Supreme Court Rule 4, Model Rule 1.0 is Supreme Court Rule 4-1.0 in Missouri, and so on. *See* MO. SUP. CT. R. 4-1.0.

58. *Disciplinary Information*, *supra* note 56.

59. *Id.*

60. *Id.* (“In some instances it is appropriate to refer the complainant to the Complaint Resolution Program administered by The Missouri Bar or a fee dispute resolution program. Local bar associations in St. Louis and Kansas City operate fee dispute resolution programs serving those areas, while The Missouri Bar administers such a program for the rest of the state.”).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*



Court of Missouri.<sup>71</sup> The parties may then brief and argue the issue before the court makes a decision.<sup>72</sup>

The OCDC data from 2015 show: eighteen disbarments, twenty-seven suspensions (eleven of which were stayed), four public reprimands, and eighty-three written admonitions.<sup>73</sup> Only nine cases were appealed and briefed to the Supreme Court of Missouri, and of those nine, only five were heard because the offending attorney disagreed with a DHP's recommended sanction.<sup>74</sup>

### C. Missouri Precedent

Sketching Missouri precedent is meant to serve two functions. First, doing so provides background on the cases the court cited – and presumably found instructive – in deciding Krigel's case. Second, due to the number of cases discussed, it allows us to better understand the method with which the Supreme Court of Missouri analyzes and decides disciplinary cases.

In the 1992 case *In re Ver Dught*, Ver Dught represented a client in her appeal to an Administrative Law Judge (“ALJ”) to receive Supplemental Security Income and Disabled Widow's benefits.<sup>75</sup> Ver Dught's client remarried before the ALJ hearing, and he advised the client not to reveal her married name when testifying; Ver Dught then elicited false testimony.<sup>76</sup> Ver Dught referred to his client by her maiden name three times, despite being fully aware that she had taken her new husband's last name.<sup>77</sup> Ver Dught also stated that his client had only been married twice, even though Ver Dught knew his client was currently married to her third husband.<sup>78</sup> The Supreme Court of Missouri found that Ver Dught: (1) knowingly made a false statement of material fact to the tribunal, (2) failed to disclose to the tribunal a material fact when disclosure was necessary to avoid assisting his client in a criminal or fraudulent act, (3) offered evidence he knew was false, (4) engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and (5) engaged in conduct prejudicial to the administration of justice.<sup>79</sup>

Despite these missteps, the court distinguished Ver Dught's actions from those of a lawyer who is “demonstrably unfit to continue in the profession” and did not disbar him.<sup>80</sup> The court distinguished based on mitigating evidence that

71. *Id.*

72. *Id.*

73. OFFICE OF THE CHIEF DISCIPLINARY COUNSEL, REPORT TOGETHER WITH THE FINANCIAL REPORT OF THE TREASURER OF THE ADVISORY COMMITTEE FUND FOR 2015, at 22 (May 2016), <http://www.mochiefcounsel.org/articles/Annual%20Report%202015.pdf>.

74. *Id.*

75. *In re Ver Dught*, 825 S.W.2d 847, 848 (Mo. 1992) (en banc).

76. *Id.* at 849–50.

77. *Id.* at 848–49.

78. *Id.* at 850.

79. *Id.* at 850–51.

80. *Id.*

he contributed to his profession, community, and church, and that he possessed a “good” reputation in the community.<sup>81</sup> The court concluded Ver Dught’s conduct did not warrant disbarment and instead suspended him for six months.<sup>82</sup>

In 1994, the defendant in the case *In re Oberhellmann* was charged with violating the Missouri Rules; the violations stemmed from his conduct in two separate matters.<sup>83</sup> In the first matter, Oberhellmann alleged that his client resided in Texas to establish diversity jurisdiction, but Oberhellmann knew his client lived in Missouri.<sup>84</sup> When answering interrogatories, Oberhellmann used his mother’s Illinois address as his client’s.<sup>85</sup> The client then followed Oberhellmann’s instructions and lied at her deposition to corroborate the interrogatories; she claimed she lived with Dorothy Goode and claimed that Goode was her cousin.<sup>86</sup> Oberhellmann also told his client to avoid answering a question during her deposition if he tapped her foot or knee.<sup>87</sup> The Supreme Court of Missouri held Oberhellmann violated the Missouri Rules by: (1) knowingly making a false statement of material fact, (2) counseling his client to give false testimony, and (3) engaging in conduct prejudicial to the administration of justice.<sup>88</sup>

In the second matter, Oberhellmann forged his former law partner’s signature on a motion to withdraw.<sup>89</sup> The court found that he violated the Missouri Rules by: (1) knowingly making a false statement of material fact, (2) engaging in conduct involving dishonestly, fraud, deceit, or misrepresentation, and (3) engaging in conduct prejudicial to the administration of justice.<sup>90</sup> The court mentioned no mitigating factors and looked to the Standards and precedent in disbaring Oberhellmann because he knowingly made a false statement and submitted a false document with the intent to deceive the court.<sup>91</sup>

In another 1994 case, *In re Storment*, the offending attorney counseled his witness to testify falsely and asked questions on direct examination designed to elicit the false testimony.<sup>92</sup> After the witness gave surprising, and potentially damaging, testimony, Storment requested a recess.<sup>93</sup> The court reporter inadvertently left the tape recorder on, and it captured Storment telling the witness to deny the damaging testimony.<sup>94</sup> Storment further told the witness, “If you

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81. *Id.* at 851.

82. *Id.*

83. *In re Oberhellmann*, 873 S.W.2d 851, 853 (Mo. 1994) (en banc).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 854.

89. *Id.* at 855.

90. *Id.* at 855–56.

91. *Id.* at 856.

92. *In re Storment*, 873 S.W.2d 227, 229–30 (Mo. 1994) (en banc).

93. *Id.* at 228.

94. *Id.*

said it didn't happen, it didn't happen."<sup>95</sup> The Supreme Court of Missouri found that Stormont: (1) knowingly failed to disclose a material fact necessary to avoid assisting a client's fraudulent act, (2) offered evidence he knew to be false, (3) engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and (4) engaged in conduct prejudicial to the administration of justice.<sup>96</sup> The court disbarred him based on the Standards; the court mentioned no mitigating factors.<sup>97</sup>

In the 1997 case *In re Caranchini*, Caranchini was charged with engaging in unethical behavior based on her conduct in four cases.<sup>98</sup> In the first case, Caranchini's unethical behavior resulted largely from a lack of diligence; she failed to properly investigate her client's claim before filing the complaint, and the district court dismissed her client's case on summary judgment.<sup>99</sup> The Supreme Court of Missouri found that she violated four Missouri Rules: (1) bringing a frivolous claim, (2) failing to make reasonable efforts to expedite litigation, (3) violating or attempting to violate the Missouri Rules, and (4) engaging in conduct prejudicial to the administration of justice.<sup>100</sup>

In the second case, Caranchini tried using a forged document to support her client's claim and continued using it after she learned of its forgery.<sup>101</sup> The court concluded she: (1) pursued a frivolous claim, (2) failed to make reasonable efforts to expedite litigation, (3) knowingly offered evidence she knew to be false, (4) engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, and (5) engaged in conduct prejudicial to the administration of justice.<sup>102</sup>

Caranchini in the third case made unsupported allegations, offered affirmative misrepresentations, and withheld material evidence.<sup>103</sup> Specifically, Caranchini affirmatively misrepresented the date she learned that a potential party's residence had changed, and she intentionally failed to disclose a significant witness's name, hoping to surprise the opposition at trial.<sup>104</sup> She also purposely misrepresented her ability to connect several witnesses to her client, after the court instructed Caranchini that the witnesses could only testify if they were adequately connected to Caranchini's client.<sup>105</sup> The court held she: (1) pursued a frivolous claim, (2) failed to take reasonable measures to expedite litigation, (3) knowingly made a false statement to the tribunal, (4) unlawfully obstructed another party's access to evidence, (5) failed to diligently attempt

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95. *Id.*

96. *Id.* at 230.

97. *Id.* at 231.

98. *In re Caranchini*, 956 S.W.2d 910, 914–15 (Mo. 1997) (en banc).

99. *Id.* at 915.

100. *Id.* at 916.

101. *Id.*

102. *Id.*

103. *Id.* at 917–18.

104. *Id.* at 917.

105. *Id.* at 917–18.

to comply with discovery requests, and (6) engaged in conduct prejudicial to the administration of justice.<sup>106</sup>

In the fourth case, Caranchini filed a frivolous motion for sanctions against opposing counsel and pursued a frivolous appeal.<sup>107</sup> The court again found that she: (1) pursued a frivolous claim, (2) failed to take reasonable steps to expedite litigation, and (3) engaged in conduct prejudicial to the administration of justice.<sup>108</sup>

The court did not reference any mitigating factors and strictly followed precedent and the Standards in disbaring Caranchini because she “intentionally submitted a false document, intentionally made false statements, and intentionally withheld material information.”<sup>109</sup> The court explained, “This misconduct is an affront to the fundamental and indispensable principle that a lawyer must proceed with absolute candor towards the tribunal. In the absence of that candor, the legal system cannot properly function.”<sup>110</sup>

In the case *In re Carey*, the court in 2002 found that Carey and Danis “violated two of the most fundamental principles of our [legal] profession, loyalty to the client and honesty to the bench.”<sup>111</sup> A former client sued Carey and Danis for breach of fiduciary duty after both lawyers knowingly failed to produce forty-two documents requested multiple times in interrogatories.<sup>112</sup> The two attorneys established the following mitigating factors: no prior disciplinary action, several attorneys attested to their reputations for loyalty to the client and honesty to the bench, participation in charities and pro bono work, and the satisfaction of an \$850,000 judgment against them.<sup>113</sup> Because of these mitigating factors, the court indefinitely suspended, rather than disbaring, Carey and Danis.<sup>114</sup>

Considering the precedent above, it appears the Supreme Court of Missouri takes the duty of honesty to the tribunal quite seriously. The court disbarred three of the six offending attorneys, while the lightest punishment the court doled out was a six-month suspension.<sup>115</sup> The court mentioned several mitigating factors in deciding not to disbar Mr. Ver Dught, Mr. Carey, and Mr.

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106. *Id.*

107. *Id.* at 918.

108. *Id.*

109. *Id.* at 919.

110. *Id.* at 919–20.

111. *In re Carey*, 89 S.W.3d 477, 503 (Mo. 2002) (en banc).

112. *Id.* at 489.

113. *Id.* at 503.

114. *Id.* at 504.

115. *In re Ver Dught*, 825 S.W.2d 847, 851 (Mo. 1992) (en banc) (attorney suspended for six months); *In re Oberhellmann*, 873 S.W.2d 851, 856 (Mo. 1994) (en banc) (attorney disbarred); *In re Storment*, 873 S.W.2d 227, 231 (Mo. 1994) (en banc) (attorney disbarred); *Caranchini*, 956 S.W.2d at 919 (attorney disbarred); *Carey*, 89 S.W.3d at 504 (both attorneys suspended indefinitely).

Danis.<sup>116</sup> The case law suggests the court has little patience for attorneys who intentionally deceive the tribunal, and absent several mitigating factors, the court disbars – as the Standards prescribe – those attorneys who intentionally deceive the tribunal. The presence or absence of mitigating evidence seems to be the crux of the court’s punishment in reprimanding lawyers who knowingly present false evidence, at least in the cases cited in *Krigel*.

#### IV. INSTANT DECISION

*In re Krigel* required the Supreme Court of Missouri to weigh Krigel’s extensive past without disciplinary action against his violation of one of a lawyer’s most serious ethical duties – candor toward the tribunal. Judge George W. Draper’s majority opinion, joined by Judges Stith and Russell, concluded that disbarment was inappropriate given Krigel’s extensive past without disciplinary action.<sup>117</sup> The court held that Krigel violated Rules 4-3.3(a)(3), 4-4.1(a), 4-4.4(a), and 4-8.4(d) and stayed his suspension, subject to Krigel completing two years’ probation.<sup>118</sup>

Chief Justice Patricia Breckenridge filed an opinion concurring with the court’s discipline, but she dissented from the finding that Krigel violated Rule 4-4.4(a).<sup>119</sup> This Note does not discuss Chief Justice Breckenridge’s opinion because she concurred in the discipline; instead, it primarily analyzes Krigel’s violation of 4-3.3(a)(3) and the court’s decision to spare Krigel’s law license. Believing Krigel should have been disbarred, Judge Zel M. Fischer dissented; Judges Wilson and Teitelman joined the dissenting opinion.<sup>120</sup>

##### A. The Majority

Because the court reviewed the evidence *de novo*, it began by determining what rules Krigel violated.<sup>121</sup> The court found that Krigel offered evidence he knew to be false, violating Rule 4-3.3(a)(3), when he questioned Birth Mother at the adoption hearing.<sup>122</sup> Specifically, Krigel knew Birth Father did not consent to adoption and was unaware of the child’s birth, but he helped Birth Mother convince the court that Birth Father had simply failed to exercise his

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116. *Ver Dught*, 825 S.W.2d at 851 (finding in mitigation that Ver Dught contributed to his profession, community, and church, and that he possessed a “good” reputation in the community); *Carey*, 89 S.W.3d at 503 (citing the following mitigating factors: no prior disciplinary action, several attorneys attested to their reputations for loyalty to the client and honesty to the bench, participation in charities and pro bono work, and the satisfaction of an \$850,000 judgment against them).

117. *In re Krigel*, 480 S.W.3d 294, 302 (Mo. 2016) (en banc).

118. *See generally id.* at 296.

119. *Id.* at 302–03 (Breckenridge, C.J., concurring in part and dissenting in part).

120. *Id.* at 306 (Fischer, J., dissenting).

121. *Id.* at 299 (majority opinion).

122. *Id.*

parental rights.<sup>123</sup> Birth Mother additionally testified that Birth Father was able to continually communicate with her, which Krigel knew was false.<sup>124</sup> The majority concluded “Krigel’s representation to the trial court via his questioning, by permitting false and misleading testimony to be presented, was designed to portray the false impression that Birth Father was not interested in the child or in asserting his parental rights.”<sup>125</sup>

The court found that Krigel violated Rule 4-4.1(a), which bars a lawyer from knowingly making a false statement of material fact to a third person, when he told Zimmerman the child would not be adopted without Birth Father’s consent.<sup>126</sup>

Next, the court held that Krigel used means having no substantial purpose other than to embarrass, delay, or burden a third person, violating Rule 4-4.4(a).<sup>127</sup> Krigel actively withheld information from Birth Father and “pursued a course of action that disregarded the parental rights of Birth Father and the best interests of the child in remaining with a natural parent.”<sup>128</sup>

Lastly, the court held that Krigel violated Rule 4-8.4(d) and engaged in conduct prejudicial to the administration of justice in submitting a Petition to Approve, Consent, and Transfer of Custody, declaring Birth Mother knew of no one else claiming to have custodial or visitation rights.<sup>129</sup> The court found that statement untrue and concluded Krigel “thwarted” Birth Father’s opportunity to assert his parental rights.<sup>130</sup>

The court shifted to discipline and noted at the outset that it relies on the Standards when imposing sanctions.<sup>131</sup> It highlighted four factors the court generally considers: (1) duty violated, (2) lawyer’s mental state, (3) potential or actual injury caused by the lawyer’s misconduct, and (4) aggravating and mitigating factors.<sup>132</sup> The court focused on the final factor, listing multiple offenses and a failure to grasp the severity of the charges as aggravating factors.<sup>133</sup> It failed to mention Krigel’s extensive legal experience as an aggravating factor.<sup>134</sup> The court noted in mitigation Krigel’s more than thirty years of practice without disciplinary action.<sup>135</sup>

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123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 299–300.

127. *Id.* at 300.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 300–01.

132. *Id.* at 301. This Note does not discuss the recommended sanctions for the other offenses at issue because the Rule 4-3.3(a) violation is the most serious, and the court must issue punishment consistent with the offender’s most serious violation.

133. *Id.*

134. *Id.*

135. *Id.*

The court acknowledged that Krigel's punishment should be consistent with that of his most egregious violation.<sup>136</sup> It concluded that his most egregious violation was making a false statement to, and withholding material information from, the tribunal, for which disbarment is usually the appropriate sanction.<sup>137</sup> After noting that disbarment is reserved for "clear cases of gross misconduct" where the lawyer is unfit to continue practicing law, the court distinguished *In re Oberhellmann*.<sup>138</sup> The court found the analogy of Krigel's conduct to *Oberhellmann* inapposite because Oberhellmann committed misconduct in two separate cases.<sup>139</sup> Considering a lesser degree of punishment, the court stated that suspension might be appropriate when the lawyer "merely knows of the misrepresentation" or "knows that a false statement is being submitted to a court and takes no remedial action."<sup>140</sup>

The court denied Krigel's request that no sanction be imposed because "Krigel's conduct in this matter was not passive; he knew material information was withheld from the trial court, and he took no remedial action during any of the proceedings."<sup>141</sup> The court found disbarment inappropriate because "Krigel has never been disciplined by this [c]ourt and has specialized in this area of law for more than thirty years without complaint."<sup>142</sup> Instead, the court suspended Krigel for six months and stayed its execution pending completion of two years' probation.<sup>143</sup>

### B. The Dissent

Judge Zel M. Fischer, joined by Judges Wilson and Teitelman, dissented.<sup>144</sup> The dissent opened with a quote of the oath every lawyer licensed to practice in Missouri must take: "That I will never seek to mislead the judge or jury by any artifice or false statement of fact or law[.]"<sup>145</sup> Because Krigel violated the oath, as well as several Missouri Rules, the dissent would disbar,

136. *Id.*

137. *Id.*

138. *Id.* at 301–02 (quoting *In re Ver Dught*, 825 S.W.2d 847, 851 (Mo. 1992) (en banc)).

139. *Id.* ("In *Oberhellmann*, the attorney's misrepresentations were made in two separate and unrelated cases. In one case, the attorney affirmatively instructed his client to perjure herself on the witness stand, and in the other case, the attorney forged his former legal associate's signature on a document submitted to the court. The analogy of Krigel's conduct to *Oberhellmann* is inapposite.")

140. *Id.* at 302 (first quoting *In re Caranchini*, 956 S.W.2d 910, 919 (Mo. 1997) (en banc); and then quoting *In re Oberhellmann*, 873 S.W.2d 851, 856 (Mo. 1994) (en banc)).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 306 (Fischer, J., dissenting).

145. *Id.* (alteration in original) (internal quotations omitted).

or at a minimum, suspend Krigel indefinitely, without leave to reapply for six months.<sup>146</sup>

Unlike the majority, the dissent allowed the circuit court's judgment removing the child from the adoptive parents and placing it with the Birth Father to inform its opinion.<sup>147</sup> The dissent quoted the beginning of the circuit court's judgment: "The facts of this case *shock the justice system* that the people of Missouri enjoy. The [c]ourt finds the actions of officers of this [c]ourt [referring to Krigel] to be at minimum disturbing to the administration of justice."<sup>148</sup> The dissent also highlighted the circuit court's finding that Krigel received from the adoptive parents \$22,000 for "a minimal role in the litigation."<sup>149</sup>

The dissent relied on precedent in concluding Rule 4-3.3(a) violations have typically resulted in disbarment or indefinite suspension.<sup>150</sup> When imposing sanctions in *Oberhellman*, the court stated, "Disbarment is appropriate when a lawyer, *with the intent to deceive a court, makes a false statement or submits a false document to a court.*"<sup>151</sup> The dissent found this controlling and attacked the majority for "turn[ing] an 'about face' from this precedent in merely suspending Krigel, staying the suspension, and permitting Krigel to continue to practice on probation."<sup>152</sup>

## V. COMMENT

This Part compares the majority opinion to the precedent the court cited and argues the majority diverged from this precedent. Next, it offers an alternative analysis of how Krigel's conduct should be examined under the Standards. Lastly, this Part argues the majority's punishment fails to achieve what it considers to be the two main purposes of punishment.

### A. *The Majority Diverged from Precedent*

The court, in establishing the legal framework, noted, "Generally, 'when an attorney, with an intent to deceive the court, submits a false document, makes a false statement, or withholds material information, disbarment is the appropriate sanction.'"<sup>153</sup> At first blush, Krigel seems to be a prime candidate for disbarment because he knowingly presented false evidence with the intent

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146. *Id.*

147. *Id.* at 309–10.

148. *Id.* at 309 (third alteration in original) (emphasis added) (internal quotations omitted).

149. *Id.* at 310 (internal quotations omitted).

150. *Id.* (citing *In re Carey*, 89 S.W.3d 477 (Mo. 2002) (en banc); *In re Caranchini*, 956 S.W.2d 910 (Mo. 1997) (en banc); and *In re Stormont*, 873 S.W.2d 227 (Mo. 1997) (en banc)).

151. *In re Oberhellmann*, 873 S.W.2d 851, 856 (Mo. 1994) (en banc) (emphasis added).

152. *Krigel*, 480 S.W.3d at 311 (Fischer, J., dissenting).

153. *Id.* at 301 (majority opinion) (quoting *Caranchini*, 956 S.W.2d at 919).



to deceive the court.<sup>154</sup> Yet the court distinguished Krigel's conduct from one who intends to deceive the court, finding controlling the Standard that governs the conduct of an attorney who merely *knows of the misrepresentation*.<sup>155</sup> But in doing so, the court failed to distinguish Krigel's conduct from Oberhellman, Stormont, and Caranchini, who were all disbarred because of their intention to deceive the court.<sup>156</sup>

Oberhellmann instructed his client to perjure herself and also offered a forged document.<sup>157</sup> Although the record is absent of any evidence that Krigel instructed Birth Mother to lie under oath, the court found Krigel and Birth Mother employed a passive strategy to keep Birth Father in the dark.<sup>158</sup> Krigel then elicited testimony whereby Birth Mother perjured herself in the hearing to terminate her parental rights.<sup>159</sup> Krigel and Birth Mother obviously concocted a plan to deceive Birth Father, *and* the court, from the outset. The majority acknowledged this in concluding that Krigel violated Rule 4-3.3(a)(3): "Krigel's representation to the trial court via his questioning, by permitting false and misleading testimony to be presented, was designed to portray the false impression that Birth Father was not interested in the child or in asserting his parental rights."<sup>160</sup> Therefore, the majority's conclusion that the Standard governing conduct where a lawyer merely *knows* of the misrepresentation contradicts its earlier analysis of Krigel's conduct.

In distinguishing Krigel's conduct from Oberhellmann's, the majority seemed to mischaracterize the dissent's use of *Oberhellman*. The majority explained, "The dissent believes that Krigel should be disbarred from the practice of law, comparing Krigel's conduct to that of the attorney in *In re Oberhellmann*."<sup>161</sup> The majority reasoned that the comparison between Krigel's conduct and Oberhellmann was "inapposite" because Oberhellmann's misrepresentations were made in two separate cases.<sup>162</sup> But the dissent merely recited *Oberhellmann* to provide the legal background; its real purpose in using *Oberhellmann* was to establish the legal standard. The dissent's block quotation of the reasoning in *Oberhellmann* affirmed this.<sup>163</sup> Judge Fischer used *Oberhellmann* to stand for the proposition that a lawyer should be disbarred if he, with

154. *See id.* at 301–02.

155. *Id.* at 302 (emphasis added) ("Turning to [the] *ABA Standards*, this [c]ourt finds the appropriate recommended range of discipline to be reflected in *ABA Standard* 6.12[, which notes when suspension, not disbarment, is appropriate].").

156. *See generally id.*

157. *In re Oberhellmann*, 873 S.W.2d 851, 853, 855 (Mo. 1994) (en banc).

158. *Krigel*, 480 S.W.3d at 297–98.

159. *Id.* at 298 ("In response to a question by Krigel, Birth Mother agreed that Birth Father 'had been consulted at length about the matter.' Birth Mother also agreed when Krigel asked 'even though you've talked to him and his family at some length, he has not stepped forward since the birth of the child claiming any rights to the child.'").

160. *Id.* at 299.

161. *Id.* at 301.

162. *Id.* at 301–02.

163. The dissent quoted the following from *Oberhellmann*:

the intent to deceive the court, makes a false statement to the court. It is irrelevant that Krigel's conduct failed to rise to the level of Oberhellmann's; the dispositive fact is Krigel knowingly offered false evidence and intentionally asked Birth Mother questions to elicit that false evidence.

Next, Storment counseled his client to testify falsely and asked questions during direct examination designed to elicit the false testimony.<sup>164</sup> The court concluded suspension was not appropriate because "Storment's active role transcends failure to remedy."<sup>165</sup> So the court disbarred him.<sup>166</sup> In determining Krigel's punishment, the majority highlighted that "Krigel's conduct in this matter was not passive; he knew material information was withheld from the trial court, and he took no remedial action during any of the proceedings."<sup>167</sup> But the court did not go so far as to characterize Krigel's conduct as active, even though he asked questions to elicit false testimony, which is analogous to Storment's conduct that the court considered "active."<sup>168</sup>

Lastly, Caranchini, among other things, intentionally submitted a forged document, intentionally made false statements, and intentionally withheld material information.<sup>169</sup> The court in disbaring Caranchini stated its decision "must turn on the precedent that when an attorney, with an intent to deceive the court, submits a false document, makes a false statement, or withholds material information, disbarment is the appropriate sanction."<sup>170</sup> Although Krigel did not submit a false document or make a false oral statement, the majority concluded his questioning at the paternity hearing "omitted essential information."<sup>171</sup> Further, Krigel signed the Petition to Approve, Consent, and Transfer of Custody, which stated Birth Mother was unaware of any other person asserting a custodial claim over the child; of course, Birth Mother knew Birth Father asserted custody over the child.<sup>172</sup> It is worth pointing out that the

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In cases of false statements, fraud, or misrepresentation, this [c]ourt issues reprimands only if the lawyer is merely negligent in determining whether statements or documents are false. Respondent was more than negligent; therefore, public reprimand is not appropriate. Nor is suspension appropriate. Suspension is appropriate only if a lawyer knows that a false statement is being submitted to a court and takes no remedial action. Disbarment is the appropriate sanction for respondent. Disbarment is appropriate when a lawyer, *with the intent to deceive a court, makes a false statement or submits a false document to a court.*

*Id.* at 311 (Fischer, J., dissenting) (quoting *In re Oberhellmann*, 873 S.W.2d 851, 856, (Mo. 1994) (en banc)).

164. *In re Storment*, 873 S.W.2d 227, 229–30 (Mo. 1994) (en banc).

165. *Id.* at 231.

166. *Id.*

167. *Krigel*, 480 S.W.3d at 302.

168. *Id.* at 298; *Storment*, 873 S.W.2d at 231.

169. *In re Caranchini*, 956 S.W.2d 910, 919 (Mo. 1997) (en banc).

170. *Id.*

171. *Krigel*, 480 S.W.3d at 299.

172. *Id.* at 300.

disbarment standard does not require an attorney to submit a false document, make a false statement, *and* withhold material information. The standard is disjunctive. Disbarment is appropriate if an attorney does any *one* of those things with the intent to deceive the court.

### B. *The Majority Improperly Weighed the Standards*

The court highlighted four factors it generally considers when determining what sanction to impose: (1) “the duty violated;” (2) “the lawyer’s mental state;” (3) “the potential or actual injury caused by the lawyer’s misconduct; and” (4) “the existence of aggravating or mitigating factors.”<sup>173</sup> The majority mostly analyzed aggravating and mitigating factors – consistent with the pattern identified in Part III.C – but this Part argues that all four factors favor disbaring Krigel.

First, the court analyzes the duty violated. The majority acknowledged Krigel’s most serious act of misconduct was his lack of candor to the tribunal.<sup>174</sup> Duties to the tribunal are among lawyers’ most important ethical obligations, and some scholars believe the duty of candor is even more important than lawyers’ duties to their clients.<sup>175</sup> The Supreme Court of Missouri has characterized the duty of candor to the tribunal as “fundamental and indispensable” and claimed that the legal system could not function properly without it.<sup>176</sup> The commentary accompanying the Standards reiterates this, instructing that those who, with the intent to deceive the court, make a false statement or improperly withhold information “violate the most fundamental duty of an officer of the court.”<sup>177</sup> The circuit court believed Krigel’s actions “shock[ed] the justice system,” and “at [a] minimum disturb[ed] . . . the administration of justice.”<sup>178</sup> Because Krigel violated what some consider his most important obligation, this factor cuts toward disbarment.

Second, the court determines the lawyer’s mental state. Under the Standards, after an attorney makes false statements or withholds material information, the severity of punishment hinges on his mental state. If the lawyer does these things with the *intent* to deceive the court, then disbarment is appropriate.<sup>179</sup> But if the attorney merely *knows* these things are happening and fails

173. *Id.* at 301.

174. *Id.*

175. John M. Burman, *Lawyers’ Duties to Tribunals: Part II – Candor*, WYO. LAW., Dec. 2011, at 46 (“Having determined that a lawyer’s duties to tribunals have priority over all other duties only begins the inquiry.”).

176. *In re Caranchini*, 956 S.W.2d 910, 919–20 (Mo. 1997) (en banc) (“This misconduct is an affront to the fundamental and indispensable principle that a lawyer must proceed with absolute candor towards the tribunal. In the absence of that candor, the legal system cannot properly function.”).

177. MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS 6.11 cmt. (AM. BAR ASS’N 1986).

178. *Krigel*, 480 S.W.3d at 309 (Fischer, J., dissenting).

179. MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS 6.11.

to remedy them, then suspension will suffice.<sup>180</sup> Krigel clearly intended to deceive the court in eliciting false testimony from Birth Mother and withholding material information. Implicit in the majority's conclusion that the Standard governing suspension controlled was its inference that Krigel merely knew of the misrepresentations and did not intend to deceive the court.<sup>181</sup> Yet that conclusion is inconsistent with the majority's conclusion that "Krigel's questioning of Birth Mother at that hearing was *designed to mislead* the trial court as to the actual circumstances between Birth Mother and Birth Father."<sup>182</sup> Because Krigel intended to deceive the court, this factor cuts toward disbarment.

Third, the court examines the potential or actual injury caused by the lawyer's misconduct. The majority failed to mention this factor, but the dissent articulated the situation as "a fraud on the circuit court that resulted in a father not receiving custody of his child *in excess of a year*, and Krigel receiving \$22,000 for a minimal role in the litigation."<sup>183</sup> It is easy for lawyers and law students to become desensitized to egregious facts as they are commonplace in the practice and study of law. But a father could not see or hold his child for more than one year because of Krigel's intentional, highly calculated, conduct. Further, it seems as though the justice system is practically rewarding Krigel for intentionally deceiving the court – yes, he is on probation, but he may nonetheless continue to practice law, and he profited from his appalling conduct. This amounts to significant harm that is arguably more serious – as it deals with parental custody – than the cases cited by the majority. This factor weighs in favor of disbarment.

Fourth, the court determines any aggravating and mitigating factors. The majority devoted significant discussion to this factor. The court cited in aggravation that Krigel committed multiple offenses and failed to understand the severity of the charges.<sup>184</sup> In mitigation, the majority noted that Krigel has been practicing for more than thirty years with no prior disciplinary history.<sup>185</sup> The crux of the court's analysis was this lone mitigation factor: "Considering Krigel has never been disciplined by this [c]ourt and has specialized in this area

180. *Id.* at 6.12.

181. *Krigel*, 480 S.W.3d at 302 ("A lesser sanction of suspension may be appropriate in cases when 'the attorney merely knows of the misrepresentation. . . .' 'Suspension is appropriate only if a lawyer knows that a false statement is being submitted to a court and takes no remedial action.' Turning to [the] *ABA Standards*, this [c]ourt finds the appropriate recommended range of discipline to be reflected in *ABA Standard 6.12.*" (alteration in original) (citations omitted) (first quoting *In re Caranchini*, 956 S.W.2d 910, 919 (Mo. 1997) (en banc); and then quoting *In re Oberhellmann*, 873 S.W.2d 851, 856 (Mo. 1994) (en banc))).

182. *Id.* at 299 (emphasis added).

183. *Id.* at 310 (Fischer, J., dissenting) (emphasis added) (internal quotations omitted).

184. *Id.* at 301 (majority opinion).

185. *Id.*

of law for more than thirty years without complaint, disbarment is an inappropriate sanction.”<sup>186</sup> But the court failed to acknowledge that Krigel’s vast experience is also an *aggravating* factor – the Standards clearly list “substantial experience in the practice of law” as an aggravating factor.<sup>187</sup> The logic behind this aggravating factor is that experienced lawyers should know better than to engage in this conduct, while inexperienced lawyers might act unethically because of youth and inexperience.<sup>188</sup> The majority cited Krigel’s substantial experience in the practice of law three separate times as a mitigating factor,<sup>189</sup> but it failed to cite Krigel’s more than thirty years’ experience specializing in adoption law as an aggravating factor. Every lawyer, even a first-year associate, should know not to intentionally deceive the tribunal. But a lawyer with more than thirty years’ experience in adoption law should be intimately aware of the negative repercussions that follow from deceiving a court in adoption proceedings.

It will always be the case that an experienced lawyer with no prior violations may be viewed one of two ways: (1) a lawyer who deserves a break because of his long record of good behavior, or (2) a lawyer who – based on his experience – should have known better and should be punished more severely because the violation was not the result of inexperience. This invites judges to arbitrarily choose whether a long record with no ethical violations mitigates or aggravates the violation. Not only does this case involve violating a lawyer’s most fundamental duty, but this duty was violated by a lawyer who has substantial experience. He knew better. In sum, there is one mitigating factor, which also doubles as an aggravating factor, weighed against three aggravating factors – this balancing favors disbarment.

### *C. The Majority’s Punishment Does Not Serve What It Considers the Two Primary Purposes of Punishment*

The majority considered protecting the public and maintaining the integrity of the profession as the twin purposes of punishing lawyers who violate the ethics rules.<sup>190</sup> The court noted that it may accomplish these purposes di-

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186. *Id.* at 302.

187. MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.22 (AM. BAR ASS’N 1986).

188. 7 AM. JUR. 2D *Attorneys at Law* § 68 (2016) (“Substantial experience is deemed to be an aggravating factor in determining a sanction for attorney misconduct, while lack of experience as a lawyer is considered to be a mitigating factor; the distinction is made in recognition of the fact that a youthful and inexperienced attorney may have engaged in misconduct as a result of inexperience rather than as a result of deliberate calculation.”).

189. *Krigel*, 480 S.W.3d at 297, 301, 302.

190. *Id.* at 301.

rectly, by removing a lawyer from the practice of law, and indirectly, by ordering sanctions that deter others from engaging in similar conduct.<sup>191</sup> The majority's decision to stay Krigel's six-month suspension fails to accomplish either punishment purpose. First, the majority does not protect the public because Krigel – even after eliciting false testimony and withholding material information – is still practicing law. Krigel may continue to practice adoption law so long as he does not violate the terms of his two-year probationary period.<sup>192</sup> It is unlikely that the probationary terms will change the nature of Krigel's practice. It should be relatively easy for Krigel to satisfy the terms. The majority listed as an aggravating factor that Krigel failed to appreciate the severity of his conduct, which implies he might engage in this behavior again. Under the majority's decision, Krigel has the opportunity to do so at any time.

Second, the majority's punishment does not protect the integrity of the profession. This decision tells lawyers if they have a long history of practicing law with no prior ethical violations, they will be treated leniently, *even if* they violate the lawyer's most fundamental duty. Instead of deterring other lawyers from engaging in such conduct, the majority's decision implies that it is acceptable to bend the rules so long as the lawyer is experienced and well behaved to date. There will be repercussions, such as probation, if these rules are bent, but these repercussions will not keep experienced lawyers with no disciplinary history from practicing law.

Third, because this decision strays from precedent, it leaves practitioners wondering what will happen in a similar case. Is *Krigel* an outlier, or is the Supreme Court of Missouri moving toward a more lenient treatment of lawyers who violate the duty of candor toward the tribunal? This decision tells experienced lawyers they may intentionally deceive the tribunal and continue to practice law if it is their first documented misstep. That message undermines the integrity of the legal profession and the public's trust in lawyers. Hopefully *Krigel* is an outlier, rather than the turn of the ethical tide in Missouri.

## VI. CONCLUSION

Due to the nature of the profession, lawyers must obey strict ethical obligations. No obligation is more important than the duty of candor to the tribunal. After all, how will our legal system function properly if lawyers fail to

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191. *Id.*

192. *Id.* at 302. The terms of Krigel's probation require him to: (1) submit quarterly reports to his probation monitor, (2) comply with the Missouri Rules, (3) attend the Solo & Small Firm Conference of The Missouri Bar (which may count toward his fifteen-hour CLE requirement), (4) obtain malpractice insurance, (5) notify the CDC of any change of employment, (6) report the details of any client trust accounts, (7) provide audits of the client trust accounts, (8) pay for probation participation, and (9) comply with terms one through eight or face a potential six-month suspension of his law license. See generally Terms and Conditions of Probation at 1–7, *In re Krigel*, 480 S.W.3d 294 (Mo. 2016) (en banc).

exercise honesty and trustworthiness before the court? Krigel violated this fundamental ethical duty – yet the Supreme Court of Missouri stayed the execution of his six-month suspension. In doing so, the majority departed from precedent and misapplied the Standards. The decision in this case shows one of two things: (1) the Supreme Court of Missouri judges decide disciplinary cases based on their subjective beliefs of what is proper, regardless of precedent, or (2) Missouri is headed in a more lenient direction when it comes to punishing lawyers who violate ethical obligations. Hopefully the court corrects this misstep and replaces subjective manipulation of the Standards with a stricter adherence to its own precedent.