

**IN THE SUPREME COURT  
STATE OF MISSOURI**

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<b>IN RE:</b>	)	
	)	
<b>KARL WILLIAM HINKEBEIN,</b>	)	<b>Supreme Court # SC96089</b>
	)	
<b>Bar No. 41666</b>	)	
	)	
<b>Respondent.</b>	)	

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**RESPONDENT'S BRIEF**

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Respectfully submitted,

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**POINTS RELIED ON**

**POINT I.**

**RESPONDENT VIOLATED RULE 4-1.3 IN THAT RESPONDENT FAILED TO DILIGENTLY REPRESENT HIS CLIENTS.**

Rule 4-1.3.

**POINT II.**

**RESPONDENT VIOLATED RULE 4-1.4(a) IN THAT RESPONDENT FAILED TO KEEP HIS CLIENTS REASONABLY INFORMED ABOUT THE STATUS OF THEIR CASES.**

Rule 4-1.4(a)

**POINT III.**

**THIS COURT SHOULD REPRIMAND RESPONDENT IN LIGHT OF THE SIGNIFICANT MITIGATING FACTORS, INCLUDING THE LACK OF CONTROL HE HAD OVER HIS CIRCUMSTANCES, AND THE LACK OF INJURY TO HIS CLIENTS.**

*Eastburn v. State*, 400 S.W.3d 770 (Mo. banc 2013)

*Mason v. State*, 488 S.W.3d 135 (Mo. App. S.D. 2016)

*In re Eisenstein*, 485 S.W.3d 759 (Mo. banc 2016)

*Giles v. State*, 504 S.W.3d 256 (Mo. App. S.D. 2016)

Rule 24.035

Rule 29.15

Rule 4-1.3

Rule 4-1.4(a)

Rule 5.19

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ABA Standards for Imposing Lawyer Sanctions, Standard 2.7 Probation

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ABA Standards for Imposing Lawyer Sanctions, Standard 9.22(a) Prior Discipline

**ARGUMENT**

**POINT I.**

**RESPONDENT VIOLATED RULE 4-1.3 IN THAT RESPONDENT  
FAILED TO DILIGENTLY REPRESENT HIS CLIENTS.**

Respondent acknowledges that he violated Rule 4-1.3.

**POINT II.**

**RESPONDENT VIOLATED RULE 4-1.4(a) IN THAT  
RESPONDENT FAILED TO KEEP HIS CLIENTS REASONABLY  
INFORMED ABOUT THE STATUS OF THEIR CASES.**

Respondent acknowledges that he violated Rule 4-1.4(a).

### POINT III.

**THIS COURT SHOULD REPRIMAND RESPONDENT IN LIGHT OF THE SIGNIFICANT MITIGATING FACTORS, INCLUDING THE LACK OF CONTROL HE HAD OVER HIS CIRCUMSTANCES, AND THE LACK OF INJURY TO HIS CLIENTS.**

Respondent's violations of the diligence and communications rules are primarily attributable to his severe health problems and excessive caseload. Both are factors outside Respondent's control. Respondent had no viable options related to his workload.

#### **Health Issues**

Respondent's health issues were a significant factor in Respondent's inability to file amended motions or statements in lieu in a timely manner in all six cases. Respondent began having serious health issues in 2004. His health issues became critical in 2010. Respondent had recurring episodes of extremely serious or critical health events over the next few years. His last event was in 2013 and he began to feel that he was back to functioning at a reasonable level of physical functioning in 2014. Even while Respondent was seriously ill, he returned to work. Respondent continues in treatment but has not had such serious or critical events for several years. Respondent testified in more detail about his health from 2010 through 2014 in a sealed portion of the transcript. (Rec.



Sealed Vol. 5, pp. 948-949: T. 75-82). Respondent's medical records are Exhibits A-C. (Rec. Sealed Vol. 5, pp. 951-1167 and Sealed Vol. 6, pp. 1168-1350).

Respondent's supervisor testified:

But Karl was in and out of the hospital several times. While he would be, I was maintaining contact with him, as well as he was making contact with his secretary. He was attempting to keep things moving at a normal pace even through that. As far as me, I visit him in the hospital some and take files to him and retrieve files that he had worked on. I made a poor assumption and probably did a very poor job of deadline with that because my impression was -- or else I was turning a blind eye to his ability to continue on. Karl, out of all the people in our office, may be the last person to ask for help. He just doesn't function that way. He is dedicated and has a very good work ethic. It's just his personality. I think I made a poor assumption that he was able to keep up and he wasn't and ultimately things snowballed from there to where we realized there were several cases in trouble.

(Rec. 98: T. 181).

Except during times when respondent was fairly critically ill or in the hospital, he estimates that he was working 50 hours a week. (Rec. 80: T. 111). When Respondent was hospitalized, he worked on cases, when he could, which he believes was a significant amount. (Rec. 80: T. 111-112).

### Caseload

All of Respondent's cases at issue were post-conviction relief (PCR) cases under Rule 29.15. (Rec. 74: T. 89). Pursuant to Rule 29.15, counsel must be assigned to represent indigents. The Missouri State Public Defender's Office (MSPD) is always assigned. (Rec. 74: T. 86). The MSPD cannot reject the assignment. (Rec. 75, 103: T. 90, 203).

Cases get assigned to individual public defenders by the District Defender in the Public Defender's Office, after the judge assigns the case to the office. (Rec. 75: T. 90). Respondent works under the District Defender in Area 67. (Rec. 75, 87: T. 91, 138, 140). In Respondent's experience, it is usually 7-10 days between when the court assigns the case to MSPD and when he receives the assignment. (Rec. 78: T. 101). Respondent does not have the option to reject assignments, unless he has a conflict of interest. If he refused an assignment, he believes he would be fired. (Rec. 75, 104: T. 92, 207).

If Respondent had gone to the District Defender and informed him that Respondent was missing deadlines, the District Defender really would not have had any options. (Rec. 101: T. 195). Individual public defenders are trapped. (Rec. 104: T. 208).

All of the other attorneys within the same office as Respondent had large caseloads during the timeframe in question. (Rec. 81: T. 115). During the time frame in question, MSPD was using the Public Defender Commission Caseload Crisis Protocol as its caseload standard. (Rec. 103: T. 201). During the time frame in question, MSPD was over the caseload standard 46 of the 48 months in Area 67. MSPD was taking in more cases than it believed it could handle and this was a period of very high workload. (Rec.

103-104: T. 204, 206).

MSPD requests for relief in the form of increased staffing have been only minimally successful. (Rec. 103: T. 204). A Missouri Bar Task Force, a Senate interim committee, the Spangenberg Group, and the American Bar Association have determined that MSPD has far more cases than they can handle. (Rec. 104: T. 205).

Respondent is part of the Area 67 office, which covers all of the state except for Kansas City and a portion of Northwest Missouri, the St. Louis and St. Charles area, and an area south from St. Louis along the river in southeastern Missouri. (Rec. 80: T. 112). Respondent's job requires him to travel to all of the state covered by Area 67, plus other areas of the state when there are conflicts. No other MSPD PCR office covers the entire state. (Rec. 80-81: T. 112-113).

Once the time for filing an amended motion elapses, without filing an amended motion, counsel is legally deemed to have abandoned the movant, even if counsel files an amended motion out of time. (Rec. 77: T. 98). *Eastburn v. State*, 400 S.W.3d 770, 774 (Mo. banc 2013). Respondent has filed amended motions out of time and has continued to handle the case, although he technically was considered to have abandoned the movant. (Rec. 77: T. 98-99). Other counsel in Respondent's office also continue handling cases after a finding that they have abandoned the client. (Rec. 108: T. 221). Respondent has never been denied the opportunity to file an amended motion out of time, if he recited that the lateness of the amended motion was his fault rather than the movant's fault. (Rec. 77: T. 99).

Respondent testified that he puts his best effort into every case, even though no one would probably know if he did less than his best. (Rec. 76: T. 94). Respondent is always looking for an edge for his clients and trying to challenge the law and raise claims to the benefit of his clients. (Rec. 98: T. 182). As of the date of the hearing, Respondent's caseload was approximately 110, which was higher than anyone else in his office. (Rec. 76, 99-100: T. 94, 188-189). The District Defender believes that he cheated on his normal approach to caseload parity regarding Respondent and assigned Respondent a heavier caseload because it included a lot of serious cases, based on Respondent's work ethic and willingness to work. (Rec. 98: T. 182). Respondent typically works more hours than any other attorney in the office. (Rec. 100, : T. 192, 214). From 2010 until 2014 when the cases at issue were reassigned, Respondent believes he had an unreasonable number of cases assigned to him. (Rec. 106: T. 111).

Respondent's supervisors reassigned the cases at issue out of an abundance of caution. (Rec. 99: T. 186). Cases are not always reassigned when a deadline is missed. The same attorney who missed the deadline may file the appropriate pleadings and continue handling the case. (Rec. 99: T. 187).

After the cases were reassigned in late summer of 2014, the District Defender reduced the number of assignments and seriousness of the cases assigned to Respondent (Rec. 95: T. 172), including assigning Respondent had an increased percentage of Rule 24.035 cases, which are a slightly lighter assignment. (Rec. 83: T. 124).

Prior to that time, the District Defender believes he was a little remiss and had been piling on Respondent in terms of caseload. (Rec. 96: T. 173). Respondent had been

handling more cases than most of the attorneys and filing more amended motions consistently through time. (Rec. 96: T. 174). Respondent is typically the highest producer in the office, in terms of filing amended motions and conducting hearings. (Rec. 100: T. 189). Respondent was the highest producer in the office, even during the period when he was suffering serious health problems. (Rec. 100: T. 190).

Respondent entered into an Employee Improvement Plan (EIP) with MSPD on September 4, 2014. (Exh 10). Part of the EIP involved the only full-time secretary in the office assisting Respondent with monitoring his calendar. (Rec. 94: T. 166). At the time of the hearing, Respondent was in compliance with the EIP, except for missing the deadline in one case that was an oddball, inadvertent situation. (Rec. 81, 94: T. 113, 167-168).

### **ABA Standards**

This Court views the ABA Standards for Imposing Lawyer Sanctions as providing guidance for assessing the appropriate discipline. *In re Eisenstein*, 485 S.W.3d 759, 763 (Mo. banc 2016).

#### **4.4 LACK OF DILIGENCE**

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client:

**4.42 Suspension** is generally appropriate when:

(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or

(b) a lawyer engages in a pattern of neglect causes injury or potential injury to a client.

**4.43 Reprimand** is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

**4.44 Admonition** is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.

#### **ABA Standard 2.7 Probation**

Probation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be imposed alone or in conjunction with a reprimand, an admonition or immediately following a suspension. Probation can also be imposed as a condition of readmission or reinstatement.

The ABA Standards Definitions define “knowledge” and “negligence” as:

“Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

“Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

Respondent certainly had no conscious objective or purpose not to file the amended motions or statements in lieu. His conscious awareness was that he intended to file them. (Rec. 63: T. 41-42). His conscious awareness was also that he had never been denied filing an amended motion out of time and there are no set time limits on statements in lieu. Out of hundreds of cases over the period of time involved, he let these cases slip by for an extended period. Respondent was working far beyond what should have been expected of him in an effort to do his best to represent all of his clients, despite his health and unreasonable caseload.

#### **Low Potential for Harm to Clients in These Cases**

Less than 5-10% of the PCR cases result in relief for the movant and it is rare that a movant would actually be discharged. (Rec. 81, 104-105: T. 113, 208-209).

This case involves six of Respondent's clients. At the time of the hearing, none had obtained relief. Respondent asks this Court to take judicial notice of the subsequent court proceedings in their cases, to the extent that proceedings continued after the date of the Disciplinary Hearing Panel (DHP) hearing. None of the clients of obtained relief.

In three of the cases, Robinson, Giles, and Arata, Respondent intended to file a "statement in lieu" pursuant to Rule 29.15(e). (Rec. 63: T. 41). Respondent files a "statement in lieu" when he can find no viable claims to make. Respondent is hesitant to file such statements and was probably less likely to file one than anyone else in the office. (Rec. 76, 100: T. 95, 192). There is no time limit for filing a statement in lieu. (Rec. 77: T. 97). *Mason v. State*, 488 S.W.3d 135, 141 (Mo. App. S.D. 2016).

The disposition of the case or current status for each client:

A. Robinson. The circuit court made a docket entry denying Robinson relief on July 5, 2016, in Case No. 1031-CV18129, Circuit Court of Greene County. (Rec. 105: T. 210).

B. Hines. The circuit court denied Hines relief on July 28, 2016, in Case No. 1231-CV16886, Circuit Court of Greene County. He dismissed his appeal on April 11, 2017 in Case No. SD34624.

C. Williams. Movant Williams had dismissed his PCR case, 13PO-CC00056, Circuit Court of Polk County, by the date of the DHP hearing. (Rec. 674). He had received the minimum sentence and had the potential for a longer sentence if his PCR case succeeded. (Rec. 78-79: T. 104-105).

D. Watson. Movant Watson's case is still pending. The Circuit Court made a docket entry denying Watson relief on July 5, 2016, Case No. 1231-CV00474, Circuit Court of Greene County. (Rec. 104: T. 211). No corresponding Order or Judgment appears in the record related to the July 5, 2016, entry. The Circuit Court formally denied relief on April 14, 2017. On April 25, 2017, the Circuit Court granted Watson's motion to proceed as a poor person on appeal.

E. Giles. Giles represented himself at trial. As a result, he was precluded from making an ineffective assistance of counsel claim. Respondent informed him of that. (Rec. 80: 109). The Circuit Court denied Giles relief and his case was on appeal at the time of the hearing. (Rec. 105: T. 211). In December 2016, the Court of Appeals affirmed the Circuit Court Judgment. *Giles v. State*, 504 S.W.3d 256, 259 (Mo. App. S.D. 2016), confirmed the information Respondent provided to Giles.



F. Arata. The circuit court denied Arata relief in Case No. 1331-CC00971, Circuit Court of Greene County. (Rec. 105: T. 212). The Court of Appeals affirmed that decision in *Arata v. State*, 509 S.W.3d 849 (Mo. App. S.D. 2017).

Although Respondent did not intentionally delay filing in any of the cases, he has found that delay in post-conviction proceedings is sometimes beneficial because the prosecutor will agree to a resolution in order to conclude an old case. (Rec. 76: T. 93-94). In light of the general low success rate in PCR cases, the fact that Respondent intended to file a “statement in lieu” in three of the cases, and the fact that delay is sometimes beneficial and the fact that even successful PCR’s rarely result in discharge, the potential for harm to the clients was low. There is no evidence of actual harm to any of Respondent’s clients.

**Mitigating and Aggravating Factors**

**ABA Standard 9.32 Factors which may be considered in mitigation.**

Mitigating factors include:

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems;

\* \* \* \*

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

(g) character or reputation;

(h) physical disability;

\* \* \* \*

(m) remoteness of prior offenses.

Respondent has been cooperative with Informant. (Rec. 81: T. 114). Respondent's health constitutes a personal problem and was at a level such that he was functioning under a physical disability during the timeframe in question. (Rec. 81: T. 114-115).

Respondent's conduct did not result from selfish motives. In fact, Respondent went above and beyond what should be expected to try to keep up with his caseload. There is no evidence any of the clients were adversely affected by the delay and Respondent does not believe that his failure to file an amended motion or "statement in lieu" adversely affected the clients. (Rec. 81: T. 115).

As far as his character and reputation, Respondent's dedication to his clients is beyond reproach. Respondent puts in whatever time it takes to research a case and do it and is very creative in some of his pleadings resulted in relief to some clients. (Rec. 100: T. 192).

Respondent is honest and has a good reputation among coworkers and judges. (Rec. 101-102, 106: T. 196-198, 214-215). Respondent's work product is of high quality and Respondent is a valuable asset to MSPD, on many levels, including creativity and the ability to untangle complex legal messes. (Rec. 101, 106: T. 193, 212-213).

As noted by Informant, Respondent previously received three admonitions in 2003, 2008, and 2010, which is an aggravating factor under ABA Standard 9.22(a).

Respondent disagrees that a pattern of misconduct or multiple offenses should be considered aggravating factors, under the circumstances of this case. All of the violations occurred during a several year period of recurring serious illness compounded by

unrealistic caseloads. The following chronology shows the interrelationship between the cases and Respondent's hospitalizations. Respondent remained in treatment for various conditions and continued to have significant health problems between hospitalizations, as shown by his health records and recurring hospitalizations.

12/25/10 to 12/31/10	Hospitalized
03/13/11	Robinson Amended Motion due (Statement in lieu intended)
08/06/11 to 08/10/11	Hospitalized
08/22/11 to 08/30/11	Hospitalized
04/16/12	Watson Amended Motion due
09/07/12 to 09/12/12	Hospitalized
11/30/12 to 12/11/12	Hospitalized
03/05/13	Hines Amended Motion due
04/15/13	Giles Amended Motion due (Statement in lieu intended).
04/07/13 to 04/11/13	Hospitalized
06/02/13	Austin Amended Motion due
09/22/13	Arata Amended Motion due (Statement in lieu intended).
11/10/13	Williams Amended Motion due

Respondent believes that his failure to comply with the diligence and communication rules should be viewed as one continuous problem that did not begin to resolve until 2014 when these cases were reassigned and Respondent's health returned to a reasonable level.

Respondent also disagrees that vulnerability of victims is applicable here. Incarcerated individuals are quite aware of how to complain and to whom they should complain. These clients had the avenue to complain to MSPD which is more than many clients who are not incarcerated have when dealing with attorneys who are not part of a large organization. MSPD responded by reassigning the cases, when they received a complaint.

### **Suspension Not Appropriate**

Informant cites several cases in support of the argument for suspension. Each of the cases is significantly distinguishable.

Informant cites *In re Crews*, 159 S.W.3d 355 (Mo. banc 2005) as supporting suspension. Unlike Crews, Respondent has done nothing to potentially harm the credibility of the legal profession, as a whole. Crews engaged in deception by offering explanations that were not credible and steadfastly refused to recognize his breach of ethical principles, even when given the opportunity to do so during oral argument before this Court. In contrast, Respondent in the instant case has acknowledged his mistakes and has compelling mitigating factors. The only mitigating factor for Crews was that he practiced law in this state for thirty-nine years with only one minor disciplinary action, a reprimand.

Informant also cites *In re Frank*, 885 S.W.2d 328 (Mo. banc 1994) as supporting suspension. Frank had no mitigating factors. Frank consistently engaged in bad faith obstruction of disciplinary proceedings by intentionally failing to comply with the committee's requests for information and admonitions to reform his conduct. He also consistently refused to acknowledge the wrongful nature of his conduct, except as to his failure to respond to the bar committee's investigators. Frank demonstrated a “disturbing, continuing disregard for the rights and interests of his clients.” *Id.* at 333-334. Respondent in the instant case acknowledges that he let a few cases slip but he demonstrated admirable dedication to his clients, despite his serious health problems.

Informant cites *In re Geniuk*, SC95726 (6/28/16). Geniuk is a case in which this Court did not issue an opinion. It is also a case in which it appears that this Court did not follow its own procedural rules. Geniuk accepted the DHP recommendation of a stayed suspension and one year probation by not rejecting the DHP decision, as provided by Rule 5.19(a). Without briefing or argument as provided by Rule 5.19(d)(3), this Court suspended Geniuk for a minimum of one year. Geniuk appears to be a procedural aberration and should not be relied upon. Based upon the DHP Decision in Geniuk, there were apparently no mitigating factors.

### **CONCLUSION**

Respondent had no intent to violate the rules. Respondent was doing the best he could under impossible circumstances. He let some matters slip while he was working harder than anyone else in the office to take care of other clients, despite his serious

health problems. There is no evidence clients were harmed and the potential for harm was low. This Court should reprimand Respondent.

If this Court determines that more discipline than a reprimand is required, this Court should impose no more than the one year probation recommended by the DHP.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify I signed the “original” in accordance with Rule 103.04 and that this 18th day of May, 2017, I have served a true and accurate copy of the foregoing via efile to:

Melody Nashan, Attorney for Informant.



Sara Rittman

**CERTIFICATION: RULE 84.06(c)**

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

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 3,928 words, exclusive of the cover, certificate of service, Rule 84.06 certificate, and signature block, according to Microsoft Word, which is the word processing system used to prepare this brief.

A handwritten signature in black ink, appearing to read "Sara Rittman". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Sara Rittman