

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

JAMES MICHAEL RIEHN,

Respondent.

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Supreme Court #SC93412

RESPONDENT'S BRIEF

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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

The Respondent accepts the Statement of Facts contained in the Informant's Brief.

POINTS RELIED ON

POINT I

THE COURT SHOULD ADMONISH MR. RIEHN FOR VIOLATING RULES 4-1.5 (c) AND 4-1.5 (e) BECAUSE:

- (A) HE HAS ADMITTED THOSE VIOLATIONS, AND
- (B) AN ADMONISHMENT IS AN APPROPRIATE SANCTION UPON APPLICATION OF ABA SANCTION STANDARDS AND GUIDENCE FROM PREVIOUS DECISIONS BY THIS COURT AND OTHERS.
- (C) MITIGATING FACTORS INCLUDE:
 - (1) MR. RIEHNS' COOPERATION AND FULL DISCLOSURE TOWARDS THE PROCEEDINGS;
 - (2) MR. RIEHN'S DISCIPLINARY HISTORY; AND
 - (3) ABSENCE OF DISHONEST OR SELFISH MOTIVE.

THE COURT SHOULD REPRIMAND MR. RIEHN FOR VIOLATING RULES 4-1.7
AND 4-1.9 BECAUSE:

- A) HE HAS ADMITTED THOSE VIOLATIONS, AND
- (B) A REPRIMAND IS AN APPROPRIATE SANCTION UPON
APPLICATION OF ABA SANCTION STANDARDS AND GUIDENCE
FROM PREVIOUS DECISIONS BY THIS COURT AND OTHERS, AND
- (C) MITIGATING FACTORS INCLUDE:
 - (1) MR. RIEHNS' GOOD FAITH BELIEF THAT A CONFLICT DID
NOT EXIST.
 - (2) MR. RIEHN'S GOOD FAITH BELIEF THAT ANY CONFLICT
WHICH AROSE AFTER MS. MIESS AND MR. BARTON'S
BREAK UP DID NOT EXIST UNTIL THE APPORTIONMENT
PHASE OF THE CASE.
 - (3) MR. RIEHN'S COOPERATION AND FULL DISCLOSURE
TOWARDS THE PROCEEDINGS;
 - (4) MR. RIEHN'S DISCIPLINARY HISTORY; AND
 - (5) ABSENCE OF DISHONEST OR SELFISH MOTIVE

Missouri Civil Rule 4-1.5(c)

Missouri Civil Rule 4-1.5(e)

Missouri Civil Rule 4-1.7

Missouri Civil Rule 4-1.9.

R.S.Mo. 537.095

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

POINT I

THE COURT SHOULD ADMONISH MR. RIEHN FOR VIOLATING RULES 4-1.5 (c) AND 4-1.5 (e) BECAUSE:

- (A) HE HAS ADMITTED THOSE VIOLATIONS, AND
- (B) AN ADMONISHMENT IS AN APPROPRIATE SANCTION UPON APPLICATION OF ABA SANCTION STANDARDS AND GUIDENCE FROM PREVIOUS DECISIONS BY THIS COURT AND OTHERS.
- (C) MITIGATING FACTORS INCLUDE:
 - (1) MR. RIEHNS' COOPERATION AND FULL DISCLOSURE TOWARDS THE PROCEEDINGS;
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- (1) MR. RIEHNS' GOOD FAITH BELIEF THAT A CONFLICT DID NOT EXIST.
- (2) MR. RIEHN'S GOOD FAITH BELIEF THAT ANY CONFLICT WHICH AROSE AFTER MS. MIESS AND MR. BARTON'S BREAK UP DID NOT EXIST UNTIL THE APPORTIONMENT PHASE OF THE CASE.
- (3) MR. RIEHN'S COOPERATION AND FULL DISCLOSURE TOWARDS THE PROCEEDINGS;
- (4) MR. RIEHN'S DISCIPLINARY HISTORY; AND
- (5) ABSENCE OF DISHONEST OR SELFISH MOTIVE

Violations Related to Fee Agreements

Rule 4-1.5 (c). The contingency fee agreement executed by Ms. Miess and Mr. Barton did not explain what litigation and other expenses were to be deducted and whether such expenses are to be deducted before or after the contingent fee is calculated. *Joint Stipulation and Recommendation To Disciplinary Hearing Panel, Record, Vol. 1, Page 34, #6.*

Clearly, representing the clients without the appropriate provisions concerning expenses in the agreement violated Rule 4-1.5 (c). The question then becomes what is the appropriate sanction to Mr. Riehn. The Informant cites ABA Standards for Imposing

Lawyer Sanctions (1991 ed.), Standard 7.3 in support of his position that Mr. Riehn should be reprimanded:

Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public or the legal system. (Emphasis Added).

Clearly, Mr. Riehn failed to insure the fee agreement had an explanation of what expenses would be deducted and how they would be deducted in relation to the contingency fee. That being said, the Respondent would submit that no injury or potential injury was caused. Injury and Potential Injury are defined in the ABA Standards, Section III, Definitions:

“Injury” is harm to a client, the public, the legal system, or the profession which results from a lawyer’s misconduct. The level of injury can range from “serious” injury to “little or no” injury; a reference to “injury” alone indicates any level of injury greater than “little or no” injury.

“Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct.

In the case before this court, the District Court remedied the failure of Mr. Riehn and Mr. Trotter to include the required expense provisions by completely disallowing any claim they had for reimbursement of their expenses. *Supp. Record Volume 1, Page 19.*

Applying the ABA Standard definition, no injury occurred to the client, the legal system or the profession from the failure to include the expense provisions. As far as potential injury, the Respondent would submit that harm is not reasonably foreseeable to anyone except the attorney drafting the document since any ambiguity in the drafting of the fee contract is interpreted against the drafting party.

Since no injury occurred as a result of the failure to properly describe how expenses would be handled, the Respondent would submit that the appropriate sanction for failure to properly define the expenses and how they would be charged to Mr. Riehn is set for in ABA Standard 7.4:

Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

Rule 4-1.5 (e). Mr. Riehn acknowledges that he did not obtain confirmation in writing of Ms. Miess and Mr. Barton's agreement that he and Mr. Trotter would be dividing any fee collected. *Joint Stipulation and Recommendation To Disciplinary Hearing Panel, Record, Vol. 1, Page 35, #8.*

It is undisputed that Ms. Miess and Mr. Barton were both aware and agreed that Mr. Riehn would be acting as co-counsel and that Mr. Trotter and Mr. Riehn would be sharing any fee collected. *Joint Stipulation and Recommendation To Disciplinary Hearing Panel, Vol. 1, Page 35, #8.*

Throughout the time that Mr. Trotter and Mr. Riehn represented Ms. Miess and Mr. Barton, from March 2008 through June 16, 2009, Ms. Miess was aware that both Mr.

Riehn and Mr. Trotter were her attorneys. T.57, L. 19-T.58 L. 2 She met with her attorneys at least three times and spoke to Mr. Riehn on the phone numerous times. T. 58, L. 11-17 Though failure to obtain written confirmation was a violation of Rule 4-1.5 (e), the Respondent would submit that the fact the amended rule requiring the confirmation in writing was adopted a few months before the incident is a mitigating factor. Mr. Riehn's conduct was negligent, but was not done with any evil motive or knowledge.

Again, because Mr. Riehn did not negligently engage in conduct that caused injury or potential injury to a client, the public or the legal system. The appropriate sanction for the violation is admonition.

Violations Related to Conflicts: Knowing or Negligent

4-1.7 and 4-1.9 Conflict of Interest. Where passengers are killed or injured in auto injury/death cases there is always the question of the liability of the driver of the vehicle carrying those passengers. The Miess-Barton case was unique in that it would be very difficult or even impossible to ascribe any fault to Mr. Barton who was stopped by a flagman at a road construction site when he was rear-ended by a semi-truck. *Joint Stipulation and Recommendation To Disciplinary Hearing Panel, Record, Vol. 1, Page 48, #4.* Neither Mr. Riehn nor the attorney who replaced him believed that Mr. Barton was negligent in any manner in the accident. T. 141 L. 25-T.142, L. 5.

Mr. Riehn did not believe there was a conflict of interest between Ms. Miess and Mr. Barton regarding the wrongful death claim for the loss of their child prior to judgment or settlement. Mr. Riehn believed that Ms. Miess and Mr. Barton had an indivisible cause of action for the wrongful death of their unmarried minor child.

“Wrongful death actions are indivisible—only one action may be brought against any one defendant for the death of any one person. § 537.080. Any recovery in a wrongful death action is for the benefit of those who sue or are entitled to sue and of whom the court has notice. § 537.095.1. The individual interests of the beneficiaries become separable only after the indivisible cause of action becomes merged in a judgment.” (Citations Omitted) Teeter v. Missouri Highway and Transportation Commission, 891 S.W.2d 817 (Mo. En Banc 1995), R.S.Mo. 537.095.

Mr. Riehn did not believe there would be any conflict at the apportionment phase because the parties had agreed to a 50/50 split of the proceeds arising from the death of Ms. Miess and Mr. Barton’s child. *Joint Stipulation and Recommendation To Disciplinary Hearing Panel, Vol. 1, Page 49, #12.*

The District Court did not find that Mr. Riehn violated the conflict of interest rule by representing Ms. Miess and Mr. Barton in the liability phase, rather, the Judge ruled that a potential conflict could arise at the apportionment phase. *Supp. Record Volume 1, Page 7.* Respondent would submit that Mr. Riehn’s failure to recognize a conflict which would not arise until the apportionment phase is understandable. Mr. Riehn had understood Ms. Miess and Mr. Barton had agreed to a 50/50 split and Ms. Miess and Mr. Barton continued in their relationship.

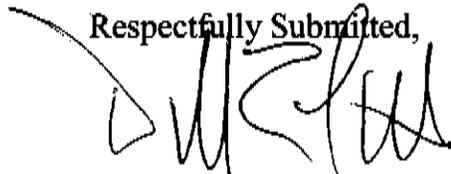
This changed after Ms. Miess and Mr. Barton ended their relationship midway through the litigation. After they terminated their relationship, Mr. Riehn was requested by Ms. Miess to see if Mr. Barton would accept a 60/40 split instead of 50/50 split, because she was not getting child support and Mr. Barton said no. T. 121, L. 18-122, L.7

Mr. Riehn acknowledges that after the break-up of Ms. Miess and Mr. Barton and when Ms. Miess requested the 60/40 split, he should have recognized the potential of the future conflict and sought written formal consent from Ms. Miess and Mr. Barton. He failed to recognize the problem and was thereby negligent.

CONCLUSION

Mr. Riehn in his stipulation has admitted that he negligently violated the Rules of Professional Conduct. Throughout this proceeding he has attempted to be cooperative and forthcoming in order to reach an appropriate resolution for the violations. Though Respondent believes based on his professional history and the unique facts of this case an admonition is the appropriate sanction for a portion if not all of the violations, Mr. Riehn has voluntarily agreed to accept a reprimand for his actions. This action is taken with the hope that expedient resolution can allow him to concentrate on his practice and to more readily recognize potential ethical violations in the future.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2013, a true and correct copy of the foregoing was served via the electronic filing system pursuant to Rule 103.08 on: Samuel S. Phillips, Attorney for Informant.



DONALD L. CUPPS

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitation contained in Rule 84.06(b);
3. Contains 2,107 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

